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THE
INDIANA DIGEST

A DIGEST

OF THE

DECISIONS OF THE COURTS
OF INDIANA

REPORTED IN

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EXPLANATORY NOTE

THIS DIGEST is compiled on the **KEY-NUMBER SYSTEM**

This means that

Topics and section numbers of this Digest are identical with those in

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Moreover, the **Indexes** in the **Advance Sheets and bound volumes of the Northeastern** are arranged on the same system, and are **current Supplements to this Digest.**

Whenever you find a case in point in this Digest and wish to find other authorities on the **same** point, turn to the **same topic and section** number in these other digests and indexes.

Illustration: A legal proposition found in this Digest under Carriers, section 93, Liability for Misdelivery, will also be found under

Carriers, § 93, in the Decennial Digest;

Carriers, § 93, in the American Digest, Key-Number Series, and

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DIGEST

OF THE

REPORTED DECISIONS OF ALL THE COURTS OF INDIANA

VOLUME 8

PLEADING.

Scope-Note.

[INCLUDES formal statements in writing of causes of actions and defenses in civil actions in general, whether proceeding according to the course of practice at common law or under provisions of practice acts, codes of procedure, etc.; nature, requisites, and sufficiency of such statements by the respective parties, and allegations and denials therein; affidavits of claim, of merits, and of defense; exhibits annexed to pleadings, and copies of accounts mentioned and bills of particulars of matters alleged in pleadings; filing and service of pleadings and of papers connected therewith; motions and other proceedings relating to pleadings; amended and supplemental pleadings; joinder of issue, issues, admissibility of evidence under pleadings; what constitutes variance between allegations and proof, and effect of such variance; waiver of objections; and effect of verdict and judgment to cure defects.

[EXCLUDES pleading by particular classes of persons in actions by or against them (see *Infants*; and other specific heads); joinder and designation of parties in pleading, and objections to pleadings for nonjoinder, misjoinder, misnomer, or other defects as to parties (see *Parties*); grounds of abatement and necessity of pleading in abatement (see *Abatement and Revival*); judgment on pleadings, and arrest of judgment for defects in pleadings (see *Judgment*); pleading in particular forms of action, and alleging particular causes of action and defenses (see specific heads); pleading in civil proceedings other than actions (see *Mandamus*; *Quo Warranto*; *Scire Facias*; and other specific heads); pleading in suits in equity (see *Equity*) or admiralty (see *Admiralty*), or in proceedings to probate or contest wills (see *Wills*), or in proceedings under insolvent acts (see *Insolvency*) or bankrupt acts (see *Bankruptcy*); pleading in criminal prosecutions (see *Indictment and Information*); and titles of particular crimes); and pleadings as evidence (see *Evidence*) and as ground of estoppel (see *Estoppel*). For complete list of matters excluded, see cross-references, post.]

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Of legacy charged on land. WILLS, § 826.

Of liability for support of insane person. INSANE PERSONS, § 58.

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Of liability of stockholders for corporate debts and acts. CORPORATIONS, § 268.

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- Of municipal taxes. MUNICIPAL CORPORATIONS, § 978.
- Of right of exemption—
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 - HOMESTEAD, § 213.
 - TAXATION, § 251.
- Of right of subrogation. SUBROGATION, § 41.
- Of right of subrogation of insurer to rights of insured. INSURANCE, § 606.
- Of vendor's lien. VENDOR AND PURCHASER, § 280.
- Equitable relief against judgment. JUDGMENT, § 460.
- Establishment and enforcement of trust. TRUSTS, § 371.
- And protection of easement. EASEMENTS, § 61.
- Of boundaries. BOUNDARIES, § 32.
- Of claim to attached property. ATTACHMENT, § 306.
- Of claim to property garnished. GARNISHMENT, § 216.
- Of claim to property taken on execution. EXECUTION, § 192.
- Of drain. DRAINS, § 28.
- Of freight rates. CARRIERS, § 10.
- Of highway. HIGHWAYS, § 29.
- Of will. WILLS, § 279.
- Failure of railroad to maintain private crossing. RAILROADS, § 102.
- To construct and maintain bridges over canals. CANALS, § 19.
- To deliver or misdelivery of goods shipped. CARRIERS, § 94.
- To deliver possession of leased premises. LANDLORD AND TENANT, § 129.
- FALSE IMPRISONMENT, § 20.
- FORCIBLE ENTRY AND DETAINER, §§ 22-24.
- Foreclosure of lien for cost of partition fence. FENCES, § 15.
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 - BUILDING AND LOAN ASSOCIATIONS, § 39.
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 - MORTGAGES, §§ 444-459.
 - RAILROADS, § 188.
 - STREET RAILROADS, § 53.
- Forfeiture of charter of railroad company. RAILROADS, § 32.
- Of liquor license. INTOXICATING LIQUORS, § 108.
- Forthcoming bonds. EXECUTION, § 155.
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- From construction or maintenance of telegraph or telephone lines. TELEGRAPHS AND TELEPHONES, § 20.
- From defects in demised premises. LANDLORD AND TENANT, § 169.
- From defects in steam engine owned by city. MUNICIPAL CORPORATIONS, § 857.
- From defects or obstructions in bridges. BRIDGES, § 46.
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- From escape or explosion of gas. GAS, § 20.
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- From negligence. NEGLIGENCE, §§ 107-117, 119.
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- From negligence or misconduct of sheriff or constable. SHERIFFS AND CONSTABLES, § 137.
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 Enforcement of drainage assessments. **DRAINS**, § 91.
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See—

Decisions reviewable. **APPEAL AND ERROR**, §§ 70, 78, 87, 102, 103.

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Pleading to assignment of errors. **APPEAL AND ERROR**, § 749.

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Review of decisions as dependent on motion for new trial in lower court. **APPEAL AND ERROR**, § 285.

On prejudicial nature of error. **APPEAL AND ERROR**, §§ 1038-1042.

Review, etc.—(Cont'd).

On presentation of question in lower court. **APPEAL AND ERROR**, §§ 191-197, 236.

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On specification in assignment of errors. **APPEAL AND ERROR**, §§ 725, 737.

On statements in brief. **APPEAL AND ERROR**, § 757.

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Review of decisions involving discretion of court. **APPEAL AND ERROR**, §§ 959, 960.

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I. FORM AND ALLEGATIONS IN GENERAL.

Determination of nature of action by pleading contract or tort, see **ACTION**, § 27.

Form and contents of pleading as affecting right to open and close at trial, see **TRIAL**, § 25.

In justices' courts, see **JUSTICES OF THE PEACE**, § 90.

§ 1. Nature and mode of pleading in general.

[a] (**Sup.** 1855)

The spirit of the Code of 1852 is that the parties shall place upon the record, in the form of averments, the real facts of the case, eschewing all fictions and repetitions.—*Shinloub v. Ammerman*, 7 Ind. 347.

FOR CASES FROM OTHER STATES,
SEE 39 CENT. DIG. Plead. §§ 1, 2.
See, also, 31 Cyc. pp. 43, 44.

§ 2. Statutory provisions.

[a] (**Sup.** 1866)

The statute providing certain forms in civil cases (2 Gav. & H. Rev. St. 373) does not require that those forms shall be used, but only provides that they may be used, and that they shall be sufficient in cases to which they are applicable.—*Shipler v. Isenhower*, 27 Ind. 36.

FOR CASES FROM OTHER STATES,
SEE 39 CENT. DIG. Plead. §§ 3, 4.
See, also, 31 Cyc. p. 43.

§ 3. Necessity for written pleadings.

To correct judgment, see **JUDGMENT**, § 294.

[a] (**Sup.** 1832)

Though pleadings may not be required by statute in a given proceeding, there seems to be no good reason why parties may not, if they elect to do so, put the facts on record in the form of pleadings, rather than in the shape

of evidence, and thus secure the judgment of the court upon the matters of law arising out of the facts.—*Puett v. Beard*, 86 Ind. 172, 44 Am. Rep. 280.

FOR CASES FROM OTHER STATES,
SEE 39 CENT. DIG. Plead. § 5.
See, also, 31 Cyc. pp. 45, 46.

§ 5. Subject-matter of allegations in general.

[a] (**Sup.** 1839)

A plea founded on an ordinance of a private corporation, without setting out the ordinance or act of incorporation, is bad.—*Plant v. Wormager*, 5 Blackf. 236.

[b] (**Sup.** 1845)

A plea asserting a right founded on a statute should aver every fact necessary to show that the case is within it.—*Ezra v. Manlove*, 7 Blackf. 389.

FOR CASES FROM OTHER STATES,
SEE 39 CENT. DIG. Plead. § 7.
See, also, 31 Cyc. p. 47.

§ 6. Matters judicially noticed.

[a] (**Sup.** 1842)

Matter of law cannot be pleaded in bar of an action.—*Scott v. Brokaw*, 6 Blackf. 241.

[b] (**Sup.** 1860)

In cases under the statute where the courts are required to take judicial notice of the existence of certain corporations, a denial of incorporation does not put plaintiff to proof thereof at the trial.—*Anderson v. Kerns' Draining Co.*, 14 Ind. 199, 77 Am. Dec. 63.

[c] (**App.** 1839)

The court will take judicial notice that defendant "town of Thorntown" is an incorporated town; so that, under *Burns' Rev. St.* 1804, § 377 (*Rev. St.* 1881, § 374), it is unnecessary to allege this in the complaint.—*Town*

of *Thorntown v. Fugate*, 52 N. E. 763, 21 Ind. App. 537.

[d] (*App.* 1905)

Conduct, judicially noticed as being within the scope of the employment of the conductor of a train, need not be alleged to be within the scope of his employment.—*Indianapolis & E. Ry. Co. v. Barnes*, 74 N. E. 583, 35 Ind. App. 483.

[e] (*App.* 1910)

In an action for injuries to a driver in a coal mine by the fall of rock from the roof of the mine entry, a complaint alleging that the timbers which upheld the roof at that point were broken, weak, and insufficient to sustain the roof, and that defendant had knowledge of the defective and dangerous condition thereof, and for more than 10 days prior to the date of the accident knew that it was liable to fall and injure its employes who were required to pass along the entry, etc., was not defective for failure to aver that the defect complained of could be remedied, since the court will take judicial notice that a structure once made could be repaired.—*Princeton Coal Mining Co. v. Howell*, 92 N. E. 122.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 8, 9.

See, also, 31 Cyc. p. 47.

§ 7. Matters of presumption or implication.

In action to enforce assessment for municipal improvements, see *MUNICIPAL CORPORATIONS*, § 567.

[a] (*Sup.* 1883)

Facts which the law will imply from other facts need not be pleaded, as it is sufficient for a party to state in his pleading the actual facts on which his cause of action is based.—*Drum v. Stevens*, 94 Ind. 181.

[b] (*Sup.* 1886)

A general averment in an answer of the due adoption of a resolution by a common council is sufficient, without showing the particular manner of its adoption, since all presumptions ought to be indulged in favor of the regularity of the proceedings by which the resolution referred to was adopted.—*Over v. City of Greenfield*, 107 Ind. 231, 5 N. E. 872.

[c] *Burns' Rev. St.* 1901, § 3307, provides that all copartnerships, associations, and companies engaged as foreign express companies shall file in the office of the recorder, in each county in which their business is conducted or where they may have an agency or office, a statement setting forth the name of such association, etc. *Held*, that where a complaint in an action against an express company averred that defendants were "a partnership and association," engaged in the business of carrying money, merchandise, etc., within the state, it was not necessary to aver that the copartners had complied with the law and filed a

statement of their trade-name, since, as they were bound to do so under the statute, it would be presumed that they had complied therewith.—(*Sup.* 1903) *Adams Exp. Co. v. State*, 67 N. E. 1033, 161 Ind. 328; (1903) *Id.*, 67 N. E. 1092, 161 Ind. 705; (1903) *United States Exp. Co. v. State*, 67 N. E. 1092, 161 Ind. 705; (1903) *Adams Exp. Co. v. Same*, 67 N. E. 1092, 161 Ind. 706; (1906) *American Exp. Co. v. Same*, 167 Ind. 707, 79 N. E. 353.

[d] (*App.* 1904)

Where a lease provided that the rentals, when due, should be deposited in a certain bank, a deposit in the bank was a payment of rent under the lease, and an averment in a pleading that the rent was not paid included by implication a statement that it was not deposited in the bank.—*Indiana Natural Gas & Oil Co. v. Lee*, 72 N. E. 492, 34 Ind. App. 119.

[e] (*Sup.* 1906)

Facts necessarily implied from the allegations in a complaint are sufficiently alleged.—*Indianapolis St. R. Co. v. Ray*, 167 Ind. 236, 78 N. E. 978.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 11.

See, also, 31 Cyc. pp. 48, 49.

§ 8. Matters of fact or conclusions.

Admissions by demurrer, see post, § 214.

Aider by verdict or judgment, see post, § 433.

Allegations as to limitations of action, see *LIMITATION OF ACTIONS*, § 183.

Allegations as to performance or waiver of conditions in action on insurance policy, see *INSURANCE*, § 634.

Consideration in hearing on demurrer, see post, § 216.

In application for appointment of receivers, see *RECEIVERS*, § 37.

Pleading conclusions of law as ground for demurrer, see post, § 192.

Responsiveness of answer to conclusions pleaded in complaint, see post, § 98.

§ 8 (1). In general.

[a] Pleadings should state facts, and not mere conclusions.—(*Sup.* 1837) *Warner v. Hatfield*, 4 Blackf. 392; (1897) *Davis v. Clements*, 47 N. E. 1056, 148 Ind. 605, 62 Am. St. Rep. 539.

[b] (*Sup.* 1839)

It is a rule in pleading that matters of fact and law must not be so blended that they cannot be separated.—*Lair v. Abrams*, 5 Blackf. 191.

[c] The sufficiency of a pleading is to be determined from facts alleged, rather than general conclusions and recitals.—(*Sup.* 1881) *State v. Wenzel*, 77 Ind. 428; (1887) *State ex rel. McKenzie v. Casteel*, 110 Ind. 174, 11 N. E. 219.

[d] (Sup. 1888)

The facts stated in a pleading, and not the pleader's conclusions of law thereon, govern its sufficiency.—*Quick v. Taylor*, 113 Ind. 540, 16 N. E. 588.

[e] (Sup. 1888)

The reply must be judged by the facts it pleads, and not by the mere conclusions of the pleader.—*Lawrence v. Beecher*, 19 N. E. 143, 116 Ind. 312.

[f] (Sup. 1888)

The sufficiency of a pleading depends upon the substantive facts alleged, and not upon the conclusions of the pleader.—*Frain v. Burgett*, 50 N. E. 873, 52 N. E. 395, 152 Ind. 55.

[g] (Sup. 1905)

A pleading must be tested by facts alleged, and not by the conclusions therein.—*Board of Com'rs of Lake County v. Jarnecke*, 164 Ind. 658, 74 N. E. 520.

[h] (App. 1905)

Probative facts, and not conclusions, should be alleged in pleadings.—*American Plate Glass Co. v. Nicoson*, 34 Ind. App. 643, 73 N. E. 625.

[i] (App. 1905)

A pleading must be tested by the material facts directly stated, and, in the absence of such facts, cannot be upheld by inferences drawn from the pleader's conclusions.—*South Bend Chilled Plow Co. v. Cissne*, 74 N. E. 282, 35 Ind. App. 373.

[j] (Sup. 1909)

In testing the sufficiency of a pleading on demurrer, only the facts well pleaded, and not mere conclusions, can be considered.—*Farra v. Braman*, 86 N. E. 843, 171 Ind. 529.

[k] (Sup. 1909)

Under *Burns' Ann. St. 1908*, § 343, providing that the complaint must contain a statement of facts constituting the cause of action, a complaint must state facts, and not conclusions.—*Daily v. Sate ex rel. Bigler*, 171 Ind. 646, 87 N. E. 4, transferred from the Appellate Court (1908) 42 Ind. App. 690, 86 N. E. 498.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 12-28½; 23

CENT. DIG. Fraud, § 37; 24 CENT. DIG.

Fraud. Conv. § 773; 37 CENT. DIG. Neglig. § 182.

See, also, 31 Cyc. pp. 49-65.

§ 8 (2). *Nature and subject-matter of allegations in general.*

[a] (Sup. 1860)

Claim against a decedent's estate for money received by him in his lifetime. Answer, the statute of limitations, to which the claimant replied: (1) That said decedent received said money as a technical and continuing trust; (2) that he received said money as the agent of the claimant, etc.; (3) that one Rea paid said money to said decedent, as the money of

claimant, to be by decedent delivered to the heirs and personal representatives of claimant, etc. *Held*, that the first paragraph was bad for pleading a conclusion of law, instead of a statement of facts, in averring that there was a "technical trust."—*Holman v. Mayhew*, 15 Ind. 263.

[b] (Sup. 1862)

A statement in a complaint that a certain place is a public highway is sufficient, without further averment of the manner in which it became so.—*Jackson v. Smiley*, 18 Ind. 247.

[c] (Sup. 1877)

An averment that the party, "with a full knowledge of the facts, ratified and confirmed said agreement," is sufficient, on demurrer, as an averment of the fact of ratification, and not objectionable as a mere statement of a conclusion of law.—*Voiles v. Beard*, 58 Ind. 510.

[d] (Sup. 1879)

An allegation in an answer in an action on an insurance policy "that, by reason of the premises, the risk and hazard of said building was greatly increased, and, by reason of said unlawful business, said fire occurred which destroyed said buildings," is not an averment of facts, but the mere conclusion of the pleader from unstated facts, and amounts to nothing in a pleading.—*Behler v. German Mut. Fire Ins. Co.*, 68 Ind. 347.

[e] (Sup. 1881)

An allegation of insolvency is an allegation of fact, and not of opinion.—*State ex rel. Shuckman v. Neff*, 74 Ind. 146.

[f] (Sup. 1884)

In an action on a certificate of membership in a fraternal association, a complaint alleging that the plaintiff has an insurable interest in the life of the insured states merely a conclusion of law, and is not an averment of a traversable fact.—*Elkhart Mut. Aid Benev. & Relief Ass'n v. Houghton*, 98 Ind. 149.

[g] (Sup. 1885)

An averment in an answer that plaintiff in fact had near relatives who were afflicted with and died of consumption before signing and making his application for insurance stated a conclusion of law, and there was no error in sustaining a demurrer thereto.—*Penn Mut. Life Ins. Co. v. Wiler*, 100 Ind. 92, 50 Am. Rep. 769.

[h] (Sup. 1887)

In a suit upon a benefit certificate, providing that no claim should be made for any injury which might happen "while engaged in, or in consequence of, any criminal act," an answer that, at the time plaintiff was injured, he was in a public highway, in a state of intoxication, which is a criminal act under the statutes of Indiana, and "that the injury happened to the plaintiff while he was engaged in, and in consequence of, a criminal act," is bad on demurrer; the conclusion being a mere conclusion of law, and no causative connection

being shown between the alleged criminal act and the injury.—*National Ben. Ass'n v. Bowman*, 110 Ind. 355, 11 N. E. 316.

[l] (Sup. 1893)

In an action by the guardian of an insane person to set aside a conveyance by his ward on the ground of his alleged insanity at the time he executed the conveyance, there having been no adjudication as to his insanity at the time of such conveyance, an answer stating that the guardian, after his appointment, with full knowledge of the facts and circumstances under which the conveyance was made, ratified it, is demurrable, as stating a conclusion of law, and not facts.—*Funk v. Rentchler*, 134 Ind. 68, 33 N. E. 364, 898.

[j] (App. 1894)

An allegation, in a complaint in an action against a county for injuries sustained while crossing a bridge, that the bridge was constructed at a point where the defendant had a right to and its duty to construct it, is a mere conclusion, and does not take the place of an allegation of fact showing that the county had authority to build it.—*Board of Com'rs of Shelby Co. v. Blair*, 36 N. E. 216, 8 Ind. App. 574.

[k] (Sup. 1895)

Rev. St. 1894, § 4377, prohibits the creation of indebtedness by towns unless a majority of the owners of taxable real estate shall petition the board of trustees to contract such debt. *Held*, in an action to enjoin a town from executing a contract for lighting on the ground that it creates an indebtedness in violation of such statute, that allegations in the complaint that "said town will not have money to meet said indebtedness when the same matures, above the amounts necessary for the actual running expenses of said town, and will not receive from the present levy sufficient funds to pay such indebtedness, and cannot make a levy in time to pay the same as it matures," are mere conclusions, and present no question.—*Foland v. Town of Frankton*, 142 Ind. 546, 41 N. E. 1031.

[l] (App. 1899)

A complaint in an action to recover damages for failure to promptly transmit a telegram deposited on Sunday, which alleged "that it was necessary that said dispatch should be transmitted on said day [Sunday] in order to relieve suffering, avert harm, and prevent serious loss of health and life, and that the defendant's agent then and there had knowledge of such necessity," is demurrable for the reason that it does not allege facts, but merely the opinion of the pleader.—*Western Union Tel. Co. v. Henley*, 54 N. E. 775, 23 Ind. App. 14.

[m] (App. 1899)

A complaint by an attorney to recover on an implied contract for services rendered, alleging that the services were necessary, and

that the benefit to defendant which accrued therefrom would have been lost but for such services, without alleging facts showing the necessity for the services, and that the benefit to defendant would have been lost, is insufficient, since such averments are mere conclusions.—*Cleveland, C., C. & St. L. Ry. Co. v. Shrum*, 55 N. E. 515, 24 Ind. App. 96.

[n] (App. 1900)

An answer which alleges that, prior to the commencement of the suit, plaintiff demanded of defendant an amount in excess of the amount lawfully due, and refused to accept an amount less than an amount named, which was in excess of the amount lawfully due, does not plead facts showing that a tender before suit of the amount lawfully due would have been refused, as such allegation is a mere conclusion.—*Indiana Bond Co. v. Jameson*, 56 N. E. 37, 24 Ind. App. 8.

[o] (Sup. 1901)

The statement, in an affidavit supporting the complaint in an action for the appointment of receiver, that the defendant is insolvent, states an issuable fact, and not a conclusion.—*Chicago & S. E. Ry. Co. v. Kenney*, 62 N. E. 26, 159 Ind. 72.

[p] (App. 1901)

In an action for injuries inflicted by the bite of defendant's dog, allegations of the complaint that the dog was of a fierce and dangerous nature, with a propensity to attack and bite mankind, were not insufficient, as being statements of conclusions rather than facts.—*Guenther v. Fohey*, 59 N. E. 182, 26 Ind. App. 93.

[q] (App. 1902)

An allegation that the court would not have entered the judgment it did if it had been advised of the facts, merely states a conclusion of law.—*Harlow v. First Nat. Bank*, 65 N. E. 603, 30 Ind. App. 160.

[r] (Sup. 1903)

An averment that Const. art. 4, § 18, requiring every bill to be read by sections on three several days, unless the several readings are dispensed with by two-thirds vote, "is a general rule of parliamentary law," is a conclusion of the pleader, unless accompanied by an averment that a council had adopted it as one of its governing rules.—*Landes v. State ex rel. Matson*, 67 N. E. 189, 160 Ind. 479.

[s] (App. 1907)

In an action on a note, a claim of set-off, which averred that a partnership of which plaintiff's deceased husband and defendant were members was indebted on a certain note of which no account was taken on the settlement of the partnership affairs, and which defendant was compelled to pay after such settlement, that the deceased partner devised to plaintiff his entire estate upon the express condition that she pay his indebtedness, and that she accepted the provisions of the will, was insuffi-

cient. where the provisions of the will under which it was claimed plaintiff took decedent's property were not set out or a copy thereof made a part of the pleading.—*Schnell v. Schnell*, 39 Ind. App. 558, 80 N. E. 432.

[t] (Sup. 1908)

In an action against a railroad company to recover for the death of plaintiff's decedent, a conductor on defendant's freight train, occurring in Illinois, an allegation "that by the common law of the state of Illinois on the 13th and 14th days of October, 1905, employes of railroad corporations operating lines of railroads in such states were fellow servants only where such employes were brought together in direct co-operation in the performance of a particular work and were directly co-operating with each other in a particular work at the time," is not a declaration as to what the common law of Illinois was at that time, but is a mere conclusion as to its legal effect, and bad on demurrer.—*Wabash R. Co. v. Hassett*, 170 Ind. 370, 83 N. E. 705.

[u] (Sup. 1908)

An averment that an injured person's wounds were so severe as to create an emergency calling for the immediate attention of a physician and surgeon in order to save life is the pleading of a conclusion, and not a fact, which is not permissible.—*Cushman v. Cloverland Coal & Mining Co.*, 170 Ind. 402, 84 N. E. 759, 16 L. R. A. (N. S.) 1078, 127 Am. St. Rep. 391.

[v] (Sup. 1908)

An averment in an action for injury to a passenger, who was thrown from a car platform, that the carrier held out the train to the public as vestibuled, was in the nature of a conclusion rather than a statement of fact.—*Pittsburgh, C. & St. L. Ry. Co. v. Schepman*, 171 Ind. 71, 84 N. E. 988.

[w] (App. 1908)

An allegation in a complaint in an action against a carrier for failure to furnish shipping facilities that defendant held itself out to be a through carrier to the seaboard markets was not objectionable as pleading a conclusion, but is within the rule that evidence need not be pleaded, but that pleading the ultimate fact to be proved is sufficient.—*Pittsburgh, C. & St. L. Ry. Co. v. Wood*, 84 N. E. 1009.

[ww] (App. 1908)

An allegation, in a complaint in eminent domain proceedings, "that the change of line of said road is desirable with a view to a more easy ascent and descent to and from the same," etc., is a conclusion, and not a statement of fact.—*Slider v. Indianapolis & L. Traction Co.*, 42 Ind. App. 304, 85 N. E. 372, 721.

[x] (Sup. 1909)

The averments of the complaint, in an action by the widow against divorced wife of deceased to determine the right to insurance un-

der the policy of a benefit association, in which the divorced wife was named as beneficiary, that deceased, "in accord with the rules and regulations of said association," applied to and requested the local agent of the association to change the name of the beneficiary; that he "did and performed all things that he could do and perform" in an effort to have plaintiff substituted as beneficiary; that an "absolute divorce was granted to him, thereby depriving * * * (defendant) of any right to participate in said fund as beneficiary or otherwise"; and that on account of the rules and regulations of the association defendant ceased to be and has never since been the legal beneficiary of deceased—are mere conclusions.—*Farra v. Braman*, 86 N. E. 843, 171 Ind. 529.

[xx] In an action by a railroad company to enjoin a city from preventing it from laying a second track along a street after the city had repealed an ordinance authorizing it to do so, an allegation of the complaint that the obstruction to public travel by plaintiff's trains will be less when two tracks are used than when all trains pass over one track, and that there is ample space for travel with a double track, was merely a conclusion.—(Sup. 1909) *Grand Trunk & W. Ry. Co. v. City of South Bend*, 89 N. E. 885; (1910) *Grand Trunk Western Ry. Co. v. City of South Bend*, 91 N. E. 800, denying rehearing, *Grand Trunk & W. Ry. Co. v. City of South Bend* (1909) 89 N. E. 885.

[y] (Sup. 1909)

In a condemnation proceeding, an allegation in the complaint that the proposed appropriation was necessary to the conduct of plaintiff's business was a mere conclusion of the pleader.—*Kinney v. Citizens' Water & Light Co. of Greenwood, Ind.*, 90 N. E. 129, 26 L. R. A. 195.

[yy] (App. 1909)

Where a complaint alleged that plaintiff went to defendant's exchange by means of an alleged defective stairway maintained by defendant "upon its express invitation," the allegation that plaintiff was invited to use the stairway was not objectionable as a mere recital, and not an allegation of fact.—*Cumberland Telephone & Telegraph Co. v. Hatter*, 89 N. E. 912.

[z] (Sup. 1910)

A complaint to establish and probate a will alleged its execution and that during the testatrix's lifetime it was destroyed without her or plaintiffs' consent, the destruction having never come to her knowledge, and that by the terms thereof she devised and bequeathed all her property, real and personal, to plaintiffs. *Held*, that the allegations as to the effect of the terms of the will were sufficient as a means of identifying plaintiffs' right to sue; and an objection thereto on the ground that it stated a mere conclusion, and not a fact, was without merit.—*Gfroerer v. Gfroerer*, 90 N. E. 757.

[zz] (App. 1910)

Burns' Ann. St. 1908, § 291, makes whatever obstructs the use of property so as to essentially interfere with its comfortable enjoyment a "nuisance," and the subject of an action. The complaint alleged that plaintiffs did a retail clothing and furnishing business on the first floor of the building, under a lease from one of defendants, and that such defendant caused and permitted the upper story to be used by the other defendant as a roller skating rink, the noise from which prevented conversation in plaintiffs' store, and annoyed and drove away his customers, thereby causing loss of profits and injury to the business, which could not be compensated for by damages, and that, if such use is permitted to continue, plaintiffs' business will be destroyed, and also alleged facts showing the character and extent of plaintiffs' business, their inability to procure another room, and prayed an injunction. *Held*, that the complaint was not defective as alleging conclusions for failing to aver the names of plaintiffs' customers who were driven away by the noise; that being evidential.—*Foor v. Edwards*, 90 N. E. 785.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 12-28½; 23 CENT. DIG. Fraud, § 37; 24 CENT. DIG. Fraud. Conv. § 773; 37 CENT. DIG. Neglig. § 182.

See, also, 31 Cyc. pp. 49-65.

§ 8 (3). *Characterization of acts or conduct and stating result thereof in general.*

[a] (Sup. 1902)

The allegation that, by reason of the street being out of repair, plaintiff was thrown from her bicycle, was a conclusion; the facts stated not justifying the inference.—*City of Logansport v. Kihm*, 64 N. E. 595, 159 Ind. 68.

[b] (Sup. 1905)

It is not necessary to allege that a certain act or conduct was under the law imposed on a defendant, for such allegations would be a legal conclusion.—*Chicago Terminal Transfer R. Co. v. Vandenberg*, 164 Ind. 470, 73 N. E. 990.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 12-28½; 23 CENT. DIG. Fraud, § 37; 24 CENT. DIG. Fraud. Conv. § 773; 37 CENT. DIG. Neglig. § 182.

See, also, 31 Cyc. pp. 49-65.

§ 8 (4). *Allegations as to consideration.*

[a] (Sup. 1880)

An answer setting up false and fraudulent representations as to value, and then concluding with a general statement that defendants received no consideration for the notes in suit, is in its allegations as to want of consideration merely a conclusion of the pleader from

the facts previously stated.—*Kennedy v. Richardson*, 70 Ind. 524.

[b] (Sup. 1881)

A general statement in a plea in an action on a note that the consideration had wholly failed is a mere general conclusion, which cannot supply the place of traversable facts, and is therefore insufficient.—*Mitchell v. Stinson*, 80 Ind. 324.

[c] (Sup. 1902)

A plea of whole or partial failure of consideration must state facts showing such failure, though a general plea of no consideration may allege such fact in general terms.—*D. M. Osborne & Co. v. Hanlin*, 63 N. E. 572, 158 Ind. 325.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 12-28½; 23 CENT. DIG. Fraud, § 37; 24 CENT. DIG. Fraud. Conv. § 773; 37 CENT. DIG. Neglig. § 182.

See, also, 31 Cyc. pp. 49-65.

§ 8 (5). *Allegations or denials of indebtedness.*

[a] (Sup. 1899)

An allegation, in an action on account, that there is due plaintiff a certain sum as a balance on the mutual accounts between the parties, is insufficient, being a mere conclusion. *Gise v. Cook*, 52 N. E. 454, 152 Ind. 75.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 12-28½; 23 CENT. DIG. Fraud, § 37; 24 CENT. DIG. Fraud. Conv. § 773; 37 CENT. DIG. Neglig. § 182.

See, also, 31 Cyc. pp. 49-65.

§ 8 (6). *Validity or legality of particular acts, claims, conduct or instruments.*

[a] (Sup. 1881)

That the oaths of city commissioners were not indorsed on their certificates of appointment according to law, or that the commissioners did not take the oath of office required by law, is an averment of a legal conclusion.—*Caskey v. City of Greensburgh*, 78 Ind. 233.

[b] (Sup. 1882)

A complaint alleging that, in answer to proposals of defendants, plaintiffs made bids for the building of a courthouse, and filed a good and sufficient bond, and that they were the lowest bidders, states a conclusion. The facts must be stated showing that the bond was sufficient.—*Boseker v. Board of Com'rs of Wabash County*, 88 Ind. 267.

[c] (Sup. 1884)

In a suit by a taxpayer to restrain a county treasurer from making a sale of his land for the collection of a tax in aid of a railroad company, an allegation that the company did not

legally commence work was not equivalent to an allegation that it did not commence work, and was subject to the objection that a conclusion of law was pleaded.—*Sellers v. Beaver*, 97 Ind. 111.

[d] (Sup. 1885)

In replevin for goods seized under an execution, an averment in the complaint that the execution and judgment were absolutely void was merely a conclusion, and amounted to nothing in the absence of a statement of facts.—*Louisville, E. & St. L. Ry. Co. v. Payne*, 2 N. E. 582, 103 Ind. 183.

[e] (Sup. 1892)

Where a paragraph of a complaint, in an action for damages on the ground of fraud in procuring a deed of land from a father to his son, proceeds on the theory that the grantor, at the time the deed was executed, was, by reason of age and infirmity, of unsound mind, but states no facts showing such unsoundness of mind, the paragraph is open to a demurrer.—*Bateman v. Snoddy*, 32 N. E. 327, 132 Ind. 480.

[f] (Sup. 1902)

A paragraph of a complaint in false imprisonment, to the effect that defendant unlawfully imprisoned plaintiff and deprived him of his liberty, was not demurrable as stating a mere conclusion of law.—*Harness v. Steele*, 64 N. E. 875, 159 Ind. 286.

[g] (App. 1906)

In an action to recover money paid on a void policy of insurance, an allegation in the complaint "that plaintiff had no insurable interest in the life insured," not being an averment of fact, but a conclusion of law, did not aid the pleading in showing that the policy was void ab initio.—*American Mut. Life Ins. Co. v. Mead*, 39 Ind. App. 215, 79 N. E. 526.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 12-28½; 23 CENT. DIG. Fraud, § 37; 24 CENT. DIG. Fraud. Conv. § 773; 37 CENT. DIG. Neglig. § 182.

See, also, 31 Cyc. pp. 49-65.

§ 8 (7). *Construction and effect of contracts and performance or breach thereof.*

[a] (Sup. 1848)

In an action of debt on a bond for the payment of money in consideration of a certain conveyance, conditioned to be void if the deed was not valid in law, a general allegation in the answer that the grantor did not have a good title to the land is sufficient on a general demurrer, as it is not a mere conclusion of law, but is compounded of both law and fact.—*Hays v. Muir*, 1 Ind. 174, Smith, 90.

[b] (Sup. 1879)

An answer in an action by a draining association to collect an assessment averring that plaintiff has not constructed the ditch accord-

ing to the articles of the association and specifications, and has not dug the ditch the depth nor the width therein named, and has abandoned the work in an unfinished condition, and that the ditch will be of no benefit to defendant, is insufficient, in that it does not allege facts, but conclusions.—*Liberty Tp. Draining Ass'n v. Brumback*, 68 Ind. 93.

[c] (Sup. 1881)

In an action against a town for breach of a contract for the construction of a public improvement, an allegation in the complaint that the town was liable for a specified portion of the expense of the improvement was the statement of a mere conclusion.—*Town of Tipton v. Jones*, 77 Ind. 307.

[d] (Sup. 1888)

In an action on a road-building contract wherein it was agreed that the engineer should pay defendant at the end of every 30 days, on the estimates of said engineer, 85 per cent. of the amount due on the work, an allegation in the answer "that on June 3, 1885, defendant was entitled to an estimate of \$500, according to the terms of such contract, and that, instead of giving him an estimate for that sum, the engineer, in violation of such contract, gave him an estimate of \$300," is not a conclusion of law.—*Board of Com'rs of Ripley County v. Hill*, 115 Ind. 316, 16 N. E. 156.

[e] (App. 1889)

A complaint in an action for damages to a live-stock shipment showed the particular damages sustained, and alleged that plaintiff, within five days after said damages were sustained as aforesaid, made his claim in writing therefor as provided in said contract. Held an averment of a fact, and not a conclusion of the pleader.—*Cleveland, C., C. & St. L. Ry. Co. v. Heath*, 53 N. E. 198, 22 Ind. App. 47.

[f] (App. 1900)

A paragraph in a reply which alleges that the defendant was fully indemnified for entering into a certain contract is not sufficient, as it does not state the facts showing how such indemnity was given.—*Flint & Walling Mfg. Co. v. Kerr-Murray Mfg. Co.*, 56 N. E. 858, 24 Ind. App. 350.

[g] (App. 1901)

A complaint to enforce a trust, alleging that J. L. by his written agreement settled on his children by a former wife all his real and personal estate, to be taken by them at his death, and not averring whether there was a conveyance or in what manner they became the owners of the land, pleaded a conclusion.—*Repp v. Leshner*, 61 N. E. 609, 27 Ind. App. 360.

A complaint alleging that a party, "by his written agreement, settled upon his children all his real and personal estate," pleads a legal conclusion.—Id.

[h] (App. 1908)

In an action for rentals under a gas lease providing that, if gas were found in sufficient

quantities to market and to be piped to such market, plaintiff's compensation should be a certain sum per well, allegations in the complaint that gas was found in sufficient quantities to be marketed and to be piped to market, and that there were good markets within 10 miles, and others further away, where the gas could have been delivered and sold at a profit to defendant, set out facts which, if proved, with the other material averments of the complaint, would entitle plaintiff to recover, and hence were not averments of mere opinions.—*Indiana Natural Gas & Oil Co. v. Wilhelm*, 86 N. E. 86.

[i] (App. 1909)

An averment in a bill for specific performance of a contract to exchange property that certain other instruments made and constituted as a whole the written contract between the parties was a mere conclusion, and without binding force.—*McCauley v. Schatzley*, 88 N. E. 972.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 12-28½; 23 CENT. DIG. Fraud, § 37; 24 CENT. DIG. Fraud. Conv. § 773; 37 CENT. DIG. Neglig. § 182.

See, also, 31 Cyc. pp. 49-65.

§ 8 (8). *Duties or obligations and performance thereof.*

[a] (Sup. 1847)

In debt on a justice's bond for his failure to issue an execution, the relator's statement that the justice might, could, and should have issued an execution is only a conclusion of law.—*Weaver v. State ex rel. Thompson*, 8 Blackf. 503.

[aa] A complaint against a railroad company for killing live stock, which alleges that the "road was not fenced as required by law," states a legal conclusion, and is bad.—(Sup. 1867) *Indianapolis, P. & C. R. Co. v. Bishop*, 29 Ind. 202; (1872) *Jeffersonville, M. & I. R. Co. v. Underhill*, 40 Ind. 229.

[b] (Sup. 1874)

In an action under the statute against a railroad company for injuries to stock, an allegation that "the road was not securely fenced, as required by law," is a sufficient allegation as to the fencing of the road, and not a mere conclusion of law.—*Indianapolis, B. & W. Ry. Co. v. Lyon*, 48 Ind. 119.

[c] (Sup. 1904)

A complaint for negligence must show the existence of a duty, of defendant to exercise due care toward the person injured, and a mere allegation that it was defendant's duty to do or not to do a certain act is a conclusion of law and insufficient.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Lightheiser*, 163 Ind. 247, 71 N. E. 218, rehearing denied 71 N. E. 660, 163 Ind. 247.

[d] (Sup. 1905)

An allegation that the exercise of ordinary care on the part of a defendant required the guarding of a certain machine is a legal conclusion.—*M. S. Huey Co. v. Johnston*, 164 Ind. 489, 73 N. E. 996.

[e] (Sup. 1905)

The complaint, in an action for a personal injury negligently inflicted by another, must allege facts showing that the latter owed a legal duty to the person injured and that he negligently failed to perform the duty; and the mere allegation of the pleader that such a duty existed is insufficient.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Peck*, 76 N. E. 163, 165 Ind. 537.

A complaint, in an action under the employers' liability act (Laws 1893, p. 204, c. 130, § 1; Burns' Ann. St. 1901, § 7083, subd. 4), making a railroad company liable for an injury to an employé caused by the negligence of the person in charge of any engine, which alleges that cars were drawn past a switch, that it then became the duty of the engineer not to move the cars until signaled to do so by the switchman or the conductor in charge, and that the engineer, without receiving any signal and in disregard of his duty, backed the cars, causing the injury complained of, is fatally bad for failing to allege the facts making it the duty of the engineer not to move the cars unless signaled.—*Id.*

[f] (App. 1907)

A complaint for negligence, alleging that it was the duty of defendant to do or not to do a certain act, alleges a mere conclusion.—*Coal Bluff Min. Co. v. Akers*, 39 Ind. App. 617, 80 N. E. 545.

[g] (Sup. 1908)

In an action against a railroad company for the death of an employé, the allegations in the complaint that it was the duty of defendant's engineer, foreman, and flagman to do certain things are insufficient; the facts from which such duties arise being necessary.—*Wabash R. Co. v. Hassett*, 170 Ind. 370, 83 N. E. 705.

In an action against a railroad company to recover for the death of plaintiff's decedent, a conductor on defendant's freight train, an allegation that "by the rules" of the defendant company certain things were required to be done and certain duties were imposed without pleading the rules in substance or in full is a mere conclusion of the pleader.—*Id.*

[h] (Sup. 1908)

An allegation, in an action against a telephone company for injuries to one who drove against a slackened wire suspended over a street, that it was the company's duty by virtue of an ordinance of the town specified, to have its poles and wires so placed and maintained as not to interfere with the travel on the street, is objectionable as embodying a mere conclusion as to the substance and effect of the ordinance,

and is not the averment of a fact.—*Cumberland Telephone & Telegraph Co. v. Pierson*, 170 Ind. 543, 84 N. E. 1088.

[i] (App. 1908)

In an action for injury to an employé, a complaint averring that it was the duty of an employé to do certain things states a mere conclusion, and is insufficient where the facts creating the duty are not pleaded.—*Indiana Union Traction Co. v. Pring*, 41 Ind. App. 247, 83 N. E. 733.

[j] (App. 1908)

An allegation, in a complaint in an action for injuries to an employé, that it was his duty to perform such work as might be required of him, is merely a conclusion, and is insufficient for any purpose.—*Vigo Coöperage Co. v. Kennedy*, 42 Ind. App. 433, 85 N. E. 986.

[k] (App. 1908)

The word "duty" may be used in a pleading in characterizing the nature of plaintiff's employment, where it is used to describe an ultimate fact as to the character of the work, as that one of the duties he was employed to perform was to inspect his locomotive; the allegation in such case being one of ultimate fact, and descriptive of the contract of employment.—*Chicago & E. I. R. Co. v. Hamilton*, 42 Ind. App. 512, 85 N. E. 1044.

In a personal injury action by a brakeman, allegations that when the train approached a certain crossing it became plaintiff's duty to go upon the platform of the caboose, where a chain was carelessly piled, and to go upon the steps of the platform so as to see signals at the crossing, and in the performance of this duty plaintiff fell over the chain and was injured, stated conclusions of law, and not allegations of ultimate fact.—*Id.*

A bare allegation of legal duty is insufficient, it being necessary to allege facts disclosing the existence of the duty.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 12-28½; 23 CENT. DIG. Fraud, § 37; 24 CENT. DIG. Fraud. Conv. § 773; 37 CENT. DIG. Neglig. § 182.

See, also, 31 Cyc. pp. 49-65.

§ 8 (9). *Allegations as to jurisdiction and legal proceedings.*

[a] (Sup. 1889)

An answer, setting up that the claim is exclusively of equity jurisdiction, sets up matter of law, and is bad at common law and by the Code.—*Kern v. Hazlerigg*, 11 Ind. 443, 71 Am. Dec. 360.

[b] (Sup. 1878)

In an action on an injunction bond, an allegation in the answer that the title to real estate was in issue in the injunction suit, so as to deprive the court of common pleas of jurisdic-

tion, was a mere conclusion of law.—*Sipe v. Holliday*, 62 Ind. 4.

[c] (Sup. 1881)

In a plea to the jurisdiction, a general conclusion, unsupported by facts, will not avail even in cases where the record does not disclose jurisdiction.—*Marshall v. Gill*, 77 Ind. 402.

[d] (Sup. 1881)

Where the plaintiff in an action for the recovery of real estate filed a petition for the appointment of a receiver, alleging his ownership of a junior judgment and the redemption by him from the foreclosure sale, the general allegation that "plaintiff afterwards took such other steps as required by law" to perfect his title, was insufficient.—*Heavilon v. Farmers' Bank of Frankfort*, 81 Ind. 249.

[e] (Sup. 1884)

Allegations that a petition was never signed, as the law required, and that the county board for want of a legal petition never acquired any jurisdiction to act in the premises, were not allegations of fact, but they were the pleader's conclusions from facts which were not alleged.—*City of Logansport v. La Rose*, 99 Ind. 117.

[f] (Sup. 1895)

In an action to enjoin the collection of a judgment, allegations in the complaint that the affidavit on which the proceedings in attachment were had "stated no grounds for an attachment" are mere conclusions of law, and cannot be considered in determining the sufficiency of the complaint on demurrer thereto.—*Gum Elastic Roofing Co. v. Mexico Pub. Co.*, 140 Ind. 158, 39 N. E. 443, 30 L. R. A. 700.

In an action to enjoin the collection of a judgment, an allegation in the complaint that "no legal process was served" is a mere conclusion of law, and cannot be considered in determining the sufficiency of the complaint on demurrer thereto.—*Id.*

In an action to enjoin the collection of a judgment, an allegation in the complaint that the court had "no jurisdiction" of the subject-matter or of the person of the defendant is a mere conclusion of law, and cannot be considered in determining the sufficiency of the complaint on demurrer thereto.—*Id.*

[g] (Sup. 1908)

An allegation by a board of county commissioners, in an action to enjoin the removal of bridges in the construction of a public drain, that the board has never, in any way, been made a party to the drainage proceedings is bad on demurrer, as the pleading of a legal conclusion, though it is alleged that neither the board nor the county was named in any complaint or petition as a party; since, under the direct provisions of Burns' Ann. St. 1901, § 5624, the county might have been made a party in effect without being so named.—*Karr v. Board of Com'rs of Putnam County*, 170 Ind. 571, 85 N. E. 1.

[h] (*Sup.* 1909)

Averring in a mandamus complaint that relator has no other plain and adequate remedy is a legal conclusion and is controlled by specific allegations showing that relator on payment of a sum of money may receive all the demands.—*State v. Cadwallader*, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 12-28½; 23 CENT. DIG. Fraud, § 37; 24 CENT. DIG. Fraud. Conv. § 773; 37 CENT. DIG. Neglig. § 182.

See, also, 31 Cyc. pp. 49-65.

§ 8 (10). Discharge, release, waiver, or abandonment.

[a] (*Sup.* 1885)

The averment, in an answer by the sureties in a suit on a promissory note, that the agent of the payee had released them, is a mere conclusion of law, and such answer is not good unless facts are pleaded showing a release.—*Marshall v. Mathers*, 103 Ind. 458, 3 N. E. 120.

[b] (*Sup.* 1885)

An averment that the payee of a note "released" the payor is a mere conclusion of law.—*Kelso v. Fleming*, 104 Ind. 180, 3 N. E. 830.

[c] (*Sup.* 1890)

The answer set forth certain acts of defendants in relation to the subject-matter of the complaint, and alleged that the same were "taken and received" by plaintiffs "in full and perfect satisfaction of all wrongs and injuries incident" thereto. *Held* that, there being no averment that plaintiffs agreed with defendants to accept such acts in satisfaction, a demurrer should be sustained to this part of the answer, as a statement of a mere conclusion.—*Renihan v. Wright*, 125 Ind. 536, 25 N. E. 822, 21 Am. St. Rep. 249, 9 L. R. A. 514.

[d] (*App.* 1902)

A complaint alleging the making of a certain agreement, and that defendant had waived certain requirements, is demurrable, in alleging a conclusion, instead of stating the facts constituting the waiver.—*Crafton v. Carmichael*, 64 N. E. 627, 29 Ind. App. 320.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 12-28½; 23 CENT. DIG. Fraud, § 37; 24 CENT. DIG. Fraud. Conv. § 773; 37 CENT. DIG. Neglig. § 182.

See, also, 31 Cyc. pp. 49-65.

§ 8 (11). Title, ownership, estate, or possession.

[a] (*Sup.* 1880)

To a suit to recover the possession of personal property, an answer that the defendant is entitled to the possession is bad. It should

set out the grounds of his right.—*McTaggart v. Rose*, 14 Ind. 230.

[b] (*Sup.* 1865)

In a proceeding against B. and others for the foreclosure of a mortgage, C., who had a judgment against B., was made a party defendant. The complaint alleged that the judgment of C. was on the foreclosure of a mortgage on other lands, and did not affect any of the lands mortgaged to plaintiff. *Held*, that the averment as to the lien of C.'s judgment was not the averment of a fact, but of a conclusion of law, which could not be deduced from the facts averred, and which, if a fact was wholly immaterial, and hence was not admitted by a default.—*Fletcher v. Holmes*, 25 Ind. 458.

[c] (*Sup.* 1876)

In an action by an administrator on a policy on the life of his decedent, defendant's answer alleged that plaintiff could not maintain the action because insured in his lifetime assigned the policy to another, the company indorsing on the assignments its consent thereon. *Held*, that the reply averring that the assignee had no insurable interest in the life of insured averred a conclusion of law, and was bad on demurrer.—*Franklin Life Ins. Co. v. Sefton*, 53 Ind. 380.

[d] (*Sup.* 1881)

Where a complaint for partition of real estate avers facts showing a tenancy in common between the parties, an answer denying that any tenancy in common has existed between the parties, and averring that for 15 years last past defendant and those under whom he claims title have been in the exclusive and undisputed possession of the land under claim and color of title, continuously and adversely, alleges a legal conclusion only, and must be considered without reference to the denial of the cotenancy and as admitting the alleged title of the plaintiff.—*Nicholson v. Caress*, 76 Ind. 24.

[e] (*Sup.* 1882)

An allegation in a pleading that title is derived "by gift" is an allegation of fact, and not a conclusion of law.—*McCarty v. Tarr*, 83 Ind. 444.

[f] (*App.* 1903)

Where a complaint alleged that plaintiffs were in possession of a one-story brick building situated on a lot described, as leasees, and that on a certain day defendants unlawfully excavated so near the wall of the building occupied by plaintiffs as to unlawfully destroy the support of the brick wall of the building adjoining such lot, that the wall was thrown down into the building, injuring plaintiff's property, etc., it was not objectionable on the ground that it stated conclusions only.—*Payne v. Moore*, 66 N. E. 483, 67 N. E. 1005, 31 Ind. App. 360.

[g] An averment in a pleading that a way existed as appurtenant to an owner's land is

an averment of a fact.—(App. 1904) Cincinnati, R. & M. R. Co. v. Miller, 72 N. E. 827, 73 N. E. 1001, 36 Ind. App. 26; (1906) Same v. Troutman, 38 Ind. App. 700, 75 N. E. 277.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 12-28½; 23 CENT. DIG. Fraud, § 37; 24 CENT. DIG. Fraud. Conv. § 773; 37 CENT. DIG. Neglig. § 182.

See, also, 31 Cyc. pp. 49-65.

§ 8 (12). Rights, claims, or liens, and priority thereof.

[a] (App. 1889)

An allegation that "plaintiff was entitled to the free and unobstructed flow of water" in a ditch on a railroad right of way is the statement of a conclusion, and not a showing of facts entitling plaintiff to maintain such ditch on the right of way.—Cleveland, C., C. & St. L. Ry. Co. v. Huddleston, 52 N. E. 1008, 21 Ind. App. 621, 69 Am. St. Rep. 385.

[b] (App. 1903)

In an action on a benefit insurance certificate, an averment in the complaint that deceased was at the time of his death a member of the order, and entitled to all the rights of such member, was only a statement of a conclusion, and did not aid the complaint, or supply the necessary averment of performance of all conditions.—Grand Lodge A. O. U. W. v. Hall, 67 N. E. 272, 31 Ind. App. 107.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 12-28½; 23 CENT. DIG. Fraud, § 37; 24 CENT. DIG. Fraud. Conv. § 773; 37 CENT. DIG. Neglig. § 182.

See, also, 31 Cyc. pp. 49-65.

§ 8 (13). Appointment, authority, and duties of officers.

[a] (App. 1903)

In an action on a judgment rendered in another state against an insurance company foreign thereto, the complaint alleged that the writ was personally served on a certain person, who was deputy insurance commissioner, "lawfully authorized to receive service," and the "lawful representative" of defendant, and the statute pleaded provided that no foreign insurance company should do business within the state until it should have stipulated that any process might be served on the insurance commissioner, on the party designated by him, or the agent specified by the company to receive service. It was not alleged that service was made on the insurance commissioner, on any one designated by him, or on any agent appointed by defendant. *Held*, that the allegations that the deputy insurance commissioner was "legally authorized," etc., were mere conclusions, and the complaint was insufficient to show jurisdiction.—Old Wayne Mut. Life Ass'n v. Flynn, 68 N. E. 327, 31 Ind. App. 473.

[b] (Sup. 1905)

The complaint in an action on the official bond of a county auditor alleged that defendant was entitled to retain from moneys received a certain sum for his services, and that it was his duty to pay over all moneys in excess of this amount. This was followed by specific allegations of various sums received by defendant and wrongfully retained, and it was charged that defendant had received his full salary, and that the aggregate sum mentioned was retained by him in addition to the sum paid as salary, and that it was defendant's duty to pay over this sum. *Held*, that the complaint was not objectionable as merely alleging a conclusion.—Workman v. State ex rel. Board of Com'rs of Owen County, 73 N. E. 917, 165 Ind. 42.

[c] (Sup. 1909)

An allegation that defendant was elected for a term commencing on a certain date was a conclusion.—Russell v. State ex rel. Crowder, 87 N. E. 13, 171 Ind. 623.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 12-28½; 23 CENT. DIG. Fraud, § 37; 24 CENT. DIG. Fraud. Conv. § 773; 37 CENT. DIG. Neglig. § 182.

See, also, 31 Cyc. pp. 49-65.

§ 8 (14). Heirship.

[a] (Sup. 1886)

The averment in a complaint that the plaintiff is an heir of a certain intestate is an allegation of fact, and not a mere conclusion of law.—Physio-Medical College v. Wilkinson, 108 Ind. 314, 9 N. E. 167.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 12-28½; 23 CENT. DIG. Fraud, § 37; 24 CENT. DIG. Fraud. Conv. § 773; 37 CENT. DIG. Neglig. § 182.

See, also, 31 Cyc. pp. 49-65.

§ 8 (15). Fraud or misrepresentation.

[a] (Sup. 1830)

A general plea that the bond was obtained by fraud and covin is good, without setting forth the particulars of the fraud.—Pence v. Smock, 2 Blackf. 315.

[b] (Sup. 1833)

In an action of debt on a bond, defendant may plead generally that the execution of the bond was obtained by fraud, covin, and misrepresentation.—Huston v. Williams, 3 Blackf. 170, 25 Am. Dec. 84.

[c] (Sup. 1857)

In an action on a note, an answer alleging that it was given for an alleged mechanic's lien which plaintiff pretended to hold on a building, and averring that plaintiff falsely and fraudulently represented that he held such lien, when he well knew he had no valid lien, is an allegation of matters of opinion.—Lynam v. King, 9 Ind. 3.

[d] (Sup. 1862)

Where fraud is raised as a defense in a suit under the Code on notes and a mortgage, all the elements necessary to be proved to make a fraud must be specially averred.—*Jenkins v. Long*, 19 Ind. 28, 81 Am. Dec. 374.

[e] Fraud, when sought to be made a ground for relief, must be so alleged as to disclose the facts constituting fraud; an averment of fraud as a conclusion being insufficient.—(Sup. 1868) *Curry v. Keyser*, 30 Ind. 214; (1868) *Darnell v. Rowland*, Id. 342; (1870) *Ham v. Greve*, 34 Ind. 18; (1873) *Joest v. Williams*, 42 Ind. 565, 13 Am. Rep. 377; (1876) *Steele v. Moore*, 54 Ind. 52; (1879) *Over v. Hetherington*, 66 Ind. 365; (1879) *Iles v. Martin*, 69 Ind. 114; (1882) *Wilson v. Town of Monticello*, 85 Ind. 10; (1882) *Hamilton v. Reynolds*, 88 Ind. 191; (1884) *McComas v. Haas*, 93 Ind. 276; (1885) *Bodkin v. Merit*, 1 N. E. 625, 102 Ind. 293; (1889) *Jackson v. Myers*, 22 N. E. 90, 23 N. E. 86, 120 Ind. 504; (1889) *Conant v. National State Bank*, 22 N. E. 250, 121 Ind. 323; (App. 1891) *Kain v. Rinker*, 27 N. E. 328, 1 Ind. App. 86; (1892) *Norris v. Scott*, 6 Ind. App. 18, 32 N. E. 103, 865; (Sup. 1895) *Stroup v. Stroup*, 39 N. E. 864, 140 Ind. 179, 27 L. R. A. 523; (1895) *Burden v. Burden*, 40 N. E. 1067, 141 Ind. 471; (1905) *Board of Com'rs of La Porte County v. Wolff*, 76 N. E. 247, 166 Ind. 325.

[f] (Sup. 1877)

In pleading fraud, it is not sufficient to allege the same in general terms, and the facts may be charged without using the words "fraud" or "false and fraudulent representations."—*Hess v. Young*, 59 Ind. 379.

[g] (Sup. 1897)

The use of epithets in a pleading is not sufficient to show fraud; but the facts constituting the fraud must be distinctly alleged.—*Guy v. Blue*, 45 N. E. 1052, 146 Ind. 629.

[h] (Sup. 1905)

An answer in a suit against a county to recover for expert accountants' services, alleging that they formed a conspiracy with complainant, who was then auditor of the county, to obtain the contract sued on, that they might obtain large sums of money from the state and surrounding counties, etc., and that they obtained the contract by fraud and false representations, but failing to allege in what the fraud consisted, was demurrable.—*Board of Com'rs of Howard County v. Garrigus*, 164 Ind. 589, 73 N. E. 82, 74 N. E. 249.

[i] (App. 1905)

When fraud is urged as a ground of defense, it must be shown by a special plea, containing facts directly averred constituting fraud, before evidence will be admitted tending to prove the ultimate fact.—*McAfee v. Bending*, 76 N. E. 412, 36 Ind. App. 628.

[j] (App. 1907)

A complaint for fraud must state facts, and not conclusions.—*Supreme Council of*

Knights & Ladies of Columbia v. Apman, 39 Ind. App. 670, 80 N. E. 640.

[k] (Sup. 1909)

An answer, in a suit to foreclose a street improvement lien, averring that the common council and the city engineer fraudulently colluded together to accept the work, but stating no facts showing fraud, is bad as stating a mere conclusion.—*Dawson v. Hipskind*, 89 N. E. 863.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 12-28½; 23 CENT. DIG. Fraud, § 37; 24 CENT. DIG. Fraud. Conv. § 773; 37 CENT. DIG. Neglig. § 182.

See, also, 31 Cyc. pp. 49-65.

§ 8 (16). *Mistake, duress, or undue influence.*

[a] (Sup. 1881)

In an action to recover a payment, a general averment that plaintiff was compelled to pay the money sought to be recovered is but the statement of a conclusion, and not the allegation of a fact.—*Worley v. Moore*, 77 Ind. 567.

[b] (App. 1899)

Averments in an answer that property conveyed to a husband and wife, as tenants by the entireties, was purchased with the wife's separate means entirely, and that the husband, by intimidations and threats, procured the title to be made in himself and wife over her objections, are mere conclusions of law, and and are demurrable.—*Taggart v. Kem*, 53 N. E. 651, 22 Ind. App. 271.

[c] (App. 1902)

The word "mistake," in a bill alleging a contract different from that reduced to writing, and that it was so written by mutual mistake, is the statement of a fact, and not of a conclusion.—*Smelser v. Pugh*, 64 N. E. 943, 29 Ind. App. 614.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 12-28½; 23 CENT. DIG. Fraud, § 37; 24 CENT. DIG. Fraud. Conv. § 773; 37 CENT. DIG. Neglig. § 182.

See, also, 31 Cyc. pp. 49-65.

§ 8 (17). *Allegations of negligence.*

[a] (App. 1901)

In an action for the death of plaintiff's decedent from a blast in defendant's tunnel, an averment in the complaint that defendant negligently caused decedent to enter the tunnel was the statement of a conclusion.—*Standard Cement Co. v. Minor*, 61 N. E. 684, 27 Ind. App. 479.

[b] (App. 1903)

A complaint which alleges that defendant negligently and unlawfully did certain acts, without averments showing that the acts were

unlawfully done, is insufficient. Rehearing, 66 N. E. 483, 31 Ind. App. 360, denied.—Payne v. Moore, 66 N. E. 483, 67 N. E. 1005, 31 Ind. App. 360.

[c] (Sup. 1904)

In a complaint by a servant against his master for personal injuries, allegations that the injuries were received by reason of the master's negligent and defective rules and mode of keeping knowledge of and directing its cars are mere conclusions of the pleader, stated by way of recital, and will be disregarded in determining the sufficiency of the pleading.—Indianapolis & G. R. T. Co. v. Foreman, 69 N. E. 669, 162 Ind. 85, 102 Am. St. Rep. 185.

[d] (App. 1904)

In an action by an employé for personal injuries received in operating a machine, predicated on Acts 1899, p. 234, c. 142, § 9 (Burns' Rev. St. 1901, § 7087i; Horner's Rev. St. 1901, § 5169k), making it the duty of manufacturing establishments to have the machinery properly guarded for the use of operators, a complaint alleging a failure to properly guard the machinery is not insufficient as pleading a conclusion.—Blanchard-Hamilton Furniture Co. v. Colvin, 69 N. E. 1032, 32 Ind. App. 398.

[e] (Sup. 1905)

In an action for negligence, where a legal duty and a violation thereof are disclosed by the complaint, a general averment of negligence is sufficient on demurrer. Judgment (1903) 68 N. E. 166, reversed on rehearing.—Chicago, I. & L. Ry. Co. v. Barnes, 73 N. E. 91, 164 Ind. 143.

[f] (Sup. 1905)

A general allegation of negligence is sufficient to withstand a demurrer for want of facts.—Nickey v. Steuder, 73 N. E. 117, 164 Ind. 189.

[g] (App. 1906)

The sufficiency of a complaint in an action for negligence as against a demurrer must be tested by the specific averments thereof, without reference to the general allegations.—Baltimore & O. S. W. R. Co. v. Kleespies, 76 N. E. 1015, 78 N. E. 252, 39 Ind. App. 151.

[h] (Sup. 1908)

In an action for injuries to an employé, a complaint alleging that, by reason of the absence of necessary guards over the rollers of a mangle at which plaintiff was employed, etc., plaintiff's hand was "inadvertently" caught between the rollers, etc., was bad on demurrer, as being but a mere recital and conclusion, and containing no allegation of fact respecting defendant's negligence.—Pein v. Miznerr, 170 Ind. 659, 84 N. E. 981.

[i] (Sup. 1909)

In an action for a brakeman's death by being run over by an engine which he was preparing to couple, allegations of negligence by the company in failing to provide switch lights

in the yard and a headlight on the engine, were mere conclusions of law, averring such duty.—Cleveland, C., C. & St. L. Ry. Co. v. Morrey, 172 Ind. 513, 88 N. E. 932.

[j] (Sup. 1910)

In an action against a railroad company for negligently causing the death of a conductor, claimed to have been due to the negligence of defendant's engineer on a passenger train in disobeying a city ordinance regulating the speed of trains, and running his train at an excessive rate of speed through an open switch and into the siding where the conductor's train was standing, allegations that if the engineer had slackened the speed of his train to comply with the ordinance a collision would not have occurred, or that the negligence of the engineer was the direct cause of the conductor's death, were only conclusions of the pleader, since the sufficiency of the pleading must depend on the averment of material facts, and without such facts the conclusions of the pleader lend it no support.—Wabash R. Co. v. Beedle, 90 N. E. 760.

[k] (Sup. 1910)

Where the facts alleged in the complaint show a legal duty owing plaintiff from defendant, the violation of such duty may be shown by a general allegation of negligent performance or failure to perform such duty.—Indianapolis Abattoir Co. v. Neidlinger, 92 N. E. 169.

[l] (App. 1910)

A complaint for injuries to plaintiff's wife alleged that defendant operated a street railroad over a public highway, and that, while plaintiff's wife was traveling in a wagon drawn by two horses driven by her son, one of defendant's cars approached from the rear at a high speed, that the motorman sounded the whistle, causing one of the horses to become frightened and rear and plunge and run on the track, and that, though the motorman could plainly see the unmanageable condition of the horses, and that he could not pass without striking the team, and though by ordinary care he could have stopped the car and avoided the collision, he nevertheless ran the car against the team and caused the injury complained of. Held, that the complaint was not objectionable as stating conclusions and not issuable facts.—Cincinnati, L. & A. St. R. Co. v. Cook, 90 N. E. 1052.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 12-28½; 23 CENT. DIG. Fraud, § 37; 24 CENT. DIG. Fraud. Conv. § 773; 37 CENT. DIG. Neglig. § 182.

See, also, 31 Cyc. pp. 49-65.

§ 8 (19). *Invitation to enter and status as passenger.*

[a] (App. 1905)

Where, in an action for death of a servant after he had alighted from a train by which he was carried free from his home to his work, the

complaint alleged that defendant agreed and undertook to carry decedent on its regular passenger trains free of charge as a passenger, and safely discharge him from such train, the averment that he was a passenger was not objectionable as a conclusion.—*Baltimore & O. S. W. R. Co. v. Clapp*, 74 N. E. 267, 35 Ind. App. 403.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 12-28½; 23 CENT. DIG. Fraud, § 37; 24 CENT. DIG. Fraud. Conv. § 773; 37 CENT. DIG. Neglig. § 182.

See, also, 31 Cyc. pp. 49-65.

§ 8 (20). *Damage or injury.*

[a] (Sup. 1903)

Where a railroad company licensed a gas company to maintain its mains under the railroad's tracks, an averment in a cross-complaint to prevent the gas company from laying a fourth pipe under the tracks that the latter was violating the statute by increasing the flow of gas by artificial means, and that such violation caused defendant special injury peculiar to itself, and exposed defendant's property to particular damage, etc., was a mere conclusion of fact, and insufficient to show any change in the situation after the execution of the license.—*Chicago, I. & E. Ry. Co. v. Indiana Natural Gas & Oil Co.*, 68 N. E. 1008, 161 Ind. 445.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 12-28½; 23 CENT. DIG. Fraud, § 37; 24 CENT. DIG. Fraud. Conv. § 773; 37 CENT. DIG. Neglig. § 182.

See, also, 31 Cyc. pp. 49-65.

§ 8 (21). *Knowledge or notice.*

[a] (Sup. 1887)

An averment, in an action to enjoin the sale of land to collect a drainage assessment, that there was no proper or legal notice of drainage proceedings is insufficient, being a mere conclusion of the pleader, implying that there was some notice.—*Harris v. Ross*, 112 Ind. 314, 13 N. E. 873.

[b] (Sup. 1888)

In a bill to enjoin the collection of an assessment, an averment that there was no notice of the levy does not state a mere conclusion of law, but a material fact.—*Board of Com'rs of Wells County v. Gruver*, 115 Ind. 224, 17 N. E. 290; *Board of Com'rs of Wells County v. Huffman*, 115 Ind. 597, 17 N. E. 294; *Same v. Latimore*, 115 Ind. 597, 598, 17 N. E. 294; *Same v. Jamison, Id.*, 115 Ind. 598, 599, 17 N. E. 294; *Same v. Van Camp*, 115 Ind. 599, 17 N. E. 294; *Same v. Eaton, Id.*; *Same v. Popejoy*, 115 Ind. 599, 600, 17 N. E. 294; *Same v. Bolton*, 115 Ind. 600, 17 N. E. 294.

[c] (Sup. 1908)

Allegations that defendant knew certain facts are mere recitals and not allegations of fact.—*Chicago, I. & L. R. Co. v. Barker*, 169 Ind. 670, 83 N. E. 369, 17 L. R. A. (N. S.) 542.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 12-28½; 23 CENT. DIG. Fraud, § 37; 24 CENT. DIG. Fraud. Conv. § 773; 37 CENT. DIG. Neglig. § 182.

See, also, 31 Cyc. pp. 49-65.

§ 9. *Conclusions of law from facts alleged.*

Admissions by demurrer, see post, § 214.

[a] (Sup. 1873)

It is sufficient to state in a pleading facts from which the law implies an agreement without averring the agreement.—*Hamilton v. Winterrowd*, 43 Ind. 393.

[b] (Sup. 1882)

In pleading an implied contract, it is sufficient to state the facts from which the law implies the agreement, and it is not necessary to make a specific allegation of such agreement.—*Starret v. Burkhalter*, 86 Ind. 439.

[c] (Sup. 1886)

Where facts are pleaded showing an acceptance of a proposition, it is not necessary to aver an acceptance in express terms.—*McCasland v. Aetna Life Ins. Co.*, 108 Ind. 130, 9 N. E. 119.

[d] (Sup. 1888)

Where the inevitable inference from the facts alleged in a paragraph is that defendant owned certain property when it was mortgaged, the paragraph will not be held insufficient for failure to distinctly aver such ownership.—*Tennison v. Tennison*, 114 Ind. 424, 16 N. E. 818.

[e] (Sup. 1892)

Where a mortgagee who has redeemed from a foreclosure sale sued under the statute (Rev. St. § 774) to enforce his lien, it is immaterial that his complaint fails to allege title to the land in his mortgagor where the facts pleaded show such title.—*Scobey v. Kinningham*, 31 N. E. 355, 131 Ind. 552.

[f] (App. 1910)

In an action by a servant for injuries alleged to have resulted from the negligence of the master in failing to guard machinery, an allegation in the complaint "that, if the shaft had been guarded, the timber would not have been thrown," while a conclusion of the pleader, was not subject to objection where it followed a statement of the facts relating to the absence of a guard.—*Hohenstein-Harmetz Furniture Co. v. Matthews*, 92 N. E. 196.

[g] (App. 1910)

An allegation in a pleading, which in form a conclusion of law, is not objectionable,

where such conclusion is preceded by an averment of the facts on which it is based.—*Morgantown Mfg. Co. v. Hicks*, 92 N. E. 193.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 29.

See, also, 31 Cyc. pp. 49-65.

§ 10. Pleading according to legal effect.

Written instruments, see post, § 32.

[a] (Sup. 1842)

A declaration professing to give the legal effect of a general recognizance of special bail, taken on the back of the writ, must give it the meaning prescribed by statute, which is the same as that of a regular recognizance of special bail.—*White v. Guest*, 6 Blackf. 228.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 30.

See, also, 31 Cyc. p. 70.

§ 11. Matters of evidence.

Striking out matters of evidence, see post, § 364.

[a] (Sup. 1842)

In pleading, it is not necessary to state what is merely matter of evidence.—*State ex rel. Anderson v. Leonard*, 6 Blackf. 173.

[b] (Sup. 1867)

A pleading averring mere inconclusive evidence of facts, instead of the facts themselves, is bad.—*Stone v. Lewman*, 28 Ind. 97.

[c] (Sup. 1881)

A pleading must state facts, and it is not sufficient to state merely matters of evidence tending to show the facts which ought to be stated, unless the evidence is conclusive in its nature, and even then the better rule is to aver the fact, and not the evidence of it.—*Fee v. State ex rel. Pleasant*, 74 Ind. 66.

[d] (Sup. 1885)

In pleading, facts must be directly stated, and not evidence.—*Avery v. Dougherty*, 102 Ind. 443, 2 N. E. 123, 52 Am. Rep. 680.

[e] (Sup. 1888)

An averment that money was reloaned is the averment of a fact, and not of a mere conclusion, and evidence to establish this act of lending money a second time, or oftener, must not be pleaded.—*Spurgeon v. Smitha*, 114 Ind. 453, 17 N. E. 105.

[f] (App. 1891)

It is the office of a pleading to assert ultimate or issuable facts, which alone can call in to exercise the function of the court to make the application of the law, and not mere matters of evidence from which such facts may be inferred.—*Pennsylvania Co. v. Zwick*, 27 N. E. 508, 1 Ind. App. 280.

[g] (App. 1906)

A complaint should not plead the evidence.—*Lewis Tp. Improvement Co. v. Royer*, 38 Ind. App. 151, 76 N. E. 1068.

[h] (App. 1908)

It is sufficient if a complaint alleges the ultimate facts to be proved.—*Indiana Natural Gas & Oil Co. v. Wilhelm*, 86 N. E. 86.

In an action to recover rentals under a gas lease, where it was alleged that gas was found in sufficient quantities to be marketed and to be piped to a market, and that there were good markets for the gas within 10 miles, and at other places further away, to which the gas could be delivered and sold at a profit to defendant, the amount of gas produced in any well, cost of production, and cost of transportation to market were evidentiary facts to be proved in support of the ultimate facts alleged, and need not be pleaded.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 31.

See, also, 31 Cyc. p. 49.

§ 12. Matters peculiarly within knowledge of adverse party.

In action on mutual benefit certificate, see INSURANCE, § 815.

Matters not known to party pleading, see post, § 13.

[a] (Sup. 1882)

Where a party is brought into court to answer as to his interest in land, it is not necessary that the complaint specifically set forth his title.—*Andrews v. Swanton*, 81 Ind. 474.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 33.

See, also, 31 Cyc. p. 48.

§ 13. Matters not known to party pleading.

Departure, see PLEADING, § 183.

[a] (Sup. 1895)

To be within the rule that facts peculiarly within the knowledge of the party against whom they should be pleaded, and not accessible to the pleader, need not be pleaded, a pleading must show that such facts are so within the knowledge of the opposite party, and not accessible to the pleader.—*Brashear v. City of Madison*, 142 Ind. 685, 36 N. E. 252, 42 N. E. 349, 33 L. R. A. 474.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 34.

See, also, 31 Cyc. pp. 48, 49.

§ 14. Matters of record.

[a] (Sup. 1889)

An answer which alleges that an agreement to submit a controversy to arbitration was made in open court, and was to have been en-

tered of record, but that no entry thereof was made, is insufficient, since the court can only speak by its record.—*Kelly v. Adams*, 120 Ind. 340, 22 N. E. 317.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 35.

See, also, 31 Cyc. p. 47.

§ 15. Adoption of allegations in other pleadings.

Reference from one count or paragraph of declaration or complaint to another, see post, § 54.

Reference from one plea or paragraph of answer to another, see post, § 95.

[a] (Sup. 1881)

A paragraph of a reply to an answer, alleging payment and referring for facts to a paragraph of the answer in which satisfaction by way of exchange is pleaded, is bad because it makes the answer a part of the reply.—*Atchison v. Lee*, 75 Ind. 132.

[b] (App. 1895)

A pleading in a former suit, though not the foundation of the present action, may supply necessary averments therein, if set out in full in the complaint, and not merely attached thereto as an exhibit.—*Westfield Gas & Milling Co. v. Noblesville & E. Gravel-Road Co.*, 13 Ind. App. 481, 41 N. E. 955.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 37.

See, also, 31 Cyc. pp. 47, 48.

§ 16. Sufficiency of allegations in general.

[a] Each paragraph of a pleading must be perfect and complete within itself, and defective allegations in one paragraph cannot be aided by reference to another.—(Sup. 1873) *Silvers v. Junction R. Co.*, 43 Ind. 435; (1873) *Potter v. Earnest*, 45 Ind. 416; (1880) *Field v. Burton*, 71 Ind. 380.

[b] (App. 1908)

A pleading will not be defective because a fact is awkwardly stated, but the defect in order to be material must be one affecting the substantial rights of the adverse party or it will be disregarded as one of form only, as provided by *Burns' Ann. St.* 1901, § 401.—*City of Huntington v. Stuver*, 41 Ind. App. 171, 83 N. E. 518.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 32, 36, 42.

See, also, 31 Cyc. pp. 101, 102.

§ 17. Directness and positiveness, or argumentativeness.

Admissions, see post, § 127.

Aider by verdict or judgment, see post, § 433.

Argumentative denials in reply, see post, § 176.

Argumentativeness as defect reached by general demurrer, see post, § 205.

Argumentativeness as ground for demurrer, see post, §§ 192, 194, 196.

Argumentativeness as ground for striking out pleadings, see post, § 352.

Argumentativeness as objection reached by special demurrer, see post, § 208.

Necessity for reply to argumentative denial, see post, § 165.

Pleading bad for argumentativeness as to part of codefendants; see post, § 84.

Responsiveness of argumentative answer to complaint, see post, § 98.

[a] (Sup. 1841)

A declaration in debt by an insurance company, stating that defendant delivered to it his note and thereby promised to the order of the insurance office, thereby meaning and intending to make the note payable to the order of plaintiff, is insufficient for want of a direct averment that the defendant promised the plaintiff.—*Madison Ins. Co. v. Stangle*, 6 Blackf. 88.

[b] (Sup. 1845)

A plea must state facts in a direct and positive form, and not leave them to be collected by inference.—*Stonsel v. Abrams*, 7 Blackf. 516.

[c] (Sup. 1873)

A pleading should state facts, not arguments, inferences, or matters of law.—*Clark v. Lineberger*, 44 Ind. 223.

[d] (Sup. 1876)

It is not error to sustain an objection to a paragraph of a pleading, amounting only to an argumentative denial.—*Ill v. Gust*, 55 Ind. 45.

[e] (Sup. 1877)

In an action by one of two joint lessors of a coal mine, against the other, to recover an amount due under a contract whereby the plaintiff had sold to the defendant his interest in the sum to be received as rent, the answer alleged that a certain amount less than that claimed in the complaint was due the plaintiff, and offered to allow judgment to be taken therefor. *Held* not an argumentative denial.—*Morris v. Thomas*, 57 Ind. 316.

[f] (Sup. 1878)

A., a creditor of B., sued C., alleging that C. had agreed with B. to pay B.'s debts in consideration of property sold and delivered by him to C. C. answered that he had received such property, and that the agreement between himself and B. was that he was to apply the proceeds first to the payment of certain specified debts and then to the payment of the plaintiff's debt and others; that he had received the proceeds of such property at its fair value, and had applied the proceeds to the payment of such specified debts, and that nothing remained with which to pay the plaintiff's debt. *Held* that, although C.'s answer amounted to an argumentative denial, it was sufficient.—*Loeb v. Weis*, 64 Ind. 285.

[g] (Sup. 1879)

To a plea of the statute of limitations in bar of an action, a reply that the suit was com-

menced before the time limited expired is merely an argumentative denial, which may be rejected on motion where the general denial is also replied, and hence there is no available error in sustaining a demurrer thereto.—*Niblack v. Goodman*, 67 Ind. 174.

[h] (Sup. 1879)

In a suit on a note and to foreclose a mortgage by an assignee thereof, tried on an issue formed by general denial, there is no prejudicial error in sustaining a demurrer to an argumentative denial of the alleged assignment of the note and mortgage.—*McCallam v. Pleasants*, 67 Ind. 542.

[i] (Sup. 1880)

In a complaint for the return of property alleged to have been obtained from plaintiff by duress through threatening to arrest, imprison and send plaintiff to the state prison for a felony, an allegation that the defendants well knew that plaintiff was not guilty of the crime charged is not equivalent to an averment that he was not guilty, but such a detached allegation could not be cause for a demurrer when all the allegations construed together show the complaint to be sufficient.—*Reynolds v. Copeland*, 71 Ind. 422.

[j] (Sup. 1881)

In a complaint by a widow for partition of her deceased husband's land, an allegation that she owned one-third of the land argumentatively asserts that she was the first wife or a subsequent wife having children by her husband, alive at his death, and states a cause of action.—*Utterback v. Terhune*, 75 Ind. 363.

[k] Material facts essential to the existence of a cause of action must be alleged directly and positively, and not by way of recital.—(Sup. 1881) *Cummins v. City of Seymour*, 79 Ind. 491, 41 Am. Rep. 618; (1890) *Nysewander v. Lowman*, 24 N. E. 355, 124 Ind. 584; (1897) *Erwin v. Central Union Tel. Co.*, 46 N. E. 667, 47 N. E. 663, 148 Ind. 365; (App. 1904) *Cleveland, C., C. & St. L. Ry. Co. v. Lindsay*, 33 Ind. App. 404, 70 N. E. 283, 998.

[l] (Sup. 1883)

Where the plea in partition simply avers title in defendant, it is bad as argumentative.—*Black v. Richards*, 95 Ind. 184.

[m] (Sup. 1884)

Where a complaint charged that defendants raised the height of their dam so as to back water upon plaintiffs' mill wheels, an answer from which it might be inferred that the dam had been constructed several years before, and that it had been continued at such height until the commencement of suit, was an argumentative denial of the allegation as to raising the dam.—*Williamson v. Yingling*, 93 Ind. 42.

[n] (Sup. 1889)

All averments in a pleading must be direct and certain and not in the alternative or in

ambiguous language.—*Wheeler v. Thayer*, 22 N. E. 972, 121 Ind. 64.

[o] (Sup. 1890)

In an action against a county for building a bridge, an answer, alleging that it was constructed under a special contract with a certain city, whereby the city was to pay plaintiff \$50, and the county donate to him \$50, is argumentative and demurrable.—*Board of Com'rs of Clinton County v. Hill*, 122 Ind. 215, 23 N. E. 779.

[p] (App. 1897)

In an action to foreclose a mechanic's lien for material furnished in the erection of a tank, an answer alleging that defendant purchased no materials, but bought a tank, which was "knocked down," and shipped as lumber to him, and that plaintiff was not entitled to a lien, is an argumentative denial.—*Parker Land & Improvement Co. v. Reddick*, 47 N. E. 848, 18 Ind. App. 616.

[q] (App. 1900)

A complaint should contain a succinct and definite statement of the facts relied on to constitute a cause of action, and they should be stated by direct averment, and not by way of recital, so that defendant may be apprised of the facts on which plaintiff relies.—*Sutton v. Todd*, 55 N. E. 980, 24 Ind. App. 519.

[r] (App. 1900)

Where plaintiff seeks to recover wages as patrolman, an answer alleging that plaintiff was never appointed an officer of defendant city, and that defendant never agreed to pay him for any services, and so notified him, amounts to an argumentative denial.—*City of Huntington v. Boyd*, 57 N. E. 939, 25 Ind. App. 250.

[s] (App. 1901)

A complaint, in an action for rent, alleged, in the first paragraph, an amount due on an implied promise, and in the second paragraph charged the liability under a written lease described, and alleged that defendant was in arrears thereunder for the sum sued for. In his answer, which was addressed to both paragraphs of the complaint, defendant alleged that, as a part of the contract of letting, defendant was entitled to use a wall of the building for a business sign after the expiration of an existing lease of the wall, but charged that after the expiration of such lease plaintiff refused to surrender possession thereof to defendant, contrary to the terms of the lease, and that defendant vacated the premises and abandoned the lease before any part of the rent claimed in either paragraph of the complaint fell due. *Held*, that the answer was an argumentative denial of the complaint, and not a plea in confession and avoidance, and hence was not objectionable on the ground that it did not overcome, by affirmative allegations, the prima facie case which it confessed and sought to avoid.—*Flanagan v. Reitemier*, 59 N. E. 389, 26 Ind. App. 243.

[t] (Sup. 1902)

While a court in dealing with evidence may be justified in drawing inferences from certain items of evidence, still it is not warranted in resorting to inferences or deductions where the question involved pertains to the sufficiency of pleading, for the rule recognized at common law and by the Code affirms that material facts necessary to constitute a cause of action must be directly averred, and cannot be left to depend upon or to be shown by mere recitals or inferences.—*McElwaine-Richards Co. v. Wall*, 65 N. E. 753, 159 Ind. 557.

[u] (Sup. 1906)

At common law, and under Burns' Ann. St. 1901, §§ 341, 342, requiring the complaint to state the facts constituting the cause of action, and declaring a want of statement of sufficient facts ground for demurrer, facts must be positively and expressly averred.—*Malott v. Sample*, 74 N. E. 245, 164 Ind. 645.

[v] (Sup. 1905)

An allegation in a pleading, which involved a bald assumption of the existence of a fact which was not averred, was insufficient.—*Lake Erie & W. R. Co. v. McFall*, 165 Ind. 574, 76 N. E. 400.

[w] (App. 1905)

Material facts in a pleading should be shown by direct and issuable averments, and not merely left to inference, nor pleaded by way of recital.—*Corbin Oil Co. v. Searles*, 75 N. E. 293, 36 Ind. App. 215.

[x] (Sup. 1908)

As against a demurrer for want of facts, facts pleaded by way of recital merely are of no avail to plaintiff.—*Chicago & E. R. Co. v. Lain*, 170 Ind. 84, 83 N. E. 632.

[xx] (Sup. 1908)

Facts material and necessary to constitute the cause of action declared on must be directly averred, and no essential element should be shown by way of recital or be left to inference.—*Cleveland, C. & St. L. Ry. Co. v. Perkins*, 171 Ind. 307, 86 N. E. 405.

[y] (App. 1908)

In pleading, facts must be directly and positively alleged.—*McEwen v. Hoffman*, 42 Ind. App. 202, 85 N. E. 364.

[yy] (Sup. 1909)

A complaint grounded on fraud must aver the facts constituting such fraud directly and positively, and not inferentially or by way of recital.—*Gardner v. City of Bluffton*, 89 N. E. 853.

[z] (App. 1909)

The term "without," as used in an averment that building material was suffered to remain in a street after night "without" being guarded, is a direct averment that no guards or lights were placed around the obstruction, and the pleading did not merely recite such facts; the word "without" being synonymous

with "not being."—*City of Laporte v. Osborn*, 43 Ind. App. 100, 86 N. E. 995.

Where it was averred that while plaintiff was driving along the street, without knowledge of an obstruction, and without being able to see it, the horses ran against the same, the facts are directly averred, and the matters following the word "without" are not mere recitals.—Id.

[zz] (Sup. 1910)

Facts in a pleading must be positively averred and not set up by way of recital, inference, or conclusion.—*Wabash R. Co. v. Bee-dle*, 90 N. E. 760.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 38, 41, 350;

38 CENT. DIG. Partition, § 160.

See, also, 31 Cyc. pp. 71, 72

§ 18. Certainty, definiteness, and particularity.

Aider by verdict or judgment, see post, § 433.

As defects reached by general demurrer, see post, § 205.

As ground for demurrer, see post, §§ 192, 193.

As ground for motion to make more definite and certain, see post, § 367.

Effect of filing copy of account to cure uncertainties, see post, § 330.

Effect of uncertainty on sufficiency of cause of action, see post, § 48.

In affidavit of verification, see post, § 301.

In demurrer, see post, § 201.

In motion for judgment on the pleadings, see post, § 350.

In plea in abatement, see post, § 106.

In set-off or counterclaim, see post, § 144.

Motions to make more definite and certain, see post, § 367.

Waiver of defects, see post, § 406.

[a] (Sup. 1818)

In an action of covenant founded on a lease, the defendant could not require a more particular description of the land in the declaration than he had furnished the plaintiff in the lease.—*Dougherty v. Wilson*, 1 Blackf. 478.

[b] A general allegation is ordinarily allowed in a pleading where the matters to be pleaded tend to indefiniteness and multiplicity.—(Sup. 1850) *State v. McCormack*, 2 Ind. 305; (1854) *Shilling v. State*, 5 Ind. 443; (1893) *Equitable Accident Insurance Co. v. Stout*, 33 N. E. 623, 135 Ind. 444.

[c] (Sup. 1861)

An averment may be made sufficiently certain by making diagrams a part thereof.—*Booker v. Ray*, 17 Ind. 522.

[d] (Sup. 1872)

The statement in a pleading of the amount of a debt, as "a large sum of money" is too indefinite.—*Brookbank v. Kennard*, 41 Ind. 330.

[e] A pleading must proceed upon some single definite theory, and it must be good upon the theory on which it proceeds.—(Sup. 1884) *Western Union Tel. Co. v. Young*, 93 Ind. 118; (1884) *State ex rel. Padgett v. Foulkes*, 94 Ind. 493; (1885) *Leeds v. City of Richmond*, 1 N. E. 711, 102 Ind. 372; (1888) *Armcast v. Lindley*, 19 N. E. 138, 116 Ind. 295; (1889) *Hays v. Montgomery*, 20 N. E. 646, 118 Ind. 91; (1889) *Baker v. Ludlam*, 20 N. E. 648, 118 Ind. 87; (1890) *Bingham v. Stage*, 23 N. E. 756, 123 Ind. 281; (1890) *Trentman v. Neff*, 24 N. E. 895, 124 Ind. 503; (1890) *May v. Reed*, 25 N. E. 216, 125 Ind. 199; (1890) *Pearson v. Pearson*, 25 N. E. 342, 125 Ind. 341; (App. 1891) *Hasselman v. Japanese Developing Co.*, 27 N. E. 318, 28 N. E. 207, 2 Ind. App. 180; (Sup. 1892) *Racer v. State*, 31 N. E. 81, 131 Ind. 393; (1892) *Buckles v. State*, 31 N. E. 86, 131 Ind. 600; (App. 1892) *Thompson v. State ex rel. East*, 28 N. E. 996, 3 Ind. App. 371; (Sup. 1893) *Citizens' St. R. Co. of Indianapolis v. Willoby*, 33 N. E. 627, 134 Ind. 563; (1893) *Jackson v. Landers*, 34 N. E. 323, 134 Ind. 529; (1893) *Copeland v. Summers*, 35 N. E. 514, 37 N. E. 971, 138 Ind. 219; (1894) *Balue v. Taylor*, 36 N. E. 269, 136 Ind. 368; (App. 1894) *Smith v. Roseboom*, 37 N. E. 559, 10 Ind. App. 126; (1894) *Phenix Ins. Co. v. Rogers*, 38 N. E. 865, 11 Ind. App. 72; (Sup. 1895) *Terre Haute & I. R. Co. v. McCorkle*, 40 N. E. 62, 140 Ind. 613; (App. 1896) *Indianapolis Union Ry. Co. v. Neubacher*, 43 N. E. 576, 44 N. E. 669, 16 Ind. App. 21; (1897) *Indianapolis Natural Gas Co. v. Spaugh*, 46 N. E. 691, 17 Ind. App. 683; (1897) *Indianapolis Gas Co. v. Rayl*, 46 N. E. 1154, 17 Ind. App. 701; (1897) *Cleveland, C. & St. L. Ry. Co. v. Dugan*, 48 N. E. 238, 18 Ind. App. 435; (1899) *F. C. Austin Mfg. Co. v. Clendenning*, 52 N. E. 708, 21 Ind. App. 459.

[f] (App. 1903)

A description in a pleading of real estate in a county in Indiana as "the north half of lots 43, 44, 45, in R.'s addition to the plat of the town of H., being in the southwest $\frac{1}{4}$ of the southwest $\frac{1}{4}$ of sec. 28, township 32 north of range 14 east," is not too indefinite.—*Kelley v. Houts*, 66 N. E. 408, 30 Ind. App. 474.

[g] (Sup. 1905)

In pleading facts must be directly and positively alleged.—*Laporte Carriage Co. v. Sulender*, 165 Ind. 290, 75 N. E. 277.

[h] (Sup. 1905)

In pleading a cause of action, facts must be directly and positively alleged, and not left to mere inference.—*Pittsburgh, C. & St. L. R. Co. v. Peck*, 165 Ind. 537, 76 N. E. 163.

[i] (App. 1905)

While a pleading is to be construed most strongly against the pleader, when its language is uncertain, rendering its theory obscure, yet if, on giving the language a fair construction the complaint states facts sufficient to consti-

tute a cause of action, it will not be demurrable, because so constructed as to render it difficult to determine the theory intended.—*State ex rel. Millice v. Petersen*, 75 N. E. 602, 36 Ind. App. 269.

[j] (App. 1908)

If the facts averred in a complaint show that an accident occurred in the nighttime, it is a sufficient averment of darkness.—*City of Laporte v. Osborn*, 43 Ind. App. 100, 86 N. E. 995.

[k] (Sup. 1910)

In civil actions, in view of the fact that plaintiff must recover upon the case he makes in his complaint, if at all, he must set forth the facts and grounds relied upon with such particularity and certainty as to enable a person of common understanding to know what was intended, as expressly provided by *Burns' Ann. St. 1908*, § 343, subd. 2.—*Terre Haute Electric Co. v. Roberts*, 91 N. E. 941.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 39.

See, also, 31 Cyc. pp. 72-75; 20 Cyc. p. 97.

§ 19. Ambiguity.

Aider by verdict or judgment, see post, §§ 432, 433.

Effect on construction, see post, § 34.

Motions to make more definite and certain, see post, § 367.

Waiver of defects, see post, § 406.

[a] (App. 1892)

In an action by a physician to recover for medical services, a complaint as follows: "Plaintiff complains of the defendant, and says that said defendant is indebted to him for medical treatment to himself and servants,"—is not demurrable, as charging that the services were rendered by the plaintiff for the plaintiff.—*Devenbaugh v. Nifer*, 3 Ind. App. 379, 29 N. E. 923.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 40.

See, also, 31 Cyc. p. 73.

§ 20. Disjunctive and alternative allegations.

Grounds for demurrer, see post, § 192.

In petition for county aid to railroad, see *RAILROADS*, § 154.

[a] (Sup. 1881)

In a suit for conversion brought by an administrator, the alternative averment that the property was received "by the decedent, or by the defendants to his use," held good.—*Gerard v. Jones*, 78 Ind. 378.

[b] (Sup. 1905)

A complaint in an action under the employers' liability act (*Laws 1893*, p. 294, c. 130, § 1, *Burns' Ann. St. 1901*, § 7083, subd. 4) alleging that when cars were drawn past a switch it then became the duty of the engineer

not to move the cars until the signal to do so by the switchman or the one in charge, and that the engineer without receiving any signal, and in disregard of his duty, backed the cars causing the injury, is objectionable as containing allegations in the alternative.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Peck*, 76 N. E. 163, 165 Ind. 537.

[c] (App. 1908)

A party must state his cause of action by direct averments, and not by averments in the alternative.—*Indianapolis & N. W. Traction Co. v. Henderson*, 39 Ind. App. 324, 79 N. E. 539.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 43.

See, also, 31 Cyc. pp. 74, 75.

§ 21. Consistency or repugnancy.

Admissions of fact contradictorily pleaded, by demurrer, see post, § 214.

As ground for motion to make more definite and certain, see post, § 367.

Between admissions in answer and other allegations, see post, § 127.

Construction against pleading, see post, § 34.

Demurrer with answer, see post, § 188.

Departure in reply or replication from cause of action stated in complaint or declaration, see post, § 180.

General and specific allegations, see post, § 34.

Inconsistency between separate counts on same cause of action, see post, § 53.

Inconsistency or redundancy as defects reached by general demurrer, see post, § 205.

Inconsistency or repugnancy as ground for demurrer, see post, § 193.

Inconsistent defenses, see post, § 93.

Inconsistent theories of complaint, see post, § 49.

[a] (Sup. 1840)

A plea which contains repugnant allegations respecting material matter is bad on general demurrer. The contradictory averments destroy each other.—*Barber v. Summers*, 5 Blackf. 339.

[b] (Sup. 1884)

The complaint in a quo warranto proceeding against a corporation alleged in the same paragraph that stock to the amount of \$50,000 was never subscribed, and that stock to that amount was subscribed, but that \$47,000 thereof was subscribed by an insolvent person. *Held*, that one allegation in the paragraph nullified the other, and the court could not act on either.—*State ex rel. Padgett v. Foulkes*, 94 Ind. 493.

The complaint in a quo warranto proceeding against a corporation alleged in the same paragraph that the articles of incorporation were filed, and that they were never filed. *Held*, that such a contradiction occurred between the allegations as to the filing of the articles as required the court to disregard both the allegations.—*Id.*

[c] (App. 1893)

In an action by a bank on a note the answer of the maker stated that the note was given in part payment of a machine purchased of A.; that the machine was sold on a written warranty of which there had been a breach; that the bank did not become the owner or holder of such note till after maturity, "or, if it did become such owner, it was only for the purpose of collecting the same for A., or with the agreement and understanding with A. that A. would keep the bank whole and harmless." *Held*, that such answer was demurrable for repugnancy, as one material statement, following the other, but coupled by the disjunctive "or," rendered the whole nugatory and meaningless.—*Second Nat. Bank of Springfield v. Hart*, 8 Ind. App. 19, 35 N. E. 302.

[d] (App. 1896)

A pleading will not be held bad for uncertainty and repugnancy ordinarily, unless the inconsistency is such as to destroy its entire meaning.—*Lemmon v. Reed*, 43 N. E. 454, 14 Ind. App. 655.

[e] (Sup. 1904)

Where, in an action on a policy, the general theory of one of the paragraphs of the answer was that the policy was a Pennsylvania contract, and subject to a particular law, attempted to be alleged, under which plaintiff had no present right in the policy, a further allegation of such paragraph that there was an oral agreement at the time the policy was delivered to insured that it should be surrendered if the note given for the first premium was not paid, should be rejected as in conflict with the balance of such paragraph.—*Penn Mut. Life Ins. Co. v. Norcross*, 72 N. E. 132, 163 Ind. 379.

[f] (Sup. 1908)

A party may set up contradictory facts in different paragraphs of either complaint or answer, but it is improper to allege conflicting facts in the same paragraph.—*Chicago, I. & L. Ry. Co. v. Barker*, 83 N. E. 369, 169 Ind. 670, transferred from Appellate Court (1907) 40 Ind. App. 236, 81 N. E. 1179.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 44.

See, also, 31 Cyc. pp. 75, 76.

§ 22. Irrelevancy and redundancy.

Grounds for demurrer, see post, §§ 192, 196.

Necessity for proof of unnecessary allegations, see post, § 375.

Relevancy of allegations as affecting scope of admissions by demurrer, see post, § 214.

Striking out, see post, §§ 354, 364.

[a] (Sup. 1864)

The test of what is material in the complaint will be furnished by the response to the question, what, under the general denial, must the plaintiff prove to secure a verdict in his favor. More than this is redundant.—*Judah v. Trustees of Vincennes University*, 23 Ind. 272.

[b] (Sup. 1873)

A pleading is irrelevant which has no substantial relation to a controversy between parties.—*Clark v. Jeffersonville, M. & I. R. Co.*, 44 Ind. 248.

[c] (App. 1905)

Each paragraph of a complaint must proceed on a definite theory, but if, from all the facts averred in such paragraph, the theory is deducible, and on such theory the paragraph is sufficient, it will not be rendered bad because of redundant or detached allegations tending towards, yet insufficient to state, another cause of action.—*Borror v. Carrier*, 73 N. E. 123, 34 Ind. App. 353.

[d] (App. 1909)

A pleading is irrelevant only where it has no substantial relation to the controversy between the parties to the action, and not where it states facts that tend to and might by proper averment constitute a cause of action or defense.—*Ellison v. Branstrator*, 88 N. E. 963.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 45.

See, also, 31 Cyc. pp. 76, 77.

§ 23. Impertinence and scandal.

In pleading in equity, see EQUITY, § 191.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 46.

See, also, 14 Cyc. p. 679; 31 Cyc. p. 68.

§ 24. Falsity.

[a] (Sup. 1899)

An allegation of a fact or condition, which the court must know is impossible, cannot be regarded.—*Grand Trunk & W. Ry. Co. v. City of South Bend*, 89 N. E. 885.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 47.

See, also, 31 Cyc. p. 68.

§ 25. Language and form of allegations.

Allegations of representative capacity, see EXECUTORS AND ADMINISTRATORS, § 445.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 48–52.

See, also, 31 Cyc. pp. 70, 77, 78.

§ 29. — Abbreviations, numerals, and symbols.

[a] (App. 1891)

In a complaint alleging the commission of a tort in the year "88," the figures will be read as "1888."—*Medsker v. Pogue*, 1 Ind. App. 197, 27 N. E. 432.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 50.

See, also, 31 Cyc. p. 77.

§ 30. — Mistakes in writing, grammar, or spelling.

Ground for demurrer, see post, § 192.

[a] (Sup. 1879)

An administrator filed a complaint to set aside a conveyance as fraudulent as against his intestate, alleging that the same was made with intent to defraud the plaintiff, instead of plaintiff's intestate. *Held* that, the intent of the pleader being plain, a liberal construction would uphold the complaint.—*Evans v. Nealis*, 69 Ind. 148.

[b] (Sup. 1882)

Where it is apparent in a pleading that a personal pronoun is intended to refer to the plaintiff, though grammatically it refers to the defendant, the pleading will be read as intended.—*Moore v. Beem*, 83 Ind. 219.

[c] (Sup. 1887)

Under section 376, Rev. St. 1881, enjoining liberality in construing pleadings, merely clerical mistakes, such as the use of one word for another, where there is no doubt as to what was intended, will not vitiate a pleading.—*Indiana, B. & W. Ry. Co. v. Dailey*, 110 Ind. 75, 10 N. E. 631.

[d] (Sup. 1895)

In an action for the possession of land, a demurrer to the complaint on the ground that it does not allege that defendants unlawfully keep "plaintiff" out of possession, as required by the statute, is properly overruled, where, by a clerical error, the word "property" was used, instead of the word "plaintiff."—*Ross v. Banta*, 140 Ind. 120, 34 N. E. 865, 39 N. E. 732.

[e] (Sup. 1896)

Under Rev. St. 1894, § 670 (Rev. St. 1881, § 658), providing that mistakes in a pleading which might be amended by the trial court will be deemed to be amended in the supreme court, where a complaint states that a lot is west of a street, instead of east thereof, and it is apparent that the word "west" was used by mistake, the supreme court will deem the complaint amended by the insertion of "east" for "west."—*Praigg v. Western Paving & Supply Co.*, 143 Ind. 358, 42 N. E. 750.

[f] (App. 1899)

In an action by a contractor to foreclose an assessment lien, error in a reply, in alleging that plaintiff did not make the contract for the improvement, is corrected by allegations that he began the improvement on a certain day according to his said contract.—*Willard v. Albertson*, 53 N. E. 1076, 54 N. E. 446, 23 Ind. App. 162.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 51.

See, also, 31 Cyc. p. 77.

§ 32. Pleading written instruments.

Aider by verdict or judgment, see post, § 434.

Effect of omission to allege whether contract is in writing, see post, § 37.

In partition proceedings, see PARTITION, §§ 55, 56.

Profert, oyer and exhibits, see post, §§ 305–312. References between separate counts, see post, § 54.

Setting out in counterclaim contract already set out in complaint, see post, § 146.

[a] (Sup. 1842)

In declaring upon a special contract, it must be set out in terms, or according to legal effect.—*White v. Guest*, 6 Blackf. 228.

[b] (Sup. 1856)

Under the statutes, denial in an answer of the delivery of an instrument, which is an essential foundation of the cause of action, is, in effect, denial of its execution.—*Ketcham v. New Albany & S. R. Co.*, 7 Ind. 391.

[c] (Sup. 1859)

A pleading founded on a written instrument, the original or a copy of which is required by 2 Rev. St. p. 44, § 78, to be filed therewith, must aver the filing.—*Price v. Grand Rapids & I. R. Co.*, 13 Ind. 58; *Kiser v. State*, Id. 80; *Hillis v. Wilson*, Id. 146.

[d] (Sup. 1860)

In an action on a covenant, the statute requires a copy of the deed to be set out.—*Woodford v. Leavenworth*, 14 Ind. 311.

[e] (Sup. 1860)

A complaint treating a contract as rescinded, and seeking to recover back the money paid on it, need not set out a copy of the contract.—*Bales v. Weddle*, 14 Ind. 349.

Where a party to a contract treats it as unrescinded, and sues for a breach of it, he must set out the instrument, or a copy, as the foundation of his action.—Id.

[f] (Sup. 1861)

A complaint on a note is not sufficient, unless it contain some averments by which the identity of a paper or copy filed, with that sued on, is made apparent on record.—*Bennett v. Wainwright*, 16 Ind. 211.

[g] (Sup. 1861)

A pleading averring a covenant to be contained in a deed, but in no manner making such covenant a part of the pleading, is bad.—*Miller v. Rigney*, 16 Ind. 327.

[h] (Sup. 1864)

That a court may know that a written instrument is filed with the pleading, as constituting the foundation of the particular action, it must be identified by reference to it, and making it an exhibit in that pleading.—*Peoria Marine & Fire Ins. Co. v. Walser*, 22 Ind. 73.

[i] (Sup. 1869)

Where a defense is founded upon a written agreement, the instrument should be set out.—*Compton v. Davidson*, 31 Ind. 62.

[j] (Sup. 1871)

Where, in a pleading, a written contract is relied upon, the instrument must be fully set out, that the court may know what its terms are; and if the contract provide that under cer-

tain conditions there may be a partial rescission of the contract, all that such conditions required on the part of the pleader demanding rescission must be alleged to have been performed, or an excuse must be given for the omission.—*Plowman v. Shidler*, 36 Ind. 484.

[k] (Sup. 1872)

A complaint asking that a mortgage be satisfied of record and to quiet title to real estate need not set out a copy of the mortgage and notes secured thereby, or of a decree of partition mentioned therein.—*Heitman v. Schnek*, 40 Ind. 93.

[l] (Sup. 1874)

The original instrument, or a copy, must be filed, and must be identified by reference, and by making it an exhibit. Filing a copy without reference is not sufficient. An averment in such complaint as follows, "A copy of which note is now due, and remains wholly unpaid," is too vague.—*Stafford v. Davidson*, 47 Ind. 319.

[m, n] (Sup. 1879)

Where a copy of a note similar to the one described in the complaint was filed therewith, and was referred to therein as "a copy of which is filed herewith, and made a part of this complaint," the copy was sufficiently identified.—*Reed v. Broadbelt*, 68 Ind. 91.

[o] (Sup. 1880)

A complaint which purports to count on a covenant is bad, if it does not set it out or furnish a copy thereof.—*Petty v. Trustees of Church of Christ in City of Muncie*, 70 Ind. 290.

A complaint to recover subscription to the stock of a corporation, failing to set out a copy of the subscription contract, is insufficient.—Id.

[p] (Sup. 1880)

In an action to foreclose a purchase price mortgage, an answer alleging a breach of the covenants of warranty in the deed that sets out neither the deed nor a copy thereof is insufficient on demurrer.—*Douglass v. Keehn*, 71 Ind. 97.

[q] (Sup. 1881)

A writing may be declared upon according to its legal effect, and, when so declared upon, there is no variance on that account.—*Dodd v. Mitchell*, 77 Ind. 388.

[r] (Sup. 1881)

Where copies of the papers in suit are in the complaint, there need be no allegation that they are filed.—*Jones v. Parks*, 78 Ind. 537.

[rr] (Sup. 1882)

A paragraph of a complaint counting on an agreement alleged to have been contained in a chattel mortgage is insufficient, where such mortgage is not made a part of the paragraph.—*Whiteman v. Harriman*, 85 Ind. 49.

[s] (Sup. 1882)

Where, in pleadings, covenants in mortgages and in leases are relied on, the instruments must be set out or copies filed; otherwise

the pleadings are defective.—*Ashley v. Foreman*, 85 Ind. 53.

[ss] (Sup. 1882)

In an action on a contract only partly in writing, it is sufficient to plead the legal effect of the agreement, without setting out the writing in the complaint.—*Board of Com'rs of Madison County v. Miller*, 87 Ind. 257.

[t] (Sup. 1885)

In an action on a contract required to be in writing, if there is no averment that there was a note or memorandum in writing, it will be presumed that no writing was signed.—*Hudnut v. Weir*, 100 Ind. 501.

[tt] (Sup. 1886)

A written instrument described in a complaint, and following it in the transcript, is sufficiently identified as "filed" where the complaint also avers that it "is filed herewith, and made a part of this complaint."—*Northwestern Mut. Life Ins. Co. v. Hazelett*, 105 Ind. 212, 4 N. E. 582, 55 Am. Rep. 192.

[u] (Sup. 1886)

In declaring upon a writing containing abbreviated and incomplete terms, extrinsic averments may be used to explain what would otherwise be unintelligible.—*Jaqua v. Witham & Anderson Co.*, 106 Ind. 545, 7 N. E. 314.

[uu] (Sup. 1886)

A complaint upon a bond which contains a particular description of such bond, followed by the averment, "A copy of which is filed herewith," sufficiently identifies such copy, where it appears following the complaint in the record.—*Blackburn v. Crowder*, 108 Ind. 238, 9 N. E. 108.

[v] (Sup. 1888)

In an action by a mortgagee for the conversion of the property, the complaint need not aver that the mortgage was properly acknowledged before it was recorded, as an allegation that the mortgage was recorded in the proper recorder's office implies that it had been duly prepared for record.—*Syfers v. Bradley*, 115 Ind. 345, 16 N. E. 805, 17 N. E. 619.

[vv] (Sup. 1889)

A complaint, based on a written instrument, which alleges the execution of the instrument, and that a copy thereof is filed as an exhibit, is sufficient, and it is not necessary to set out the instrument in full in the complaint.—*Ledbetter v. Davis*, 121 Ind. 119, 22 N. E. 744.

[w] (App. 1891)

Where an answer pleads a breach of warranty, in an action for the purchase money of real estate, but fails to set out or file therewith the deed or a copy thereof in which the alleged warranty is contained, a demurrer to such answer is properly sustained.—*Offutt v. Rucker*, 2 Ind. App. 350, 27 N. E. 589.

[ww] (App. 1892)

Where an exhibit, which has been copied into the record next after the bill of particulars,

is designated by a certain mark of identity, and referred to in each paragraph of the pleading for which it serves as an exhibit, this is sufficient, without repeating it after each paragraph.—*Glass v. Murphy*, 4 Ind. App. 530, 30 N. E. 1097, 31 N. E. 545.

An exhibit in a pleading need not be marked by a letter or character, and referred to by such letter or character, it being sufficient to state in the pleading that the exhibit (naming it) "is herewith filed."—*Id.*

[x] (Sup. 1893)

An action on a contract which has never been reduced to writing is not within the rule requiring a copy of the contract sued on to be made part of the complaint.—*St. Joseph Hydraulic Co. v. Wilson*, 133 Ind. 465, 33 N. E. 113.

[xx] (App. 1893)

Where the complaint in an action on a note, after describing the note, alleges that "a copy is herewith filed," and immediately following is a copy of the note, marked "Exhibit," the reference to the copy of the note is sufficient.—*Gish v. Gish*, 7 Ind. App. 104, 34 N. E. 305.

[y] (Sup. 1894)

A complaint is not demurrable for failure to set out exhibits therein referred to, they not being the basis of the action.—*Ferguson v. Hull*, 136 Ind. 339, 36 N. E. 254.

[yy] (App. 1894)

The existence merely of a written contract being the fact relied on, no copy of it need be set out in the pleading nor made an exhibit thereto.—*Woodruff v. Board of Com'rs of Noble County*, 10 Ind. App. 179, 37 N. E. 732.

[z] (App. 1899)

In an action on an administrator's bond for failure to account, in which the declaration alleged a contract between the administrator and the deceased, whereby the former, an attorney, was to prosecute an action for injuries for the latter and receive one half the recovery, and it was claimed that defendant failed to account for the other half, it was unnecessary, in order to admit the written contract, that it should be stated in the complaint whether it was in writing or not, since the declaration was founded on the bond, and not on the contract.—*Harrod v. State ex rel. Meloy*, 55 N. E. 242, 24 Ind. App. 159.

[zz] (App. 1904)

Where a written instrument sued on is copied in the complaint, it is not necessary that the complaint should set out the substance of such instrument in addition.—*Miller v. Wayne International Building & Loan Ass'n*, 70 N. E. 180, 32 Ind. App. 480.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 53-57.

See, also, 31 Cyc. pp. 65-67

§ 33. Allegations of particular facts and circumstances.

Construction of allegation as to ownership of real property, see post, § 34.

[a] (Sup. 1857)

The authority of the circuit court to proceed in the trial of a cause need not appear affirmatively in the complaint.—*Brownfield v. Weicht*, 9 Ind. 394.

[b] (Sup. 1873)

An allegation that a contract was canceled implies that it was canceled with the knowledge and consent of the parties.—*King v. Enterprise Ins. Co.*, 45 Ind. 43.

[c] (Sup. 1881)

A complaint alleging a mutual mistake in the figures of an instrument is sufficient where it specifically states the figures agreed and intended to be inserted, and that, by mistake, other designated figures were inserted.—*Trammel v. Chipman*, 74 Ind. 474.

[d] (Sup. 1890)

Where the court in which an action is brought is one of general jurisdiction, it is unnecessary to allege jurisdictional facts.—*Shewalter v. Bergman*, 123 Ind. 155, 23 N. E. 686.

[e] (Sup. 1894)

Under Rev. St. 1894, § 3346 (Rev. St. 1881, § 2027), providing that a conveyance of land by which the grantor conveys and warrants land to the grantee for a sum stated shall be deemed a conveyance in fee simple, an allegation in an answer that land was conveyed to defendant by a deed of general warranty, and for a valuable consideration, sufficiently alleges that the fee was conveyed, though it is not alleged that the consideration expressed was the full value of the fee, and the contention is that the grantor had a life estate, and could convey the fee only under a power of sale contained in a will.—*McMillan v. William Deering & Co.*, 139 Ind. 70, 38 N. E. 398.

[f] (App. 1894)

A complaint in an action for a wrongful appropriation of plaintiff's land for a railroad track is not bad for insufficiency of the allegation as to ownership, though such allegation is in the present tense, if it states that plaintiff claimed title, and, the day before the alleged entry, notified defendant thereof, and that she would claim damages.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Harper*, 11 Ind. App. 481, 37 N. E. 41.

A complaint in an action for the wrongful appropriation of land for a railroad track, alleging that plaintiff was the owner and in possession of the property described on May 26, 1892, and that the wrong complained of occurred on May 28, 1892, sufficiently alleges ownership, as it will not be presumed that there was a change of ownership between the days named.—*Id.*

[g] (Sup. 1897)

In a bill by an abutting landowner to enjoin a telephone company from laying conduits under the sidewalk, an omission to allege plaintiff's present ownership of the fee in the walk is not supplied by a mere recital that defendant is about to deprive plaintiff of the legal right to employ the sidewalk for vaults and storerooms.—*Erwin v. Central Union Tel. Co.*, 46 N. E. 667, 47 N. E. 663, 148 Ind. 365.

A right dependent upon present ownership of a fee is not pleaded by alleging an ownership at a time past.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 58-65.

See, also, 31 Cyc. pp. 94, 95, 104-106.

§ 34. Construction in general.

Allegations relating to payment of debt, see PAYMENT, § 62.

Bill in equity, see EQUITY, § 153.

Character of pleading as answer or counterclaim, see post, § 142.

Character of pleading as general or special demurrer, see post, § 205.

Character of pleading, reply or demurrer, see post, § 201.

General denial and special pleas, see post, § 93.

In action to enforce street assessment, see MUNICIPAL CORPORATIONS, § 567.

In divorce suit, see DIVORCE, § 90.

Plea in abatement, see post, § 106.

Presumptions as to sufficiency of pleading in abatement, see post, § 107.

Theory of complaint, see post, § 49.

[a] Ambiguities in pleading must be construed most strongly against the pleader.—(Sup. 1843) *Burrows v. Yount*, 6 Blackf. 458, 39 Am. Dec. 439; (1850) *Tercy v. Strain*, 2 Ind. 113.

[aa] (Sup. 1858)

Where there is a good complaint, the name given it is immaterial.—*Patterson v. State*, 10 Ind. 296.

[b] (Sup. 1858)

The word "said" refers to the next antecedent only when the plain meaning requires it.—*Wilkinson v. State*, 10 Ind. 372; *State v. Fisher*, 15 Ind. 374.

[bb] (Sup. 1867)

Pleadings, under the Code, are not necessarily to be construed most strongly against the pleader. Where substantial justice will be promoted, a liberal construction is required.—*Dickensheets v. Kaufman*, 28 Ind. 251.

[c] Pleadings are to be construed most strongly against the pleader.—(Sup. 1868) *Rogers v. Place*, 29 Ind. 577; (1881) *Medcalf v. Brown*, 77 Ind. 476; (App. 1891) *Hasselman v. Japanese Developing Co.*, 27 N. E. 318, 28 N. E. 207, 2 Ind. App. 180; (1896) *Morris v. Ellis*, 46 N. E. 41, 16 Ind. App. 679; (1898) *Heintz v. Mueller*, 49 N. E. 293, 19 Ind. App. 240; (1905) *Shenk v. Stahl*, 74 N. E. 538, 35 Ind. App. 493;

(1906) *Cool v. McDill*, 38 Ind. App. 621, 78 N. E. 679.

[cc] (Sup. 1872)

An allegation that a person owns real estate implies that he owns the buildings erected thereon.—*Cromie v. Hoover*, 40 Ind. 49.

[d] (Sup. 1878)

There is no rule of construction which requires that a pronoun shall relate for its antecedent to the last noun preceding it. So *held*, in construing the sentence, "The plaintiffs complain of the defendants and say 'they' are the owners," etc.—*Steeple v. Downing*, 60 Ind. 478.

[dd] The character and sufficiency of a pleading is to be determined, not by what it is denominated by the pleader, but by the facts which it sets up.—(Sup. 1879) *Sidener v. Davis*, 69 Ind. 336; (1881) *Searle v. Whipperman*, 79 Ind. 424; (1881) *Crowder v. Reed*, 80 Ind. 1; (1885) *Mills v. Rosenbaum*, 2 N. E. 313, 103 Ind. 152; (1887) *Johnson v. Hosford*, 10 N. E. 407, 12 N. E. 522, 110 Ind. 572; (1889) *Wright v. Anderson*, 20 N. E. 247, 117 Ind. 349; (1893) *McClanahan v. Williams*, 35 N. E. 897, 136 Ind. 30; (1896) *Board of School Com'rs of City of Indianapolis v. Center Trp.*, 42 N. E. 806, 143 Ind. 391; (1897) *Dreyer v. Hart*, 47 N. E. 174, 147 Ind. 604.

[e] (Sup. 1890)

Where there is a general claim of title, followed by a specific statement of the nature of the claim, the specific facts alleged must be sufficient to show title.—*Reynolds v. Copeland*, 71 Ind. 422.

[ee] A general allegation in a pleading is controlled by specific averments on the same subject.—(Sup. 1880) *Richardson v. Snider*, 72 Ind. 425, 37 Am. Rep. 168; (1882) *McMahan v. Newcomer*, 82 Ind. 565; (1886) *Henry v. Stevens*, 9 N. E. 356, 108 Ind. 281.

[f] (Sup. 1882)

Where a complaint contains general allegations of title, followed by specific statements of the facts constituting title, the latter must control.—*Boesker v. Pickett*, 81 Ind. 554.

[ff] The sufficiency of a pleading is to be determined from the general scope and tenor of its averments.—(Sup. 1882) *Johnston v. Griest*, 85 Ind. 503; (1882) *Platter v. City of Seymour*, 86 Ind. 323; (1883) *Whitcomb v. Miller*, 90 Ind. 384; (1884) *State ex rel. Padgett v. Foulkes*, 94 Ind. 493; (1885) *Trentman v. Fletcher*, 100 Ind. 105; (1885) *City of North Vernon v. Voegler*, 2 N. E. 821, 103 Ind. 314; (1886) *Henry v. Stevens*, 9 N. E. 356, 108 Ind. 281; (1892) *Racer v. State*, 31 N. E. 81, 131 Ind. 393; (1892) *Buckles v. Same*, 31 N. E. 86, 131 Ind. 600; (1892) *Monnett v. Turpie*, 32 N. E. 328, 132 Ind. 482; (1893) *Comegys v. Emerick*, 33 N. E. 899, 134 Ind. 148, 39 Am. St. Rep. 245; (1893) *Citizens' St. R. Co. of Indianapolis v. Willooby*, 33 N. E. 627, 134 Ind. 563; (App. 1894) *Cleveland, C. C. & St. L. R. Co. v. De Bolt*, 37 N. E. 737, 10

Ind. App. 174; (1895) *Romona Oolitic Stone Co. v. Tate*, 37 N. E. 1065, 39 N. E. 529, 12 Ind. App. 57; (1901) *Carpenter v. Willard Library*, 60 N. E. 365, 26 Ind. App. 619.

[g] Pleadings will be liberally construed for the purpose of sustaining a verdict.—(Sup. 1882) *Clegg v. Waterbury*, 88 Ind. 21; (1894) *Ades v. Levi*, 37 N. E. 388, 137 Ind. 506; (App. 1897) *Alcorn v. Bass*, 46 N. E. 1024, 17 Ind. App. 500.

[gg] (Sup. 1883)

Where a pleading is not full and explicit, the allegations and admissions must be taken most strongly against the pleader.—*State ex rel. Jamison v. Beal*, 88 Ind. 106.

[h] (Sup. 1883)

In an action on a note, an averment by the defendant that the note was not his act and deed could not control a preceding specific statement of fact showing that the note was executed by him.—*Whitcomb v. Miller*, 90 Ind. 384.

[hh] (Sup. 1884)

Where there are contradictory allegations in a complaint, the court must construe the pleading against the pleader, for on him rests the burden of affirmatively stating a cause of action or defense, and, if he destroys one allegation by another nothing is affirmed.—*State ex rel. Padgett v. Foulkes*, 94 Ind. 498.

[i] (Sup. 1886)

When a complaint is questioned for the first time by an assignment of error in the supreme court that it does not state facts sufficient to constitute a cause of action, it will be held good unless it wholly omits the averment of material and necessary facts, and is radically and fatally defective.—*Smith v. Smith*, 106 Ind. 43, 5 N. E. 411.

[ii] (Sup. 1886)

A pleading should be judged from its general scope, as shown by specific allegations of fact, and not by mere general and detached phrases and epithets.—*Louisville, N. A. & C. Ry. Co. v. Schmidt*, 106 Ind. 73, 5 N. E. 684.

[j] (Sup. 1886)

Where a demurrer to a complaint which fails to state a cause of action has been overruled, the error in so ruling cannot be cured by resorting to Rev. St. 1881, §§ 338, 376, 658, providing that, in the construction of a pleading its allegations shall be liberally construed with a view to substantial justice, and that no judgment shall be reversed for any defect in form.—*Belt R. & Stockyard Co. v. Mann*, 7 N. E. 893, 107 Ind. 89.

[jj] (Sup. 1887)

Pleadings under the Code are to be construed liberally as to mere matters of form, but this rule does not dispense with the necessity of properly pleading the facts which constitute the cause of action, and, as to the material facts, the construction will in doubtful cases be against

the pleader.—*State ex rel. MacKenzie v. Casteel*, 110 Ind. 174, 11 N. E. 219.

[jjj] (*Sup.* 1887)

In an action to quiet title, where title is specifically pleaded, the specific allegations will control the general averments.—*McPheeters v. Wright*, 110 Ind. 519, 10 N. E. 634.

[k] (*Sup.* 1888)

Under Rev. St. 1881, § 343, providing that the objection that the complaint does not state facts sufficient to constitute a cause of action is not waived by failure to demur, a complaint may be attacked for the first time by assignment of error in the supreme court for this reason; but in such case it will be supported by every legal intendment, and if it states facts sufficient to render the judgment thereon a complete bar to any other suit for the same cause of action, it will withstand the attack.—*Du Souchet v. Dutcher*, 113 Ind. 249, 15 N. E. 459.

[kk] (*Sup.* 1891)

In order that specific allegations in a pleading may control the general allegations, they must be clearly repugnant thereto, and show that the general allegations are untrue.—*Warbritton v. Demorett*, 27 N. E. 730, 28 N. E. 613, 129 Ind. 346.

[kkk] (*Sup.* 1892)

A complaint will be construed by the facts it states, and not by its prayer for relief.—*McGuffey v. McClain*, 130 Ind. 327, 30 N. E. 296.

[l] (*Sup.* 1892)

A general averment in a complaint that defendant corporation is the same that entered into the contract with plaintiff gives way to specific averments that defendant is a new corporation, organized by the purchasers at foreclosure sale.—*Mayer v. Ft. Wayne, C. & L. R. Co.*, 132 Ind. 88, 31 N. E. 567.

[lll] The court will construe a pleading as proceeding upon the theory which is most apparent and most clearly outlined by the facts stated therein.—(*Sup.* 1892) *Batman v. Snoddy*, 32 N. E. 327, 132 Ind. 480; (*1892*) *Monnett v. Turpie*, 133 Ind. 424, 32 N. E. 328; (*App.* 1894) *Cleveland, C. & St. L. Ry. Co. v. De Bolt*, 37 N. E. 737, 10 Ind. App. 174; (*Sup.* 1895) *Pittsburgh, C. & St. L. Ry. Co. v. Sullivan*, 40 N. E. 138, 141 Ind. 83, 27 L. R. A. 840, 50 Am. St. Rep. 313; (*App.* 1899) *Dull v. Cleveland, C. & St. L. Ry. Co.*, 52 N. E. 1013, 21 Ind. App. 571.

[lll] (*Sup.* 1892)

The complaint will, if possible, be given such construction as to give full force and effect to all of its material allegations, and such as will afford the pleader full relief for all injuries stated in his pleading.—*Monnett v. Turpie*, 32 N. E. 328, 132 Ind. 482.

[m] (*Sup.* 1893)

Where, in an action to recover damages against a railroad company, the complaint alleges that sparks were emitted from defendant's

engine through a defect in the spark arrester and through the negligence of the engineer, and blown by the wind against plaintiff's ice house, igniting and consuming it, the court will not, under the rule that a pleading susceptible to two constructions must be construed least favorably to the pleader, presume that the wind designated was an "extraordinary" wind, and the proximate cause of the injury, in that it is not authorized to insert words into a complaint not used by the pleader.—*Cincinnati, I., St. L. & C. Ry. Co. v. Smock*, 133 Ind. 411, 33 N. E. 108.

Though pleadings are to be construed most strongly against the pleader, if a pleading is susceptible of two or more constructions, yet this rule does not extend so far as to require or authorize the court to insert words not used in the pleading.—*Id.*

[mm] (*Sup.* 1893)

The Supreme Court does not favor adherence to unduly rigid constructions in questions of practice.—*Funk v. Rentschler*, 33 N. E. 364, 133 Ind. 68.

In an action by the guardian of an insane person to set aside a conveyance by his ward on the ground of his alleged insanity at the time he executed the conveyance, the answer stated that after the conveyance was made a trial was had on the issue of the grantor's sanity, and plaintiff duly appointed his guardian; that, "at the time of" such appointment, it was agreed between plaintiff, as guardian, and defendant, that, on payment of certain costs by defendant, plaintiff would ratify such conveyance. *Held*, that the answer must be construed as meaning that the agreement recited was executed "before" the appointment of plaintiff as guardian.—*Id.*

[mmm] (*Sup.* 1893)

A pleading must not only be judged by its general scope, but the language used must be given a reasonable and fair construction; and, if by placing such construction on it it will withstand a demurrer, a demurrer to it should be overruled.—*Chicago & I. Coal Ry. Co. v. McDaniel*, 32 N. E. 728, 33 N. E. 769, 134 Ind. 166.

[n] (*App.* 1893)

Where the sufficiency of a pleading is not questioned until after verdict, the same degree of strictness will not be applied as when questioned by demurrer.—*Citizens' St. R. Co. of Indianapolis v. Spahr*, 7 Ind. App. 23, 33 N. E. 446.

[nn] (*App.* 1894)

When it is alleged that deceased died testate, and that there remains of his estate a surplus for distribution among those lawfully entitled thereto, it will be presumed that said surplus is disposed of by the terms of the will.—*Carroll v. Swift*, 10 Ind. App. 170, 37 N. E. 1061.

[nnn] (App. 1894)

Rev. St. 1834, § 346 (Rev. St. 1881, § 343), providing that, if no objection is taken to a complaint, the same shall be deemed to have been waived except only the objection to the jurisdiction of the court over the subject of the action, and except the objection that the complaint does not state facts sufficient to constitute a cause of action, must be liberally construed, and, if the complaint is merely defective in the statement of the cause of action, and if the defect is such as may be remedied by the application of reasonable intendments, it will be held sufficient to withstand an attack made for the first time after the verdict or in the appellate court.—*South Bend Iron Works v. Larger*, 39 N. E. 209, 11 Ind. App. 367.

[o] (App. 1895)

When two facts are pleaded, both of which are pertinent to the theory of the complaint, and are inconsistent one with the other, that which is strongest against the pleader must be accepted as overcoming that most favorable to him.—*Romona Oolitic Stone Co. v. Tate*, 37 N. E. 1065, 39 N. E. 529, 12 Ind. App. 57.

[oo] (App. 1896)

The court in construing a pleading and determining its sufficiency must give to the language employed a reasonable intendment.—*Morris v. Ellis*, 46 N. E. 41, 16 Ind. App. 679.

[ooo] (Sup. 1897)

When the sufficiency of a complaint is tested for the first time by an assignment of error on appeal, it will be *held* sufficient if it contains facts enough to bar another action.—*Xenia Real-Estate Co. v. Macy*, 147 Ind. 568, 47 N. E. 147.

[p] (App. 1897)

It will not be presumed that the intestate knew of defects in the machinery if the complaint alleges that he did not know of them.—*Clark County Cement Co. v. Wright*, 45 N. E. 817, 16 Ind. App. 630.

[pp] (App. 1897)

The language used in a pleading must be given a reasonable and fair construction, and in determining the rights of the parties thereunder the court will look to the nature of the acts alleged.—*Miller v. Miller*, 47 N. E. 338, 17 Ind. App. 605.

[ppp] As only one theory can be contained in a single paragraph, the court must construe the pleading most strongly against the pleader, and determine the theory from its prominent and leading allegations.—(App. 1897) *Cleveland, C. & St. L. Ry. Co. v. Dugan*, 48 N. E. 238, 18 Ind. App. 435; (1900) *Cleveland, C. & St. L. Ry. Co. v. Stewart*, 56 N. E. 917, 24 Ind. App. 374.

[q] (Sup. 1900)

Where a complaint attacking the validity of a statute, and of a resolution of a city board of public works based thereon, sets out the res-

olution in general terms, the sufficiency of the complaint will be determined by reference to the provisions of the statute, and not by the character of the averments therein concerning the resolution.—*City of Indianapolis v. Holt*, 57 N. E. 966, 988, 1100, 155 Ind. 222.

[qq] (Sup. 1904)

In construing a complaint, each disconnected and irrelevant allegation should not be considered separately, but the complaint considered as a whole.—*Seymour Water Co. v. Seymour*, 163 Ind. 120, 70 N. E. 514.

[qqq] (Sup. 1904)

A complaint must be construed according to its general scope and tenor, as appears from its averments, and the prayer is not controlling or determinative of its validity.—*West Muncie Strawboard Co. v. Slack*, 72 N. E. 879, 164 Ind. 21.

[r] A pleading should be construed upon the theory which is most apparent and clearly outlined by the facts.—(Sup. 1905) *M. S. Huey Co. v. Johnston*, 164 Ind. 489, 73 N. E. 996; (App. 1905) *City of New Albany v. Stier*, 34 Ind. App. 615, 72 N. E. 275.

[rr] (App. 1905)

Facts pleaded, and not the name given to the pleading, control as to what the pleading is.—*Johnson v. Sherwood*, 34 Ind. App. 490, 73 N. E. 180.

[rrr] (App. 1905)

The theory of a pleading is determined by its principal and leading allegations and from its general scope and tenor, and must stand or fall by that theory, regardless of its sufficiency upon some other hypothesis.—*South Bend Chilled Plow Co. v. Cissne*, 74 N. E. 282, 35 Ind. App. 373.

[s] (App. 1905)

The sufficiency of a pleading is to be tested by specific facts alleged, rather than by general averments.—*Durbin v. Northwestern Scraper Co.*, 36 Ind. App. 123, 73 N. E. 297.

[ss] (App. 1905)

Where the sufficiency of a complaint is tested for the first time after verdict, it will be sufficient if it contains facts sufficient to bar another action for the same cause, when strengthened by every reasonable intendment and doubt, even to the extent of supplying omitted facts resulting as a natural consequence from the facts averred.—*Town of Knightstown v. Homer*, 75 N. E. 13, 36 Ind. App. 139.

[sss] (Sup. 1906)

The sufficiency of a pleading will be tested by the theory on which it is based, and the theory is determined by the scope and tenor of the pleading, and not by single statements.—*Vandalia R. Co. v. State ex rel. City of South Bend*, 166 Ind. 219, 76 N. E. 980, 117 Am. St. Rep. 370, writ of error dismissed (1907) 28 S. Ct. 130, 207 U. S. 359, 52 L. Ed. 246.

[t] (*Sup.* 1906)

If possible, a pleading will be so construed as to give effect to all the material allegations.—*Flint & Walling Mfg. Co. v. Beckett*, 167 Ind. 491, 79 N. E. 503, 12 L. R. A. (N. S.) 924.

[tt] (*App.* 1906)

Where the sufficiency of a complaint is tested for the first time on appeal, it will be held sufficient if it contain facts enough to bar another action for the same cause.—*Lewis Tp. Imp. Co. v. Royer*, 76 N. E. 1068, 38 Ind. App. 151.

[ttt] (*Sup.* 1907)

Facts necessary to constitute a cause of action cannot be supplied in a complaint by intendment or by inference.—*Chicago, I. & L. Ry. Co. v. McCandish*, 167 Ind. 648, 79 N. E. 903.

[u] (*Sup.* 1907)

Particular averments control general allegations in a complaint only where irreconcilable.—*Indianapolis Union Ry. Co. v. Waddington*, 169 Ind. 448, 82 N. E. 1030.

[uu] The theory of a pleading must be determined by the court from its general scope and tenor, and not from fragmentary statements and conclusions.—(*Sup.* 1908) *Oolitic Stone Co. v. Ridge*, 169 Ind. 639, 83 N. E. 246; (*App.* 1908) *Grass v. Ft. Wayne & W. Val. Traction Co.*, 42 Ind. App. 395, 81 N. E. 514.

[uuu] (*Sup.* 1908)

In testing the sufficiency of a pleading, absent facts must be assumed to be adverse to the pleader under the presumption that a party will set forth all the facts favorable to his case.—*Cushman v. Cloverland Coal & Mining Co.*, 170 Ind. 402, 84 N. E. 759, 16 L. R. A. (N. S.) 1078, 127 Am. St. Rep. 391.

[v] (*Sup.* 1908)

Where nothing to the contrary appears, it will be presumed that a term in a pleading was advisedly employed, with knowledge of its ordinary and usual meaning, and that the pleader intended it to be interpreted accordingly.—*Pein v. Miznerr*, 170 Ind. 659, 84 N. E. 981.

It may always be presumed that a party's pleading is as strong in his favor as the facts to sustain it will warrant.—Id.

[vv] (*Sup.* 1908)

Under the rule that, in determining the sufficiency of pleadings, only inferences necessarily arising from the facts alleged will be indulged, it will not be presumed, from plaintiff's allegation that his place of business was a "restaurant," that he did not also conduct a saloon on the premises or in the same building.—*Rowan v. Butler*, 171 Ind. 28, 85 N. E. 714.

[vvv] (*Sup.* 1908)

Under Burns' Ann. St. 1908, § 385, authorizing a liberal construction of pleadings, a pleading is to be read in the light of all such ultimate facts as must be necessarily intended from the facts which are well pleaded, and matters of

substance may often be shown by the narrative of the manner in which an occurrence took place.—*Town of Newcastle v. Grubbs*, 171 Ind. 482, 86 N. E. 757.

[w] (*App.* 1908)

The material facts necessary to constitute a cause of action must be directly averred, and a material fact in a complaint cannot be supplied by inference or conjecture either at common law or under Burns' Ann. St. 1901, § 341, requiring a statement of the facts constituting the cause of action in plain and concise language.—*Wabash R. Co. v. Reynolds*, 41 Ind. App. 678, 84 N. E. 992.

In construing a complaint, conclusions, recitals, and irrelevant allegations must be disregarded.—Id.

[ww] (*App.* 1909)

A complaint, in an action to determine the ownership of stock and to whom dividends should be paid, alleging that plaintiff agreed with defendant to take the stock in payment of a note, and that in execution of such contract the certificate of stock had been delivered to plaintiff, and asserting no rights under the note, was based upon title to the stock, and not upon the note.—*Hill v. Kerstetter*, 43 Ind. App. 1, 86 N. E. 858.

[www] (*App.* 1909)

Where specific allegations of fact contradict the general allegations, the specific allegations control.—*Cleveland, C., C. & St. L. Ry. Co. v. Cyr*, 43 Ind. App. 19, 86 N. E. 868.

[x] (*App.* 1909)

Pleadings must be liberally construed.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Rogers*, 87 N. E. 28.

While necessary facts must be directly averred, the facts averred carry with them all necessary inferences.—Id.

[xx] (*App.* 1909)

A complaint, if possible, will be construed to give all material allegations full effect and afford full relief for all injuries stated.—*Flowers v. Poorman*, 43 Ind. App. 528, 87 N. E. 1107.

[xxx] (*App.* 1909)

Where pleadings are neither indefinite nor ambiguous, the court need not construe them most strongly against the pleader, when a liberal construction will promote substantial justice.—*Heritage v. State ex rel. Crim*, 43 Ind. App. 595, 88 N. E. 114.

[y] (*App.* 1909)

Doubts arising upon the construction of pleadings will be resolved against the pleader.—*Holliday & Wyon Co. v. O'Donnell*, 90 N. E. 24.

[yy] (*Sup.* 1910)

No facts will be presumed to exist in favor of a pleading which have not been averred or alleged, as it is always presumed that a

party's pleading is as strong in his favor as the facts will warrant.—*Wabash R. Co. v. Beedle*, 90 N. E. 760.

[777] (Sup. 1910)

The broad allegations of a complaint in an action for injuries to a servant of a railroad company engaged as a member of a bridge crew as to the power of the foreman of the crew and his authority to direct the work and control the men do not control the specific allegations that the injury was occasioned by a negligent direction under the changing conditions under which the work was carried on by one not discharging the duties of a master, but those of a superior servant in giving the direction, thereby relieving the company from liability.—*Cleveland, C. & St. L. Ry. Co. v. Foland*, 92 N. E. 165, denying rehearing 91 N. E. 504.

[1] (App. 1910)

Any omitted facts are considered adverse to the pleader under the presumption that a party will set forth all the facts favorable to his cause.—*Stahl v. Illinois Oil Co.*, 90 N. E. 632.

[11] (App. 1910)

The general rule that the court in construing pleadings will not infer omitted essential facts is subject to the qualification that the averment of a given fact in a pleading carries with it all facts that are necessarily to be inferred therefrom.—*Holcomb v. Norman*, 91 N. E. 625.

[111] (App. 1910)

General allegations in a pleading must be stronger than to merely suggest an inference, but they must be so strong as to enforce the inference if necessary.—*Morgantown Mfg. Co. v. Hicks*, 92 N. E. 199.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 66-75.

See, also, 31 Cyc. pp. 78-87.

§ 35. Surplusage and unnecessary matter.

Allegation of representative capacity, see EXECUTORS AND ADMINISTRATORS, § 444.

As objection reached by general demurrer, see post, § 205.

Grounds for demurrer, see post, § 192.

Ground for striking out pleading, see post, § 352.

In bill of particulars, see post, § 327.

In complaint to recover overpayments on claims against decedents' estates, see EXECUTORS AND ADMINISTRATORS, § 287.

In complaint to set aside executor's final settlement, see EXECUTORS AND ADMINISTRATORS, § 509 (6).

In demurrer, see post, § 200.

In foreclosure suits, see MORTGAGES, § 447.

In pleading in action of debt, see DEBT, ACTION OF, § 11.

In proceedings for annexation of territory to town, see MUNICIPAL CORPORATIONS, § 33. In rejoinder, see post, § 183.

Motion to make more definite or certain, see post, § 367.

Necessity for proof, see post, § 375.

Rejection of plea of justification joined with denial in answer as surplusage, see post, § 90.

Striking out surplusage, see post, § 364.

[a] (Sup. 1828)

Whatever comes under a *videlicet*, if inconsistent with the precedent matter, may be rejected as surplusage.—*Blackwell v. Board of Justices of Lawrence County*, 2 Blackf. 143.

[b] (Sup. 1850)

Where a general denial is pleaded in a suit on a judgment, a further answer of null tiel record is surplusage.—*Westcott v. Brown*, 13 Ind. 83.

[c] (Sup. 1863)

Where a complaint contains all the averments necessary to show the plaintiff's right to the relief demanded, and also other averments which are unnecessary and immaterial, such averments will be deemed mere surplusage.—*Harding v. Third Presbyterian Church*, 20 Ind. 71.

[d] (Sup. 1876)

A complaint against a railroad company, for killing plaintiff's live stock, alleged that the road was not securely fenced, and was otherwise sufficient for an action founded on the statute. It also charged negligence against the company; but did not allege that the plaintiff was free from negligence, and so was insufficient as a complaint at common law. *Held*, that instead of treating the complaint as bad, for misjoinder of causes of action, the allegations as to negligence might be disregarded as surplusage.—*Jeffersonville, M. & I. R. Co. v. Lyon*, 55 Ind. 477.

[e] (Sup. 1877)

An otherwise good paragraph of an answer, setting up a former adjudication, is not vitiated by unnecessarily making a transcript of the proceedings and judgment in the former suit a part of such paragraph.—*Richardson v. Jones*, 58 Ind. 240.

[f] (Sup. 1879)

Surplusage does not vitiate an answer.—*Reed v. Tioga Mfg. Co.*, 66 Ind. 21.

[g] (Sup. 1884)

Though surplusage does not vitiate a complaint, averments directly made and fully bearing on and blended with the material facts alleged cannot be deemed surplusage.—*State ex rel. Padgett v. Foulkes*, 94 Ind. 493.

[h] (Sup. 1885)

In an action to quiet title, a complaint which states a cause of action is not vitiated by insufficient averments as to an alleged tender, where such allegations may properly be

regarded as surplusage.—*Helms v. Wagner*, 102 Ind. 385, 1 N. E. 730.

[i] (Sup. 1887)

Statements in a complaint, which are in themselves material and relevant to the cause of action, cannot be regarded as surplusage, although they may overthrow the complaint.—*Knopf v. Morel*, 111 Ind. 570, 13 N. E. 51.

[j] (Sup. 1889)

In a suit by a judgment creditor to set aside as fraudulent a conveyance made by his debtor, an allegation that the latter was mentally incapable of executing the conveyance will not, though irrelevant, vitiate the complaint.—*Rollet v. Heiman*, 120 Ind. 511, 22 N. E. 666, 16 Am. St. Rep. 340.

[k] (Sup. 1893)

Where a complaint seeking to establish title to real estate and to quiet title charged fraud and collusion of the executrix and her son, and that the purchase was in fact made for her by and through her son acting for her, averments having for their sole object the setting aside of the judgment and proceedings in the circuit court were properly treated as surplusage. Being made in a complaint in a court having no jurisdiction in their behalf, they could have no effect, and would not be allowed to control or annul the averments which stated a good cause of action.—*Comegys v. Emerick*, 33 N. E. 809, 134 Ind. 148, 39 Am. St. Rep. 245.

[l] (App. 1899)

A complaint is not bad because containing improper averments, if the remaining averments are sufficient to state a cause of action.—*City of New Albany v. Armstrong*, 53 N. E. 185, 22 Ind. App. 15.

[m] (Sup. 1901)

Where paragraphs of an answer, not purporting to be pleas in confession and avoidance, are good as general denials, the addition of immaterial matter will not render them demurrable.—*Ralya v. Atkins*, 61 N. E. 726, 157 Ind. 331.

[n] (App. 1906)

Where, in an action on a check, defendant alleged that the check was indorsed in the payee's name by its agent without authority and that plaintiff held under such indorsement, a further allegation that it was the agent's duty to have sent such check to the payee, instead of indorsing and cashing the same himself, was mere surplusage.—*Hamilton Nat. Bank v. Nye*, 77 N. E. 295, 37 Ind. App. 464, 117 Am. St. Rep. 333.

[o] (App. 1906)

A complaint stating facts sufficient to constitute a single consistent cause of action is good, though it contains surplus facts relating to a different cause of action.—*Home Ins. Co. v. Gagen*, 38 Ind. App. 680, 76 N. E. 927.

[p] (App. 1906)

Where a complaint by a materialman on a contractor's bond running to the owner states a direct and primary cause of action in favor of the materialman, further allegations attempting to set up a cause of action by assignment of the bond from the owner may, if insufficient, be ignored, and do not invalidate the complaint.—*Ochs v. M. J. Carnahan Co.*, 42 Ind. App. 157, 76 N. E. 788, 80 N. E. 163.

[q] (App. 1908)

Where a complaint alleges that 13 years before the bringing of the suit decedent and plaintiff verbally agreed that decedent should have a lien upon plaintiff's cattle and their increase, but which did not aver that a lien existed on the cattle now in plaintiff's possession, or that defendant claimed any such lien, the allegation as to the lien must be regarded as surplusage and presents no issuable facts for trial.—*Yannice v. Dungan*, 41 Ind. App. 27, 83 N. E. 250.

[r] (App. 1909)

A paragraph in a bill to restrain several defendants from prosecuting separate actions at law for damages, praying that if the court should be of the opinion that deprivation of a jury trial would be unfair the court should refer the questions of fact to a jury, is superfluous; the court possessing such right.—*Vandalia Coal Co. v. Lawson*, 43 Ind. App. 226, 87 N. E. 47.

[s] (App. 1910)

Where a complaint charged that defendant pumped impregnated subterranean waters in great quantities to the surface of adjoining land and discharged them on the surface, where by the law of gravitation they must flow on plaintiff's land, the complaint stated a cause of action for a nuisance as to which the averments of negligence were immaterial and surplusage.—*Niagara Oil Co. v. Jackson*, 91 N. E. 825.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 76-80.

See, also, 31 Cyc. pp. 68-70.

§ 36. Conclusiveness of allegations or admissions on party pleading.

Admissions in answer, see post, § 127.

[a] (Sup. 1871)

Where, in a suit against the payee of a note to have the same declared paid, the complaint recited that the defendant "claimed that he had sold and assigned the said note and mortgage to" a third party, "whom plaintiff makes defendant hereto"; and said third party filed an answer, to which plaintiff demurred, without moving to strike out the answer. *Held*, that plaintiff was estopped from denying that the person so answering was a proper party defendant.—*Goldthwait v. Bradford*, 36 Ind. 149.

[b] (Sup. 1879)

Where a paragraph of a complaint alleged that the entire amount of a debt of \$6,000 with interest was due and unpaid, except the sum of \$1,000, this was an admission of a payment of \$1,000, and conclusive.—*Frazer v. Boss*, 66 Ind. 1.

[c] (Sup. 1832)

An allegation that personal property has been sold and assigned in consideration of a transfer of land was a mere admission which did not conclude the pleader as against one not a party to the suit, and such admission might be explained by evidence and controlled by the facts established in the case.—*Fowler v. Hobbs*, 86 Ind. 131.

[d] (Sup. 1899)

The theory of a complaint being that defendant has a right to use a right of way over plaintiff's land if he closes the gates across it, plaintiff cannot question defendant's right to use the way on the conditions alleged in the complaint.—*Boyd v. Bloom*, 52 N. E. 751, 152 Ind. 152.

[e] (App. 1902)

Where the complaint in an action against an express company for the loss of a package alleges that the contract of carriage was made with T., who acted for complainant, the latter cannot deny the authority of T. to make the contract, though it limits the liability of the company.—*Adams Exp. Co. v. Carnahan*, 29 Ind. App. 606, 63 N. E. 245, 64 N. E. 647, 94 Am. St. Rep. 279.

[f] (Sup. 1905)

Where no denial is made by an appellee of an allegation made by an appellant corporation to the effect that there has been a consolidation of appellant with another company, whereby the consolidated company succeeds to the rights of the constituent corporations, such allegation will be taken as true.—*Union Traction Co. v. Basey*, 164 Ind. 249, 73 N. E. 263; *Same v. Bell*, 164 Ind. 701, 73 N. E. 1134.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 81-86.

See, also, 31 Cyc. pp. 87-92.

§ 37. Effect of omission to make allegations.**[a] (Sup. 1855)**

Where an essential element of a cause of action is omitted from the complaint, such fact will be presumed against the pleader.—*New Albany & S. R. Co. v. Connelly*, 7 Ind. 32.

[b] In the absence of an averment that a contract declared upon is in writing, it will be presumed to be parol.—(Sup. 1873) *King v. Enterprise Ins. Co.*, 45 Ind. 43; (1880) *Clodfelter v. Hulett*, 72 Ind. 137; (1882) *Schreiber v. Butler*, 84 Ind. 576; (1887) *Carr v. Hays*, 110 Ind. 408, 11 N. E. 25; (App. 1908) *Porter v. Patterson*, 42 Ind. App. 404, 85 N. E. 797.

[c] (Sup. 1896)

Where allegations as to a lease do not disclose that there was a written lease, the presumption is that the lease was by parol, and the complaint is not insufficient in not setting out a copy thereof.—*Bucklen v. Cushman*, 145 Ind. 51, 44 N. E. 6.

[d] (Sup. 1904)

Where plaintiff alleged that he was induced to enter into a contract with defendant through fraud, and that defendant afterwards sued plaintiff on said contract, and recovered thereon, from which judgment plaintiff seeks relief, it will be inferred, in the absence of an averment to the contrary, that plaintiff, with the full knowledge of the existence of the defense of fraud, purposely omitted to assert it.—*Canon v. Castleman*, 69 N. E. 455, 162 Ind. 6.

[e] (Sup. 1905)

A plaintiff must allege all the essential elements of his cause of action, and it will be presumed, if such necessary facts are not alleged, that no cause of action exists.—*Malott v. Sample*, 164 Ind. 645, 74 N. E. 245.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 87, 88.

See, also, 31 Cyc. p. 86.

§ 38. Pleading bad in part.

Answer to material part, see post, § 80.

Demurrer to pleading good in part, see post, § 204.

Effect of prayer for relief in addition to that authorized by averments, see post, § 72.

Objections reached by general demurrer, see post, § 205.

Partial defenses, see post, § 80.

Pleading bad as to part of coplaintiffs, see post, § 57.

Pleading bad as to part of several codefendants, see post, § 84.

Set-off, see post, § 144.

[a] The insufficiency of one of several breaches assigned in a complaint on a bond does not render the whole complaint insufficient, if other assignments are good.—(Sup. 1840) *Redpath v. Nottingham*, 5 Blackf. 267; (1842) *Rock v. Gordon*, 6 Blackf. 192; (1851) *Kintner v. State ex rel. Skelton*, 3 Ind. 86, 92; (1859) *State ex rel. Leach v. Scott*, 12 Ind. 529; (1883) *McFall v. Howe Sewing Mach. Co.*, 90 Ind. 148.

[b] (Sup. 1840)

Where a declaration contains three counts, and defendant pleads non est factum to the first count and nil debet to the second and third counts, and the non est factum branch of the plea is defective, in not being verified, the whole plea is bad, for a plea which is bad in part is bad in the whole.—*Ferrand v. Walker*, 5 Blackf. 424.

[c] (Sup. 1846)

A declaration alleged that plaintiff agreed to put up for defendant an engine in good work-

ing order, and to run it for one week, for which defendant agreed to pay \$350; and that defendant was to board plaintiff's workmen while they were engaged in erecting the engine, and was to pay plaintiff a certain sum per day for every workman who should be thrown out of employment in consequence of defendant's not having ready the mason work necessary for the reception of the engine. It was further averred that plaintiff, within a reasonable time, finished the engine, and ran it for three days, when at defendant's request he left it in his possession in good working order, and that, after plaintiff commenced putting up the engine, two of his workmen were compelled to be idle for a certain time, in consequence of defendant's not having the mason work ready for the engine, for which plaintiff claimed a certain sum. *Held*, that though the account so far as concerned the claim for \$350 was bad, because the condition precedent was not performed, it was good as to the other claim.—*Milnes v. Vanhorn*, 8 Blackf. 198.

[d] (Sup. 1851)

Where a declaration consists of a special and common count, and at the trial the evidence received is under the common count, the judgment for the plaintiff will not be reversed because the special count is bad.—*Carter v. Thomas*, 3 Ind. 213.

[e] (Sup. 1856)

One good plea or paragraph of an answer going to the whole cause of action bars the suit.—*Brandon v. Judah*, 7 Ind. 545.

[f] (Sup. 1874)

Where a complaint contains one good paragraph, judgment on a general verdict for the plaintiff cannot be arrested because there are other paragraphs which are defective.—*Waugh v. Waugh*, 47 Ind. 580.

[g] (Sup. 1881)

A bad prayer for relief or a prayer for improper relief will not vitiate a pleading otherwise sufficient.—*Mark v. Murphy*, 76 Ind. 534.

[h] (Sup. 1832)

Where one paragraph of a reply is unquestionably good, the sufficiency of the reply cannot be considered in the absence of a demurrer.—*Andrews v. Swanton*, 81 Ind. 474.

[i] (App. 1891)

Where there were two paragraphs to a complaint and one of them was insufficient, the complaint, to all intents and purposes, contained but one paragraph, and hence there could be no misjoinder.—*Furry v. O'Connor*, 28 N. E. 103, 1 Ind. App. 573.

[j] (Sup. 1895)

Where a court has power to administer both equitable and legal relief in the same action, the fact that plaintiff cannot be awarded the equitable relief demanded, because the facts stated show that he has a purely legal remedy, or vice versa, will not defeat the court's jurisdiction.—

Michener v. Springfield Engine & Thresher Co. 142 Ind. 130, 40 N. E. 679.

[k] (App. 1897)

One good count is sufficient to support a verdict.—*Axtell v. Workman*, 46 N. E. 472, 17 Ind. App. 152.

[l] (App. 1907)

A paragraph of a complaint by a sheriff is good which counts on his valid right to recover his per diem for attendance at court, as well as on an invalid claim to receive fees for receiving and discharging prisoners.—*Board of Com'rs of Daviess County v. Fitzgerald*, 40 Ind. App. 24, 79 N. E. 393.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 89, 90.

See, also, 31 Cyc. pp. 68-70.

II. DECLARATION, COMPLAINT, PETITION, OR STATEMENT.

Aider by verdict or judgment, see post, § 433. Allegations as to assignment of insurance policy, see INSURANCE, § 214.

Amendment, see post, §§ 242-254.

Bill of particulars, see post, § 317.

Conclusiveness of judgment as to sufficiency of complaint, see JUDGMENT, § 735.

Defects cured by subsequent pleading, see post, § 402.

Defects or omissions cured by answer, see post, § 403.

Defects reached by general demurrer, see post, § 205.

Demurrer to part of pleading or pleading good in part, see post, § 204.

Filing as condition precedent to issuance of process, see PROCESS, § 21.

Grounds for demurrer, see post, § 193.

Indorsement on directing clerk to issue summons, see PROCESS, § 22.

In equity, see EQUITTY, §§ 128-153.

In justices' courts, see JUSTICES OF THE PEACE, § 91.

Insufficiency as affecting conclusiveness of judgment, see JUDGMENT, § 634.

Insufficiency as ground for review of judgment, see JUDGMENT, § 335.

Motion to make more definite and certain, see post, § 367.

New trial to test sufficiency of complaint, see NEW TRIAL, § 18.

Pleading contract or transaction within statute of frauds, see FRAUDS, STATUTE OF, §§ 145-149.

Pleading estoppel in pais as element of cause of action, see ESTOPPEL, § 107.

Pleading in anticipation of defense of limitation, see LIMITATION OF ACTIONS, §§ 176-179.

Review of decisions, see APPEAL AND ERROR, § 193.

Service of petition with process, see PROCESS, § 66.

Supplemental complaint, petition, or statement, see post, § 279.

Waiver of objections, see post, §§ 405-408.

In actions between persons in particular relations.

See—

Corporation and members thereof. CORPORATIONS, § 189.

HUSBAND AND WIFE, § 229.

Partners. PARTNERSHIP, § 120.

After change in membership. PARTNERSHIP, § 242.

In actions by or against particular classes of persons.

See—

Assignees or trustees in bankruptcy. BANKRUPTCY, § 302.

BENEFICIAL ASSOCIATIONS, § 20.

Consolidated corporation. CORPORATIONS, § 591.

CORPORATIONS, §§ 513, 514.

COUNTIES, § 129.

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EXECUTORS AND ADMINISTRATORS, §§ 443, 444, 473, 474, 544.

Foreign corporations. CORPORATIONS, § 672.

Guarantors. GUARANTY, § 85.

Guardian. GUARDIAN AND WARD, § 130.

Heirs, distributees, or purchasers, on debts of intestate. DESCENT AND DISTRIBUTION, § 146.

Or distributees. DESCENT AND DISTRIBUTION, §§ 90, 91.

HOSPITALS, § 8.

HUSBAND AND WIFE, § 229.

INFANTS, § 92.

JUSTICES OF THE PEACE, § 28.

LANDLORD AND TENANT, §§ 170, 285.

Life tenants. LIFE ESTATES, § 28.

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Owner of property taken for public use. EMINENT DOMAIN, § 293.

Partners after dissolution of partnership. PARTNERSHIP, § 296.

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PRINCIPAL AND AGENT, §§ 79, 89.

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Of banks. BANKS AND BANKING.

Shipowners. SHIPPING, § 86.

Stockholders on behalf of corporation. CORPORATIONS, § 211.

Sureties. PRINCIPAL AND SURETY, § 155.

Surviving partners or representatives of deceased partners. PARTNERSHIP, § 258.

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See—

Abatement of nuisance. NUISANCE, § 75.

ACCOUNT STATED, § 18.

Alienation of affections of husband or wife. HUSBAND AND WIFE, § 332.

Allowance to widow. EXECUTORS AND ADMINISTRATORS, § 194.

Alteration of highway. HIGHWAYS, § 72.

Application for transfer of cause from one state court to another. COURTS, § 487.

Appointment of administrator. EXECUTORS AND ADMINISTRATORS, § 20.

Of administrator de bonis non. EXECUTORS AND ADMINISTRATORS, § 37.

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Arbitration bond and agreements. ARBITRATION AND AWARD, § 25.

Ascertainment and entry of record of unrecorded highway. HIGHWAYS, § 15.

ASSAULT AND BATTERY, § 24.

Assessments for public improvements. HIGHWAYS, §§ 138, 144.

Assigned claims. ASSIGNMENTS, § 131.

ASSUMPSIT, ACTION OF, § 19.

ATTACHMENT, § 119.

Award. ARBITRATION AND AWARD, § 85.

Bail bonds. BAIL, §§ 33, 89.

Bank check by payee thereof. BANKS AND BANKING, § 155.

Notes or for nonpayment thereof. BANKS AND BANKING, § 212.

Bastardy proceedings. BASTARDS, § 40.

BILLS AND NOTES, §§ 461-471.

Bonds. BONDS, § 124.

For arrest or discharge therefrom. EXECUTION, § 453.

For repossession of property levied on for taxes. TAXATION, § 579.

For sale of property of decedent's estate. EXECUTORS AND ADMINISTRATORS, § 392.

For support of bastards. BASTARDS, § 89.

Of commissioners to make partition. PARTITION, § 91.

Of executors and administrators. EXECUTORS AND ADMINISTRATORS, § 537 (8).

Of guardians. GUARDIAN AND WARD, § 182.

Of highway contractors. HIGHWAYS, § 113.

Of justices of the peace. JUSTICES OF THE PEACE, § 29.

Of public officers—

CLERKS OF COURTS, § 75.

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SHERIFFS AND CONSTABLES, § 168.

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UNITED STATES MARSHALS, § 36.

Of surviving partners. PARTNERSHIP, § 250.

Or recognizance in bastardy proceedings. BASTARDS, § 47.

Or undertakings in attachment proceedings. ATTACHMENT, § 349.

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Or undertakings on appeal. APPEAL AND ERROR, § 1245.

BOUNTIES, § 1.

Breach of contract. CONTRACTS, §§ 332-337.

For carriage of passenger. CARRIERS, § 275.

Breach, etc.—(Cont'd).

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SALES, §§ 377, 411.

VENDOR AND PURCHASER, § 349.

To furnish means of transportation. CARRIERS, §§ 69, 227.

Breach of covenant. COVENANTS, § 114.

Breach of lease of land on shares. LANDLORD AND TENANT, § 331.

BREACH OF MARRIAGE PROMISE, § 18.

CANCELLATION OF INSTRUMENTS, § 37.

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Collection of tolls. TURNPIKES AND TOLL ROADS, § 43.

Collision between vessels. COLLISION, § 117.

Compelling re-execution of lost instrument.

LOST INSTRUMENTS, § 12.

Refunding of taxes. TAXATION, § 535.

Compensation of agent. PRINCIPAL AND AGENT, § 89.

Of attorney. ATTORNEY AND CLIENT, § 165.

Of broker. BROKERS, § 82.

Of clerk of court. CLERKS OF COURTS, § 37.

Of physician or surgeon. PHYSICIANS AND SURGEONS, § 24.

Of school teacher. SCHOOLS AND SCHOOL DISTRICTS, § 145.

COMPOSITION WITH CREDITORS, § 26.

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Condemnation proceedings. EMINENT DOMAIN, § 191.

Confirmation in trial of tax title. TAXATION, § 809.

CONSPIRACY, § 18.

Construction of gravel road. HIGHWAYS, § 101.

Of will. WILLS, § 702.

Contesting or setting aside will or probate. WILLS, §§ 281, 282.

Contract of reinsurance. INSURANCE, § 686.

Of suretyship. PRINCIPAL AND SURETY, § 155.

Conversion of or injury to mortgaged property. CHATTEL MORTGAGES, §§ 176, 177.

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Damages from public nuisance. NUISANCE, § 76.

From violation of anti-trust laws. MONOPOLIES, § 28.

From violation of civil rights laws. CIVIL RIGHTS, § 13.

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Determination, establishment, and protection of water rights. WATERS AND WATER COURSES, §§ 49, 107, 152.

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Of freight rates. CARRIERS, § 10.

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Of corporation. CORPORATIONS, § 614.

Distribution of estate of decedent. EXECUTORS AND ADMINISTRATORS, § 314.

Of proceeds of sale on foreclosure. MORTGAGES, § 568.

Diversion of waters. WATERS AND WATER COURSES, § 87.

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Ejection of passenger or intruder from train. CARRIERS, § 380.

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Enforcement of drainage assessments. DRAINS, § 90.

Of escheat. ESCHEAT, § 8.

Of laborer's lien. MASTER AND SERVANT, § 82.

Of landlord's lien for rent. LANDLORD AND TENANT, § 262.

Of liability of officers and agents of corporation for corporate debts and acts. CORPORATIONS, § 360.

Of liability of stockholders for corporate debts and acts. CORPORATIONS, § 268.

Of lien for taxes on recovery paid for invalid tax title. TAXATION, § 827.

Of mechanic's lien. MECHANICS' LIENS, § 271.

Of right of exemption—

EXEMPTIONS, § 147.

HOMESTEAD, § 213.

TAXATION, § 251.

Of right of subrogation. SUBROGATION, § 41.

Of right of subrogation of insurer to right of insured. INSURANCE, § 606.

Of vendor's lien. VENDOR AND PURCHASER, § 280.

Equitable relief against judgment. JUDGMENT, § 460.

Establishment and enforcement of trust. TRUSTS, § 371.

And protection of easements. EASEMENT, § 61.

Of boundaries. BOUNDARIES, § 32.

Of claim to attached property. ATTACHMENT, § 306.

Of claim to property taken on execution. EXECUTION, § 192.

Of highway. HIGHWAYS, § 29.

Failure or refusal to furnish telephonic services. TELEGRAPHS AND TELEPHONES, § 78.

To construct and maintain bridges over canals. CANALS, § 19.

To deliver leased premises. LANDLORD AND TENANT, § 129.

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To repair demised premises. LANDLORD AND TENANT, § 154.

FALSE IMPRISONMENT, § 20.
FORCIBLE ENTRY AND DETAINER, § 24.
Foreclosure of lien for cost of partition fence.
FENCES, § 15.
Of mechanic's lien. **MECHANICS' LIENS, § 317.**
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Injuries at railroad crossing. **RAILROADS, § 344.**
By animals. **ANIMALS, § 74.**
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By or to artificial ponds, reservoirs, channels, and dams. **WATERS AND WATER COURSES, § 179.**
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From defects in demised premises. **LANDLORD AND TENANT, § 169.**
From defects or obstructions in bridges. **BRIDGES, § 46.**
From defects or obstructions in highways. **HIGHWAYS, § 208.**
From defects or obstructions in streets. **MUNICIPAL CORPORATIONS, § 816.**
From drainage or discharge of surface waters. **WATERS AND WATER COURSES, § 126.**
From escape or explosion of gas. **GAS, § 20.**
From failure to repair partition fences. **FENCES, § 17.**
From fires caused by operation of railroads. **RAILROADS, § 478.**
From flowage. **WATERS AND WATER COURSES, § 179.**
From negligence. **NEGLIGENCE, § 107-114.**
From negligence of druggist. **DRUGGISTS, § 10.**
From negligence of register of deeds. **REGISTERS OF DEEDS, § 6.**
From negligence or default in transmission or delivery of telegraph or telephone message. **TELEGRAPHS AND TELEPHONES, § 65.**
From negligence or malpractice of hospitals, see **HOSPITALS, § 8.**
From negligence or malpractice of physician or surgeon. **PHYSICIANS AND SURGEONS, § 18.**
From negligence or misconduct of attorney. **ATTORNEY AND CLIENT, § 129.**

Injuries, etc.—(Cont'd).
From negligence or misconduct of justice. **JUSTICES OF THE PEACE, § 28.**
From negligence or misconduct of sheriff or constable. **SHERIFFS AND CONSTABLES, § 137.**
From negligence or wrongful acts of broker. **BROKERS, § 38.**
From negligent or wrongful use of highway. **HIGHWAYS, § 184.**
From negligent or wrongful use of street. **MUNICIPAL CORPORATIONS, § 706.**
From sale of liquor. **INTOXICATING LIQUORS, § 306.**
To animals caused by fences. **FENCES, § 25.**
To animals on or near railroad tracks. **RAILROADS, § 439.**
To child. **PARENT AND CHILD, § 7.**
To easements. **EASEMENTS, § 68.**
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INSOLVENCY, § 21.
Insurance policy. **INSURANCE, §§ 628-639, 815.**
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Loss of or injury to goods in course of transportation. **CARRIERS, §§ 131, 184.**
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To passenger's baggage. **CARRIERS, § 408.**
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Of navigable waters. **NAVIGABLE WATERS, § 26.**
Of private road. **PRIVATE ROADS, § 9.**
Or repulsion of flow of surface waters. **WATERS AND WATER COURSES, § 126.**
Opening or setting aside settlement by guardian. **GUARDIAN AND WARD, § 165.**

- Opening or vacating default judgment. JUDGMENT, § 151.
- Judgment of justice of the peace. JUSTICES OF THE PEACE, § 128.
- Opening pipe line. GAS, § 21.
- PARTITION, § 55.
- Penalty. PENALTIES, § 32.
- For abandonment of wife by husband. HUSBAND AND WIFE, § 305½.
- For delay in transmission or delivery of telegraph or telephone messages. TELEGRAPHS AND TELEPHONES, § 78.
- For failure or refusal to furnish telephonic services. TELEGRAPHS AND TELEPHONES, § 78.
- For failure or refusal to list or for making false list or schedule of property for assessment. TAXATION, § 845.
- For failure to pay wages. MASTER AND SERVANT, § 83.
- For negligence or default in transmission or delivery of telegraph or telephone message. TELEGRAPHS AND TELEPHONES, § 78.
- For refusal of inspection of corporate books. CORPORATIONS, § 513.
- For violation of liquor laws. INTOXICATING LIQUORS, § 187.
- For violation of regulations relating to carriers. CARRIERS, § 20.
- For violation of regulations relating to telegraph or telephone companies. TELEGRAPHS AND TELEPHONES, § 78.
- Pollution of surface waters. WATERS AND WATER COURSES, § 126.
- Of waters. WATERS AND WATER COURSES, § 77.
- Price of goods sold. SALES, § 353.
- Of land sold. VENDOR AND PURCHASER, § 314.
- Probate proceedings. WILLS, §§ 273-276.
- Quieting title. QUIETING TITLE, §§ 34-36.
- To public lands. PUBLIC LANDS, § 61.
- Quo Warranto, § 49.
- RECOGNIZANCES, § 12.
- Recovery of deposits in bank. BANKS AND BANKING, § 154.
- Of excess of charges paid to carrier. CARRIERS, § 202.
- Of insurance premiums paid. INSURANCE, § 198.
- Of interest. INTEREST, §§ 64-66.
- Of moneys collected by attorney. ATTORNEY AND CLIENT, § 128.
- Of overpayments on claims against estates of decedents. EXECUTORS AND ADMINISTRATORS, § 287.
- Of payments. PAYMENT, § 80.
- Of possession of leased property. LANDLORD AND TENANT, § 285.
- Of possession of mortgaged property. CHATTEL MORTGAGES, §§ 172, 173.
- Of price paid for goods. SALES, § 396.
- Of price paid for land. VENDOR AND PURCHASER, § 341.
- Of public funds in hands of clerk of court. CLERKS OF COURTS, § 70.
- Recovery, etc.—(Cont'd).
- Of public officer. OFFICERS, § 83.
- Of taxes paid. TAXATION, § 543.
- Of university lands. COLLEGES AND UNIVERSITIES, § 10.
- Redemption from judicial sale. JUDICIAL SALES, § 60.
- From mortgage sale. MORTGAGES, § 616.
- REFORMATION OF INSTRUMENTS, § 36.
- Refusal of carrier to furnish shipping facilities. CARRIERS, § 45.
- Removal of cause from state to federal court. REMOVAL OF CAUSES, § 86.
- Of executor or administrator. EXECUTORS AND ADMINISTRATORS, § 35.
- Of fixtures. FIXTURES, § 35.
- Or transfer of mortgaged property. CHATTEL MORTGAGES, § 229.
- Rent. LANDLORD AND TENANT, § 230.
- REPLEVIN, §§ 56-61.
- Rescission of contract of sale—
- SALES, § 130.
- VENDOR AND PURCHASER, § 123.
- Restraining collection of township tax. TOWNS, § 61.
- Construction of drain. DRAINS, § 40.
- Enforcement of drainage assessments. DRAINS, § 91.
- Enforcement of collection of highway assessments. HIGHWAYS, § 148.
- Enforcement of taxes. TAXATION, § 611.
- Making or delivery of tax deed. TAXATION, § 752.
- Nuisance on leased premises. LANDLORD AND TENANT, § 170.
- Obstruction of highway. HIGHWAYS, § 159.
- Removal of gate from right of way. EASEMENTS, § 60.
- Sale of allotment of work on drain. DRAINS, § 48.
- Review of judgment. JUDGMENT, § 335.
- REWARDS, § 15.
- Royalties on patented inventions. PATENTS, § 219.
- Sale of land to enforce assessment for public improvements. MUNICIPAL CORPORATIONS, § 567.
- Of property of decedent. EXECUTORS AND ADMINISTRATORS, § 336.
- SEDUCTION, § 16.
- Separate maintenance. HUSBAND AND WIFE, § 296.
- Specific performance of agreement to issue paid up insurance. INSURANCE, § 370.
- Services, supplies and other expenditures for paupers. PAUPERS, § 52.
- Setting aside conveyances in fraud of alimony. DIVORCE, § 276.
- Divorce decree. DIVORCE, § 167.
- Execution sale. EXECUTION, § 256.
- Mortgage. CHATTEL MORTGAGES, § 202.
- Settlement of accounts of executor or administrator. EXECUTORS AND ADMINISTRATORS, § 509 (G).
- Transfer in fraud of creditors or subsequent purchasers. FRAUDULENT CONVEYANCES, §§ 258-265.

SPECIFIC PERFORMANCE, § 114.Subscription. **SUBSCRIPTIONS, § 21.**To corporate stock. **CORPORATIONS, § 90.**
Supplementary proceedings. **EXECUTION, §§ 377, 387.****TORTS, § 26.****TRESPASS, § 40.****TROVER AND CONVERSION, § 32.**Unpaid taxes. **TAXATION, § 592.**

Use and Occupation, § 8.

Vacation of highway. **HIGHWAYS, § 77.**Wages. **MASTER AND SERVANT, § 80.**

Warrants, orders or certificate of indebtedness.

SCHOOLS AND SCHOOL DISTRICTS, § 95.**WORK AND LABOR, § 22.**Wrongful discharge of servant. **MASTER AND SERVANT, § 39.****§ 38½. Nature and office.**

Distinction from cross-complaint, see post, § 138.

[a] (**Sup. 1818**)

Under the act providing for the bringing of actions by petition and summons, a petition occupies the place of a declaration, and is to be considered in the same light, unless the statute creates a difference.—*Miller v. Green*, 1 Blackf. 469; *Heisland v. Wallace*, Id. 472.

[b] (**Sup. 1890**)

A single pleading cannot be permitted to perform the double function of a complaint and counterclaim.—*Toledo Agricultural Works v. Work*, 70 Ind. 253.

[c] (**App. 1894**)

The complaint is the foundation of the action, and on it alone the plaintiff must recover or not at all, and the reply cannot be looked to to aid it.—*Phenix Ins. Co. v. Rogers*, 38 N. E. 865, 11 Ind. App. 72.

FOR CASES FROM OTHER STATES,

See 31 Cyc. p. 92.

§ 39. Statutory provisions.[a] (**App. 1897**)

Rev. St. 1894, § 341 (*Horner's Rev. St. 1897, § 338*), requiring a complaint to contain "a statement of facts constituting the cause of action, in plain and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended," embodies the common-law rule requiring the facts to be set forth "with certainty."—*Speeder Cycle Co. v. Teeter*, 48 N. E. 595, 18 Ind. App. 474.

FOR CASES FROM OTHER STATES,

See 31 Cyc. pp. 92, 93.

§ 40. Time for filing or service.

Time of filing paragraph of pleading as affecting sufficiency of demurrer, see post, § 204.

Waiver of objections as to time of filing, see **APPEARANCE, § 26.****FOR CASES FROM OTHER STATES,**

SEE 39 CENT. DIG. Plead. §§ 91-95; 42 CENT. DIG. Replev. § 210.

See, also, 31 Cyc. pp. 125, 126.

§ 41. Form and requisites of declaration in general.[a] (**Sup. 1855**)

When a statute prescribing a form of declaration dispenses with an averment which would otherwise be indispensable, the statute, by dispensing with the averment, stands itself in the place of such averment.—*Shinloub v. Ammerman*, 7 Ind. 347.

[b] (**Sup. 1864**)

A complaint in the following form: "The Toledo & Wabash Railway Co., to Emanuel F. Lurch, Dr. 1861, November. To one cow killed by your locomotive, within Clinton township, Cass county, Indiana, \$50,"—does not allege facts sufficient to constitute a cause of action.—*Toledo & W. R. Co. v. Lurch*, 23 Ind. 10.

[c] (**Sup. 1887**)

A complaint good upon demurrer is a fortiori good when attacked for the first time by assignment of error in the supreme court.—*Continental Life Ins. Co. v. Hauser*, 111 Ind. 266, 12 N. E. 479.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 96.

See, also, 28 Cyc. p. 45; 31 Cyc. pp. 92, 93.

§ 42. Form and requisites of complaint, petition, or statement in general.[a] (**App. 1909**)

In this state the common count is sufficient as a complaint, though it does not meet the requirement of the Code that facts be stated in plain and concise language. *Rehearing*, 88 N. E. 636, denied.—*Southern Ry. Co. v. Hazlewood*, 90 N. E. 18.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 96.

See, also, 28 Cyc. p. 45; 31 Cyc. pp. 92, 93.

§ 43. Title or caption.Clerical error in title of foreclosure suit, see **MORTGAGES, § 439.**In justices' courts, see **JUSTICES OF THE PEACE, § 91.**

Names and description of parties, see post, § 46.

[a] (**Sup. 1866**)

A complaint commenced as follows: "In the Court of Common Pleas of Huntington County, October Term, 1863. A. B. Complains of C. D., and says," etc. *Held*, that it contained sufficiently the title of the cause, under Code, § 49.—*Ammerman v. Crosby*, 26 Ind. 451.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 97.

See, also, 31 Cyc. pp. 93, 94.

§ 44. Designation of court and term.

In justices' courts, see JUSTICES OF THE PEACE, § 91.

[a] (Sup. 1884)

The failure of a complaint to state the court in which the suit is brought is not a ground of demurrer.—*Smith v. Flack*, 95 Ind. 116.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 98, 99.

See, also, 31 Cyc. p. 94.

§ 45. Venue or designation of place of trial.

Aider by verdict or judgment, see post, § 433.

In justices' courts, see JUSTICES OF THE PEACE, § 91.

Waiver of objection, see post, § 407.

[a] (Sup. 1827)

Where no venue is laid in the body of a declaration, reference must be had to the margin, and the venue there is sufficient.—*Capp v. Gilman*, 2 Blackf. 45.

[b] (Sup. 1836)

In trespass quare clausum, the name of the county was stated in the margin, and the close was described as situated in that county. *Held*, that the venue was well laid.—*Rucker v. McNeely*, 4 Blackf. 179.

[c] (Sup. 1839)

A complaint in an action for damages for an assault is not objectionable on the ground that it does not state the venue, as it is sufficient to allege the facts constituting the cause of action without stating the county in which the unlawful acts were committed.—*Sullivan v. Jones*, 117 Ind. 327, 20 N. E. 242.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 100.

See, also, 31 Cyc. pp. 94-96.

§ 46. Names, description, and capacity of parties.

Conformity to process, see post, § 74.

Idem sonans, see NAMES. § 16.

Pleading right of plaintiff, see post, § 56.

[a] (Sup. 1874)

In an action for breach of promise of marriage, where the names of the plaintiff and defendant were given in full in the caption and commencement of the complaint, but in a paragraph of the complaint the plaintiff was identified as "she" and "her," without reference to the caption, *held*, that the parties were sufficiently referred to and identified.—*Cates v. McKinney*, 48 Ind. 562, 17 Am. Rep. 768.

[b] (Sup. 1877)

Failure of a complaint to set out the names of the plaintiffs is a fatal defect, if not cured by the process, amendment, or other pleading in which the names are properly stated.—*Sherrod v. Shirley*, 57 Ind. 13.

[c] (Sup. 1883)

Where a paragraph of a complaint in its title contains the full names of plaintiff and defendants, and mentions them afterwards as "the said plaintiff" and "the said defendants," it is sufficient, without repeating the proper names of the parties in the body of the paragraph.—*Madgett v. Fleenor*, 90 Ind. 517.

[d] (Sup. 1885)

Parties against whom relief is demanded must be designated by name in the complaint as defendants.—*Anderson v. Wilson*, 100 Ind. 402.

[e] (Sup. 1889)

In an action in rem against land, it is sufficient in making one a party defendant, to allege that he has, or claims to have, some interest in the land, without alleging the nature of such interest.—*Otis v. De Boer*, 116 Ind. 531, 19 N. E. 317.

[f] (App. 1892)

Rev. St. § 338, declaring that the title of a cause, contained in the complaint, shall specify, among other things, the "names" of the parties, requires, not merely plaintiffs' initials, but their Christian names as well; and where these do not appear in the title, or elsewhere in any of the pleadings, and the defect is not cured in any manner, the complaint is bad on demurrer.—*Bascom v. Toner*, 5 Ind. App. 229, 31 N. E. 856.

[g] The omission to name the defendants in the body of a complaint is not fatal where the name is set out in the caption.—(Sup. 1894) *Cosby v. Powers*, 137 Ind. 694, 37 N. E. 321; (App. 1907) *Indianapolis St. Ry. Co. v. Coyner*, 39 Ind. App. 510, 80 N. E. 168.

[h] (App. 1894)

A complaint which uses the feminine pronoun when reference is made to complainant sufficiently shows that she is a female.—*Cosand v. Lee*, 11 Ind. App. 511, 38 N. E. 1099.

[i] (App. 1895)

A complaint is bad which does not give the Christian name of plaintiff, unless this is supplied by other pleadings in the case.—*Cooper v. Griffin*, 13 Ind. App. 212, 40 N. E. 710.

[j] (Sup. 1897)

In an action for death, it is sufficient that the names of the parties be correctly stated in the title, and they need not be thereafter referred to in the complaint, except generally as plaintiffs or defendants, unless it becomes necessary in an allegation to particularize some plaintiff or defendant.—*Chicago & E. R. Co. v. Thomas*, 46 N. E. 73, 147 Ind. 35.

[k] (App. 1908)

Where a party is sued in his fiduciary or representative capacity, the complaint must contain sufficient averments to show that the action is so brought, and that his interest or right is in such capacity.—*Waldrip v. McConnell*, 42 Ind. App. 54, 84 N. E. 517.

[i] (App. 1909)

A caption of a complaint was "State of Indiana ex rel. Otis P. Crim, Auditor of Madison County, v.," etc. It began, "State of Indiana, on the relation of Otis P. Crim, as auditor of Madison county, Ind., complains," etc.; but there was no formal averment that relator was auditor of Madison county, duly elected, qualified, and acting. *Held*, that it sufficiently averred he was auditor of Madison county, in view of the rule in favor of a liberal interpretation of averments as to incidental or collateral matters not going to the merits, and Burns' Ann. St. 1908, § 385, providing that allegations shall be liberally construed, with a view to substantial justice.—*Heritage v. State ex rel. Crim*, 43 Ind. App. 595, 88 N. E. 114.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 101-103.

See, also, 31 Cyc. pp. 96-100.

§ 48. Statement of cause of action in general.

Single and entire cause of action, see ACTION, § 38.

[a] (Sup. 1872)

An allegation in a complaint that defendant is indebted to plaintiff, being substantially in accordance with the form required by statute, is sufficient to show that the debt is due and unpaid.—*Johnson v. Kilgore*, 39 Ind. 147.

[b] (Sup. 1873)

A complaint charging that defendant, as agent of plaintiff, had sold realty, and received the money therefor, and failed to account, and also charging him with a balance due for personalty sold him, is good as against a demurrer for want of sufficient facts.—*Ferguson v. Ramsey*, 41 Ind. 511.

[c] (Sup. 1881)

While the Code requires that the complaint must state the facts constituting the cause of action, this does not mean that a full history of the transaction out of which the action arises must be given.—*Uhl v. Harvey*, 78 Ind. 26.

[d] A complaint that defendant "owes" a debt is not a complaint that the debt is "due."—(Sup. 1882) *Musselman v. Wise*, 84 Ind. 248; (App. 1894) *Jaqua v. Shewalter*, 10 Ind. App. 234, 36 N. E. 173, 37 N. E. 1072.

[e] A complaint which states facts entitling plaintiff to some relief is good on demurrer.—(Sup. 1882) *Hewitt v. Powers*, 84 Ind. 295; (1883) *McFall v. Howe Sewing Mach. Co.*, 90 Ind. 148; (1883) *Landers v. Beck*, 92 Ind. 49; (1883) *Tipton Fire Co. v. Barnheisel*, Id. 88; (1883) *Baker v. Allen*, Id. 101; (1885) *Wolke v. Fleming*, 103 Ind. 105, 2 N. E. 325, 53 Am. Rep. 495.

[f] (Sup. 1890)

An assignment of error that the complaint does not state facts sufficient to constitute a cause of action is not available for the reversal

of the judgment, unless some fact essential to the existence of the cause has been wholly omitted from the complaint.—*McGregor v. Hubbs*, 25 N. E. 591, 125 Ind. 487.

[g] (Sup. 1894)

A complaint which alleges that a will bequeathing property to plaintiff was secreted by one of testator's heirs does not state a cause of action against him, in the absence of any allegation that plaintiff did not receive the property bequeathed to her.—*Shultz v. Shultz*, 136 Ind. 323, 36 N. E. 126.

[h] (App. 1894)

A plaintiff or claimant has a right to set up in his complaint or claim as many considerations as he chooses, and, if he succeeds in establishing any one of them which is valid and adequate, it is sufficient.—*Barnett v. Franklin College*, 37 N. E. 427, 10 Ind. App. 103.

[i] (Sup. 1895)

A complaint alleged that defendants obtained a conveyance of certain land from plaintiff's wife, and claimed thereunder an interest in land belonging to plaintiff, and procured a conveyance thereof from a commissioner, by order of a certain court, and that plaintiff thereby lost his title. The complaint showed that such court had jurisdiction of the subject-matter of the proceeding, but failed to allege that plaintiff was a party thereto. *Held*, that the complaint was demurrable, since, if plaintiff was a party, he was bound by the order, and if he was not a party he was not bound thereby, and suffered no injury therefrom.—*Davis v. Taylor*, 140 Ind. 439, 39 N. E. 551.

[j] (App. 1895)

In an action on an injunction bond for attorney's fees incurred in procuring the dissolution of the injunction, an allegation in the complaint that the judgment dissolving the injunction had been in all things affirmed by the supreme court is a sufficient averment to withstand a demurrer on the ground that the 60 days allowed for a petition for a rehearing after the affirmance of the cause in the supreme court had not expired.—*Rhodes-Burford Furniture Co. v. Mattox*, 13 Ind. App. 221, 40 N. E. 545.

[k] (App. 1895)

In determining the sufficiency of the facts alleged in the complaint to state a cause of action, the court can look to nothing except the complaint itself. Other pleadings filed, or the evidence, neither strengthen nor weaken the facts alleged in a complaint, when the sufficiency of the facts alleged to state a cause of action is being considered.—*Elwood Natural Gas & Oil Co. v. Baker*, 41 N. E. 1063, 13 Ind. App. 576.

[l] (Sup. 1903)

A complaint good at common law or under the Code must contain a clear statement of all the facts necessary for the plaintiff to prove in the first instance, on an answer of general de-

mial, to show that he is entitled to judgment.—*Lake Erie & W. R. Co. v. Holland*, 69 N. E. 138, 162 Ind. 406, 63 L. R. A. 948.

[m] (App. 1906)

It is essential to the sufficiency of a complaint on demurrer that upon a reasonable construction of the language used it may be seen by an inspection of the pleading that all the facts necessary to a complete right of action are stated in such a manner that such right may be said to arise necessarily from them upon some definite theory, and in such form that, the defendant being thereby fully informed of the nature of plaintiff's claim, the pleading will be susceptible of denial by answer, so that, upon being so traversed, a distinct issue of fact will be formed for trial.—*Corbin Oil Co. v. Searles*, 75 N. E. 293, 36 Ind. App. 215.

[n] (App. 1906)

A complaint is to be construed as a whole, and, if it contains facts enough directly stated to authorize any relief, it is not demurrable for want of facts.—*Indianapolis & N. W. Traction Co. v. Henderson*, 39 Ind. App. 324, 79 N. E. 539.

[o] (Sup. 1907)

A complaint is good if it substantially states a cause of action, though objectionable for uncertainty.—*Chicago & E. R. Co. v. Lawrence*, 169 Ind. 319, 79 N. E. 363, 82 N. E. 768.

[p] (App. 1908)

An assignment of error to a complaint, if it stated a cause of action, cannot be sustained where it states facts sufficient to bar another action.—*Small v. Binford*, 41 Ind. App. 440, 83 N. E. 507, 84 N. E. 19.

[q] (App. 1909)

All that the statute requires as to a complaint is that it shall be couched in such plain and concise language as to enable a person of common understanding to know what is intended.—*City of Laporte v. Osborn*, 43 Ind. App. 100, 86 N. E. 995.

[r] (App. 1909)

A complainant must state the facts constituting his cause of action in plain and concise language, and so as to enable a person of common understanding to know what was intended, and not by way of inference, innuendo, or recital.—*Holliday & Wyon Co. v. O'Donnell*, 90 N. E. 24.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 105, 106.

See, also, 31 Cyc. pp. 100–116.

§ 49. Theory and form of action.

Conformity of proof to theory of complaint, see post, § 380.

Cure by verdict, see post, § 433.

Failure to state cause of action on theory on which complaint is drawn as ground for demurrer, see post, § 193.

Pleading different theories in separate counts, see post, § 53.

Statement of more than one theory as ground for demurrer, see post, § 193.

Theory of pleading in general, see ante, § 44.

Variance between theory of pleading and proof, see post, § 387.

Want of theory as ground for demurrer, see post, § 193.

[a] (Sup. 1882)

The plaintiff cannot declare on one theory and recover on another, and, where a complaint professes to be founded on a written instrument and to rely thereon as the cause of action, the party cannot ask that it be held sufficient as setting forth some other right of action.—*Johnston v. Griest*, 85 Ind. 503.

[b.c] Where the prayer of a complaint is consistent with the facts stated, it is proper to consider it with such facts to determine the nature and character of the action.—(Sup. 1883) *Physio-Medical College v. Wilkinson*, 89 Ind. 23; (1892) *Monnett v. Turpie*, 32 N. E. 328, 132 Ind. 482, 133 Ind. 424.

[d] A complaint must be based upon some definite theory.—(Sup. 1883) *Mescall v. Tully*, 91 Ind. 96; (1885) *Chicago, St. L. & P. R. Co. v. Bills*, 104 Ind. 13, 3 N. E. 611; (1886) *First Nat. Bank v. Root*, 107 Ind. 224, 8 N. E. 105; (App. 1906) *Holliday v. Perry*, 38 Ind. App. 588, 78 N. E. 877; (Sup. 1908) *Oblitic Stone Co. v. Ridge*, 169 Ind. 639, 83 N. E. 246; (1909) *State v. Adams Exp. Co.*, 172 Ind. 10, 87 N. E. 712; (1909) *Same v. American Exp. Co.*, 172 Ind. 717, 87 N. E. 716; *Same v. United States Exp. Co.*, Id.; (App. 1909) *Flowers v. Poorman*, 43 Ind. App. 528, 87 N. E. 1107.

[e] (Sup. 1886)

The character of an action is determined by the facts stated in the petition, and not by the prayer for relief.—*Houck v. Graham*, 6 N. E. 594, 106 Ind. 195, 55 Am. Rep. 727.

[f] (Sup. 1887)

Where the complaint proceeds upon a certain theory, the plaintiff cannot recover upon any other theory.—*Green v. Groves*, 109 Ind. 519, 10 N. E. 401.

[g] (Sup. 1889)

Where a complaint is framed on the theory that it is a bill to review a judgment, it cannot be urged that, if insufficient as such, it is good as an application to be relieved from the judgment on the ground of mistake, inadvertence, etc. A pleading must stand or fall on the theory originally adopted.—*Baker v. Ludlam*, 118 Ind. 87, 20 N. E. 648.

[h] (App. 1891)

Where a complaint charges the defendant with abducting and seducing the plaintiff's daughter, it is immaterial for the purposes of demurrer whether the gravamen of the action is the alleged abduction or seduction, when the

complaint states a good cause of action upon either theory.—*Kreag v. Anthus*, 2 Ind. App. 482, 28 N. E. 773.

[i] The nature of an action must be determined from the general character and scope of the pleading, disregarding isolated and detached allegations not essential to the main theory.—(Sup. 1892) *Monnett v. Turpie*, 32 N. E. 328, 132 Ind. 482, 133 Ind. 424; (1908) *State ex rel. White v. Scott*, 171 Ind. 349, 86 N. E. 409.

[j] (Sup. 1892)

The court will not presume that the plaintiff instituted an action on a particular theory, when, according to that theory, a material and substantial portion of the subject-matter of the action is wholly without the jurisdiction of the court, if another theory, equally sustained by the facts pleaded and relief demanded, would bring the whole subject-matter within its jurisdiction.—*Monnett v. Turpie*, 32 N. E. 328, 132 Ind. 482, 133 Ind. 424.

While the nature of an action must be determined from the substantive facts pleaded and not from the prayer for relief, the statement of the relief demanded may be looked to in connection with other averments.—*Id.*

[k] (App. 1893)

The theory and sufficiency of a complaint cannot be determined simply from the statements or admissions of the parties, but must be determined from the facts alleged.—*American Wire Nail Co. v. Connelly*, 35 N. E. 721, 8 Ind. App. 398.

[l] (Sup. 1894)

One cannot sue a railroad as an employé and recover as a passenger.—*Evansville & R. R. Co. v. Barnes*, 137 Ind. 306, 36 N. E. 1092.

[m] (Sup. 1894)

A pleading must proceed on a single definite theory, and, if insufficient upon that theory, it is demurrable, however sufficient it may be on some other.—*Aetna Powder Co. v. Hildebrand*, 137 Ind. 402, 37 N. E. 136.

[n] (App. 1894)

The rule that a complaint must proceed on a definite theory, and that a recovery can be had only according to the averments of the complaint, applies when there is in the complaint no averment whatever entitling the plaintiff to the relief obtained.—*Phenix Ins. Co. v. Rogers*, 38 N. E. 865, 11 Ind. App. 72.

[o] (App. 1895)

When the theory of a complaint is settled, any fact alleged pertinent to that theory of the complaint may be considered in conjunction with the other facts pleaded pertinent to the same theory in determining the sufficiency of the facts pleaded to constitute a cause of action.—*Romona Oolitic Stone Co. v. Tate*, 37 N. E. 1065, 39 N. E. 529, 12 Ind. App. 57.

[p] (App. 1895)

The rule that a pleading must proceed upon a definite theory is sufficiently complied

with when it is so constructed as to show a definite liability.—*South Bend Mfg. Co. v. Liphart*, 12 Ind. App. 185, 39 N. E. 908.

[q] (App. 1897)

Since every complaint must proceed on some single, definite theory, the court may construe it as proceeding on the theory most clearly authorized by the facts stated, and require the case to be tried on that theory.—*Miller v. Miller*, 47 N. E. 338, 17 Ind. App. 605.

[r] (App. 1897)

A complaint should not be drawn with a view to make it good as a complaint for either a negligent or willful injury, or for an injury both willful and negligent. It should proceed definitely upon one theory or the other; and, to be good as a complaint for willful injury, it should show by some consistent form of averment that the injurious act was purposely done with the intent on the part of the doer to inflict the particular injury of which complaint is made.—*Kalen v. Terre Haute & I. R. Co.*, 47 N. E. 694, 18 Ind. App. 202, 63 Am. St. Rep. 343.

[s] (Sup. 1899)

The rule that a complaint must proceed on a definite theory, and must state a good cause of action on such theory, does not require that the complaint should state facts entitling plaintiff to all the relief demanded; the complaint being sufficient to withstand a demurrer or assignment of error that it does not state facts sufficient to constitute a cause of action, if it states facts entitling plaintiff to any of the relief asked on the theory of his case presented.—*Yorn v. Bracken*, 55 N. E. 257, 153 Ind. 492.

[t] (App. 1899)

A party must recover, if at all, on the theory of at least one paragraph of his complaint.—*Richardson v. League*, 52 N. E. 618, 21 Ind. App. 429.

[tt] (Sup. 1900)

Where a complaint to set aside an assignment by plaintiff's decedent, on the ground of unsound mind, stated a cause of action on that ground, the fact that the complaint also stated facts sufficient to authorize the relief prayed for, on the ground of fraud, will not render the complaint demurrable as failing to state a cause of action.—*Mark v. North*, 57 N. E. 902, 155 Ind. 575.

[u] (App. 1900)

A complaint cannot have the double theory of asking damages on account of delay and inconvenience caused by plaintiff's failure to get passage upon the train she attempted to enter, and having to wait for another train which went a few hours later, and also to recover damages for personal injuries caused by fright, resulting in nervous prostration and permanent impairment of health. These two theories are inconsistent and rest upon entirely different reasons.—*Cleveland, C. & St. L. Ry. Co. v. Stewart*, 56 N. E. 917, 24 Ind. App. 374.

[uu] (App. 1901)

The theory of an action and the relief sought are to be determined from the general scope of the pleading.—*Carpenter v. Willard Library Trustees*, 60 N. E. 365, 26 Ind. App. 619.

[v] (Sup. 1902)

The theory of a complaint is to be determined by its averments, and not by its prayer.—*State ex rel. Warren v. Ogan*, 63 N. E. 227, 159 Ind. 119.

[vv] (App. 1903)

The substantive facts pleaded, and not the prayer for relief, nor the name given to the action by the pleader, determine the nature of the cause of action; but where the prayer for relief is consistent with the facts pleaded it is proper to consider that the facts averred to determine the nature and character of the action.—*Krise v. Wilson*, 68 N. E. 693, 31 Ind. App. 590.

[w] (App. 1904)

A complaint must proceed upon a definite theory, and hence an action for damages for breach of a contract in writing will not lie, where the writing was in the form of a bilateral contract, but not signed by defendant.—*Ellison v. Towne*, 34 Ind. App. 22, 72 N. E. 270.

[ww] (Sup. 1906)

A complaint consisting of but one paragraph cannot be treated as warranting a decree declaring a certain assessment void, and at the same time be supported as advancing the inconsistent theory that the assessment exhausted the jurisdiction of the assessing authorities to make a further assessment; but the court would consider the complaint on the theory which seemed warranted by the whole instrument, and require plaintiff to stand or fall by that theory.—*Dyer v. Woods*, 76 N. E. 624, 106 Ind. 44.

[x] (Sup. 1908)

The rule that a complaint must proceed on a definite theory, and must be good on that theory, does not require that plaintiff must be entitled to all the relief asked for in the complaint; but if plaintiff is entitled to any of the relief asked for on the theory of his case, the complaint is good as against a demurrer or assignment of error that the same does not state facts sufficient to constitute a cause of action.—*Oolitic Stone Co. v. Ridge*, 169 Ind. 639, 83 N. E. 246.

Where a complaint states facts sufficient to constitute a cause of action, the mere fact that it is difficult to tell which of two theories is the true one will not render it insufficient on demurrer for want of facts, where it is so framed that either theory is consistent therewith.—*Id.*

[xx] (Sup. 1908)

Plaintiff, if stating his cause of action on two distinct theories in the same paragraph of complaint, can proceed on only one, and must, in order to prevail, establish his right of recovery

on the theory adopted.—*State ex rel. White v. Scott*, 171 Ind. 349, 86 N. E. 409.

[y] (App. 1908)

In an action to foreclose a mechanic's lien, the first paragraph of the complaint proceeded on the theory that the lot in question was owned by defendants; that plaintiff sold the materials to one who had contracted with defendants to construct a dwelling house on the lot. The second paragraph proceeded on the theory that one of the defendants was the owner of the lot, and that another of defendants, as his agent, entered into the contract for the erection of a dwelling house on the lot under which the building was erected, and the material furnished by plaintiff for the contractor. The third proceeded on the theory that the lot was the property of one of the defendants, and that he was estopped from denying liability or from rendering his property liable for payment of plaintiff's claim. *Held*, that each of the paragraphs proceeded on a definite theory, and complied with the rule that a pleading must proceed on a definite theory, and that each theory must be embraced in a separate paragraph.—*Williamson v. Shank*, 41 Ind. App. 513, 83 N. E. 641.

[yy] (App. 1909)

The "theory of the case" refers to the facts on which the right of action is claimed to exist, and if the facts stated as the basis of a right to recover are sufficient, either at common law or by statute, the complaint is good as against a demurrer, though the pleader himself may have been mistaken as to the law awarding him his right.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Rogers*, 87 N. E. 28.

[z] (App. 1909)

It is the facts averred and relief sought that must determine the nature of the action, and not the designation given the parties defendant.—*Swing v. Hill*, 88 N. E. 721.

[zz] (App. 1910)

Every action must proceed on some definite legal theory, and defendant should be apprised of such theory by the direct averments of the complaint.—*Fowler v. Ft. Wayne & Wabash Valley Traction Co.*, 91 N. E. 47.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. §§ 107-111.

See, also, 31 Cyc. p. 116.

§ 50. Separate causes of action.

Debt on specialty and debt on simple contract, see DEBT, ACTION OF, § 11.

Election between causes of action, see post, § 369.

Joinder of causes of action, see ACTION, §§ 39-50.

Misjoinder as ground for striking matter from pleading, see post, § 362.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 112, 113.

See, also, 31 Cyc. pp. 118, 119.

§ 51. — In general.

[a] (App. 1908)

The acts of negligence not being dependent on one another, separate causes of action are set up by a complaint alleging the circumstances of the killing by a street car of a child while crossing a street, and averring that the car was run at a dangerous and unreasonable speed, and a greater rate than allowed by ordinance; that the only means of stopping the car was a hand brake, which was insufficient for such purpose; that while the street was straight and level a long distance, and the child was in plain view of the motorman, the car was run to within 50 feet of the child at said high rate of speed, and till it was too late to stop it; that no warning signal was given; that there was no guard or fender on the front of the car; and that its vestibule did not afford the motorman a proper lookout.—*Louisville & S. I. Traction Co. v. Short*, 41 Ind. App. 570, 83 N. E. 265.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 112.

See, also, 31 Cyc. p. 118.

§ 52. — Separate statement and numbering.

Failure to separately state and number as ground for demurrer, see post, § 193.

Motion for separate statement and numbering, see post, § 368.

Of grounds of objection in demurrer, see post, § 201.

Scope and extent of demurrer, see post, § 203.

Separate statement of defenses, see post, § 94.

[a] (Sup. 1868)

Animals killed or injured at different times constitute separate and distinct causes of action, each of which should be stated in a separate paragraph of the complaint; and, where the complaint indicates but one cause of action, the plaintiff should be confined, in his evidence, to a single transaction.—*Jeffersonville, M. & I. R. Co. v. Brevoort*, 30 Ind. 324.

[b] (Sup. 1880)

One suing for the breach of two or more covenants in a deed may state all the breaches relied upon in a single paragraph.—*Sheetz v. Longlois*, 69 Ind. 491.

[c] (App. 1891)

Where all the items upon which a recovery is claimed are alleged breaches of the same contract, it is not necessary that there should be a separate paragraph for each breach; but all may be embraced in one by assigning each item as a separate breach.—*Smiley v. Deweese*, 27 N. E. 505, 1 Ind. App. 211.

In an action for breach of a contract to rent land to plaintiff, he sought to recover the value of three acres of grass included in the contract, but used by defendant; the value of the use of a barn, likewise included, but retained by defendant; and the value of twenty acres of corn land, and six acres of pasture land,

which defendant rented to another person in violation of the contract. *Held*, that these are separate breaches of an entire contract, and not separate causes of action which defendant is entitled, under Rev. St. 1881, § 381, to have stated in separate paragraphs.—*Id.*

[d] (Sup. 1896)

Separate and independent causes of action, amounting to several hundred in number and covering a period of six years, need not, where they are based upon similar facts, be stated in separate paragraphs of the complaint.—*Chicago, St. L. & P. R. Co. v. Wolcott*, 141 Ind. 267, 39 N. E. 451, 50 Am. St. Rep. 320.

[e] (Sup. 1908)

In an action at common law for personal injuries to an employé, plaintiff may include in his complaint as many acts as he thinks in any way contributed to the accident, without making the complaint amenable to a motion to separate it into independent paragraphs.—*Knickerbocker Ice Co. v. Gray*, 171 Ind. 395, 84 N. E. 341.

[f] (App. 1908)

The complaint for the killing of a child by a street car, alleging acts of negligence not dependent on each other, need not allege the separate causes of negligence in separate paragraphs.—*Louisville & S. I. Traction Co. v. Short*, 41 Ind. App. 570, 83 N. E. 265.

[g] (App. 1909)

Where each paragraph stated only one cause of action, a motion to require plaintiff to separate into paragraphs and number the several causes of action stated in each was properly overruled.—*Pittsburgh, C., C. & St. L. Ry. Co. v. German Ins. Co.*, 87 N. E. 995.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 113.

See, also, 31 Cyc. p. 118.

§ 53. Separate counts on same cause of action.

Verdict on pleading containing several counts, see TRIAL, § 330.

[a] (Sup. 1852)

Where a declaration contains two counts, each count on a question of jurisdiction must be considered as containing a distinct cause of action.—*Markin v. Jornigan*, 3 Ind. 548.

[b] (Sup. 1862)

Each count in a complaint must be good by itself, and the prayer for relief cannot enlarge the allegations in the complaint.—*Leabo v. Detrick*, 18 Ind. 414.

[c] (Sup. 1863)

In a complaint to recover the value of stock killed by a railroad company, in one count whereof the stock is described as common stock, and in another as stock of the full blood, such difference is sufficiently material to sustain and render proper separate counts.—*Toledo & W. Ry. Co. v. Daniels*, 21 Ind. 256.

[d] (Sup. 1876)

Under our practice, the same cause of action may be stated in different forms in as many different paragraphs of the complaint, in order that there may be an appropriate allegation for any form which the proof may take. Thus, in an action for the price of land conveyed by plaintiff to defendant, the plaintiff may complain upon a special contract for a fixed price, and under this paragraph may prove the consideration really agreed for, though different from that named in the deed; and he may also complain for what the land was reasonably worth, and under this paragraph show the market value.—*Stearns v. Dubois*, 55 Ind. 257.

[e] (Sup. 1887)

In an action to enjoin county commissioners from contracting for the erection of a bridge, plaintiff filed a third paragraph to his complaint, which failed to state that he was a taxpayer of the county, or that he would be damaged by the erection of the bridge. *Held* that, under the rules of practice, each paragraph in a complaint must be complete in itself, and, if defective, cannot be cured by reference to a preceding paragraph.—*Farris v. Jones*, 112 Ind. 498, 14 N. E. 484.

[f] (Sup. 1892)

Where plaintiff desires to present a cause of action on different theories, he must plead in separate paragraphs of his complaint confining each paragraph to a distinct theory.—*Batman v. Snoddy*, 32 N. E. 327, 132 Ind. 480.

[g] (App. 1893)

A paragraph of a complaint is demurrable where it states a cause of action which requires neither more nor less evidence to establish it than is necessary to establish the cause stated in a previous paragraph.—*Leiter v. Jackson*, 8 Ind. App. 98, 35 N. E. 289.

[h] (Sup. 1903)

Where certain paragraphs of a complaint constitute an independent pleading, they are not rendered invalid because the same things are alleged in other paragraphs.—*Lake Erie & W. R. Co. v. Holland*, 69 N. E. 138, 162 Ind. 406, 63 L. R. A. 948.

[i] (App. 1905)

The fact that plaintiff may state a single cause of action in several counts or paragraphs does not change the rule that each count or paragraph must stand or fall on its own averments, unaided by facts alleged in other paragraphs.—*Daly v. Gubbins*, 73 N. E. 833, 35 Ind. App. 86.

[j] (Sup. 1909)

Plaintiff may state his cause of action on related but different theories in separate paragraphs, and, where both paragraphs were in tort and were based on the same facts, that one was grounded on the statute making a railroad liable for injuries caused by negligence of a co-employé in charge of an engine, etc., and the other was framed under the com-

mon law, did not make them inconsistent.—*Cleveland, C., C. & St. L. Ry. Co. v. Gossett*, 172 Ind. 525, 87 N. E. 723.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. §§ 114–117.

See, also, 31 Cyc. pp. 121, 122; note, 72 Am. Dec. 588.

§ 54. Reference from one count or paragraph to another.

In cross-complaint, see post, § 147.

Reference from one plea or paragraph of answer to another, see post, § 95.

Reference to written instrument filed with other count, see post, § 311.

[a] Defective allegations in one paragraph of a pleading cannot be aided or cured by reference to the allegations of another paragraph.—(Sup. 1865) *Day v. Vallette*, 25 Ind. 42, 87 Am. Dec. 353; (1877) *McCaran v. Cochran*, 57 Ind. 166; (1879) *Smith v. Little*, 67 Ind. 549; (1884) *Lynn v. Crim*, 96 Ind. 89; (1887) *Ludlow v. Ludlow*, 109 Ind. 199, 9 N. E. 769.

[b] (Sup. 1868)

Each paragraph of a complaint must be complete in itself. It is not sufficient, in a second or subsequent paragraph, to refer to a fact or averment contained in a preceding one without setting out such fact or averment.—*Mason v. Weston*, 29 Ind. 561.

[c] (Sup. 1869)

A description of property as set out in one paragraph of the complaint as to which paragraph the action has been dismissed cannot be made a part of another paragraph by reference to the former.—*Clarke v. Featherston*, 32 Ind. 142.

[d] (Sup. 1880)

A paragraph of a complaint in replevin which fails to describe the property, except by referring to it as "the property mentioned in the first paragraph of this complaint," is bad.—*Entsminger v. Jackson*, 73 Ind. 144.

[e] (Sup. 1882)

The rule that each paragraph of a complaint must within itself contain a good cause of action does not require the repetition of the names of the parties which have been previously given in full, either in the title of the cause or in some preceding paragraph, nor is it applicable to cases where one paragraph refers to another for the purpose of the mere identification of some person or thing which is common to both paragraphs.—*Thompson v. Edwards*, 85 Ind. 414.

[f] (Sup. 1884)

Each paragraph must be sufficient of itself, and cannot be made good by reference to another paragraph for substantial averments, but it is not necessary to repeat the names of all the parties in each subsequent paragraph, and a reference may be made to them as the

"said defendant" or the "said plaintiff."—*Carver v. Carver*, 97 Ind. 497.

[g] (App. 1893)

A paragraph of a complaint cannot be completed by reference to another paragraph.—*Little v. Board of Com'rs of Hamilton County*, 7 Ind. App. 118, 34 N. E. 499.

[h] (Sup. 1899)

Facts averred in one paragraph of a pleading cannot be made a part of another paragraph by reference.—*Corbey v. Rogers*, 52 N. E. 748, 152 Ind. 169.

[i] (App. 1908)

A paragraph of a pleading tested by demurrer must stand or fall unaided by the allegations of another paragraph or another part of the record.—*Lake Erie & W. R. Co. v. Moore*, 42 Ind. App. 32, 81 N. E. 85, 84 N. E. 506.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. § 118.

See, also, 31 Cyc. pp. 123, 124.

§ 55. Right of plaintiff.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. §§ 119-122.

See, also, 31 Cyc. pp. 102, 103.

§ 56. — In general.

[a] (Sup. 1843)

A corporation, suing in its true name, on a bond executed to it by a wrong name, should aver in the declaration that the defendant bound himself to the plaintiff by the name contained in the bond.—*Town of Ft. Wayne v. Jackson*, 7 Blackf. 36.

[b] (Sup. 1846)

In a suit on a written promise, made to the plaintiff by a wrong name, the declaration should aver that the promise was made to him by the wrong name.—*Williams v. Dickerson*, 8 Blackf. 287.

[c] (Sup. 1856)

The complaint must show that the plaintiff has been injured. An allegation that other persons were injured by the conduct of the defendant is not sufficient.—*Wright v. Defrees*, 8 Ind. 298.

[d] (Sup. 1860)

It is incumbent on the pleader to show, on the face of his complaint, that he has joined the proper parties to the action.—*Alexander v. Gaar*, 15 Ind. 89.

[e] (App. 1883)

A complaint, in an action on a note, alleging that, at the time of the execution thereof to plaintiff, defendant, through inadvertence and the mutual mistake of parties, wrote therein, as payee, the name of defendant's father, instead of plaintiff's name, states sufficiently, as against a general demurrer, that the mistake was a mistake of fact.—*Smith v. Walker*, 34 N. E. 843, 7 Ind. App. 614.

[f] (App. 1894)

When the complaint in an action by a wife against a city to recover damages assessed in condemnation proceedings in the name of herself and husband alleges that at the time of the assessment the husband was dead, which fact was well known to defendant, and also shows that she had such an interest in the property as to entitle her to recover damages therefor, it is not demurrable.—*Busenbark v. City of Crawfordsville*, 9 Ind. App. 578, 37 N. E. 278.

[g] (App. 1894)

A complaint in an action, by a person not the contractor, to foreclose a street-assessment lien, which shows that the contractor sold and assigned the order issued to him for the work to a certain firm, and not to plaintiff, is demurrable for want of facts, as failing to show a cause of action in favor of plaintiff.—*Bozarth v. Mallette*, 11 Ind. App. 417, 39 N. E. 176.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. §§ 119-121.

See, also, 31 Cyc. pp. 102, 103.

§ 57. — Coplaintiffs.

Insufficiency as to part of plaintiffs as ground for demurrer, see post, § 193.

Sufficiency of cross-complaint as to all cross-complaints, see post, § 147.

[a] (Sup. 1846)

Where there are several plaintiffs, the declaration must show a prima facie title in them all to sue.—*Strange v. Lowe*, 8 Blackf. 243.

[b] A complaint which does not state a good cause of action to all, though it does to some, of plaintiffs, is bad as to all.—(Sup. 1872) *Lipperd v. Edwards*, 39 Ind. 165; (1872) *Fatman v. Leet*, 41 Ind. 133; (1881) *Ætna Ins. Co. v. Kittles*, 81 Ind. 96; (1882) *Headrick v. Brattain*, 83 Ind. 188; (1884) *Darkies v. Bellows*, 94 Ind. 64; (1894) *Brunson v. Henry*, 140 Ind. 455, 39 N. E. 256; (App. 1895) *Louisville, N. A. & C. Ry. Co. v. Lange*, 13 Ind. App. 337, 41 N. E. 609.

[c] A complaint must show a cause of action in favor of all those who unite as plaintiffs.—(Sup. 1873) *Maple v. Beach*, 43 Ind. 51; (1873) *Sim v. Hurst*, 44 Ind. 579; (1874) *Griffin v. Kemp*, 46 Ind. 172; (1881) *Nave v. Hadley*, 74 Ind. 155; (1883) *Scotton v. Mann*, 89 Ind. 404; (1884) *Field v. Holzman*, 93 Ind. 205; (1884) *Dill v. Voss*, 94 Ind. 590; (1885) *Faulkner v. Brigel*, 101 Ind. 329; (App. 1891) *Parker v. Indianapolis Nat. Bank*, 27 N. E. 650, 1 Ind. App. 462; (Sup. 1894) *Doherty v. Holiday*, 32 N. E. 315, 36 N. E. 907, 137 Ind. 282; (App. 1897) *Indianapolis Natural Gas Co. v. Spaugh*, 46 N. E. 691, 17 Ind. App. 683; (1897) *Indianapolis Gas Co. v. Rayl*, 46 N. E. 1154, 17 Ind. App. 701; (1898) *City of New Albany v. Lines*, 51 N. E. 346, 21 Ind. App. 380; (1903) *Halstead v. Coen*, 67 N. E. 957, 31 Ind. App. 302.

[d] (Sup. 1877)

The recovery in favor of a part only of several coplaintiffs, in an action in relation to real estate, contemplated by 2 Rev. St. 1876, § 600, can be had only where the allegations of the complaint show a good cause of action in favor of all the coplaintiffs, but the evidence on the trial establishes such alleged cause in favor of part only of the coplaintiffs.—*Parker v. Small*, 58 Ind. 349.

A complaint by several coplaintiffs is insufficient on demurrer unless it shows a joint cause of action in favor of all of them.—*Id.*

[e] (Sup. 1837)

It is a well-settled rule of practice that, to make a complaint sufficient upon demurrer, it must present a good cause of action in favor of the plaintiff, or in favor of all the plaintiffs, where there are more than one.—*Brown v. Critchell*, 7 N. E. 888, 11 N. E. 486, 110 Ind. 31.

[f] (Sup. 1891)

A complaint which fails to state a cause of action in favor of all the plaintiffs is demurrable.—*Sedwick v. Ritter*, 128 Ind. 209, 27 N. E. 610.

[g] (Sup. 1894)

It is a rule of practice, essential to the correct administration of justice, that all who join in a motion or pleading must show a right to the relief demanded. The rule applies to complaints, answers, demurrers, motions for new trials, and other matters of procedure.—*Carr v. Carr*, 36 N. E. 899, 137 Ind. 232.

[h] (Sup. 1898)

Rev. St. 1894, § 577 (Rev. St. 1881, § 568), providing that judgment may be given for or against one or more of the several plaintiffs, and that, when the justice of the case requires it, the rights of the parties between themselves may be determined, relates only to a question of evidence, and does not render sufficient a complaint which does not state a good cause of action as to all, though it does as to some, of the plaintiffs.—*McIntosh v. Zaring*, 49 N. E. 164, 150 Ind. 301.

A complaint which does not state a good cause of action as to all, though it does as to some of the plaintiffs, is bad as to all for want of sufficient facts to constitute a cause of action.—*Id.*

[i] (Sup. 1903)

If the complaint is not good as to either one of the plaintiffs who join in it, it is bad as to both.—*Frankel v. Garrard*, 66 N. E. 687, 160 Ind. 209.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 122.

See, also, 31 Cyc. p. 103.

§ 58. Matter of inducement.**[a] (Sup. 1894)**

The allegations of a complaint in an action for breach of contract for exchange of

land, which charges defendant with a tort in fraudulently misrepresenting his title to his land, and in concealing from plaintiff the existence of a mortgage lien thereof, and in refusing to rescind the contract of exchange and re-convey to him his land, does not render the complaint bad, where such allegations may be fairly treated as matter by way of inducement to the allegations setting forth the breach of contract.—*Balue v. Taylor*, 36 N. E. 269, 136 Ind. 368.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 123.

See, also, 31 Cyc. p. 102.

§ 59. Performance of conditions.

Remedy by demurrer or motion, see post, § 192.

[a] (Sup. 1847)

In a suit on a covenant to be performed on condition of the plaintiff's prior performance of a certain act, the declaration, which did not aver performance of such act, or show an excuse for its nonperformance, was held to be bad.—*Prather v. Ruddell*, 8 Blackf. 393.

[b] (Sup. 1857)

In a case where demand is necessary, it is sufficient if the complaint avers that the plaintiff had called upon the defendant, requested, etc., and that the defendant refused, etc.—*Willets v. Ridgway*, 9 Ind. 307.

[c] (Sup. 1873)

A complaint on a written agreement, made by a township trustee, to pay for certain writing tablets, to be "payable when the funds come in," must show that funds sufficient to pay the demand had come into the treasury before the bringing of the suit, and that such funds were by law applicable to the payment of the claim sued on.—*Washington Tp. v. Bonney*, 45 Ind. 77.

[d] (Sup. 1880)

The lack of an averment of demand before suit, in a complaint to recover costs voluntarily paid by plaintiff, and which were erroneously taxed, through mistake, by the clerk, renders such complaint bad on demurrer.—*Thompson v. Doty*, 72 Ind. 336.

[e] (Sup. 1881)

The word "fulfill" is equivalent to "perform," within the meaning of a statute declaring that, in pleading, it must be alleged that conditions were performed.—*Ætna Ins. Co. v. Kittles*, 81 Ind. 96.

[f] (Sup. 1894)

Where a demand is a prerequisite to an action it is sufficient for the complaint to allege that defendant refused to pay.—*Ferguson v. Hull*, 136 Ind. 339, 36 N. E. 254.

[g] (Sup. 1902)

The rules of code pleading permit a party to show performance of conditions precedent by specific averments as well as by general al-

legations.—*Kenney v. Bevilheimer*, 64 N. E. 215, 158 Ind. 653.

[h] (Supp. 1902)

Burns' Rev. St. 1901, § 373, authorizing the pleading of performance of conditions precedent by a general averment, does not authorize such pleading where it appears affirmatively that the only performance was a tender of performance.—*Burke v. Mead*, 64 N. E. 880, 159 Ind. 252.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. §§ 124-127.

See, also, 31 Cyc. pp. 107, 108.

§ 60. Act or omission of defendant.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. §§ 130-132.

See, also, 31 Cyc. pp. 103, 104.

§ 61. — In general.

[a] (Supp. 1884)

An allegation that plaintiff performed certain work according to contract, and that defendants, though requested, refuse to pay, is sufficient, though not directly alleging that plaintiff's claim was due and unpaid.—*Aughie v. Landis*, 95 Ind. 419.

[b] (Supp. 1886)

A complaint on an account for work and labor which avers that the defendant is indebted to the plaintiff is good, although it does not allege that the debt is due, and unpaid.—*Jaqua v. Cordesman & Egan Co.*, 106 Ind. 141, 5 N. E. 907.

[c] In an action by a real estate agent for fees, the complaint need not aver, in express terms, that the claim sued on is due and unpaid, where those facts appear from other allegations in the complaint.—(Supp. 1890) *Singleton v. O'Brien*, 125 Ind. 151, 25 N. E. 154, following *Humphrey v. Fair* (1881) 79 Ind. 410.

[d] (Supp. 1892)

An offer made by a company was to remove "all the manufacture of the Jenney arc lamps and dynamos" on condition of receiving a cash bonus, a conveyance of lands, and a stock subscription, the latter to be paid when "we shall commence moving machinery." *Held*, in an action by a subscriber to the cash subscription, constituting part of the bonus, for a breach of the contract, that an averment that the company never "moved all or any part of the manufacture of Jenney arc lamps and dynamos," nor did it "begin the removal thereof," was a sufficient averment that it did not begin the removal of its "machinery."—*Fort Wayne Electric Light Co. v. Miller*, 131 Ind. 439, 30 N. E. 23, 14 L. R. A. 804.

[e] (App. 1894)

In an action for a money demand on a contract the complaint must be that the debt is

due and unpaid.—*Jaqua v. Shewalter*, 10 Ind. App. 234, 36 N. E. 173, 37 N. E. 1072.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 130, 131.

See, also, 31 Cyc. pp. 103, 104.

§ 62. — Codefendants.

Insufficiency of complaint as against codefendant as giving right to demurrer, see post, § 196.

Joint demurrer, see post, § 198.

[a] (Supp. 1880)

A complaint need not state a cause of action against defendants as to whom no remedy is sought, but who are made parties on the ground that they have some supposed interest in the property subject to the suit.—*Woollen v. Wishmier*, 70 Ind. 108.

[b] (Supp. 1905)

In considering the sufficiency of a complaint against more than one defendant, the Civil Code requires that it be treated as both joint and several.—*Chicago Terminal Transfer R. Co. v. Vandenberg*, 73 N. E. 990, 164 Ind. 470.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 132.

See, also, 31 Cyc. pp. 103, 104.

§ 63. Statutory actions, and following language of statute.

In action against railroad company for killing stock, see RAILROADS, § 439.

In action by landowner to recover expense of constructing fences along railroad right of way, see RAILROADS, § 104.

In action to enforce assessment for public improvements, see MUNICIPAL CORPORATIONS, § 567.

Petition for drain, see DRAINS, § 28.

Pleading exceptions as anticipation of defenses, see post, § 67.

[a] A pleader seeking to avail himself of a statute must bring himself within its terms.—(Supp. 1858) *Struble v. Nodwift*, 11 Ind. 64; (1905) *Board of Com'rs of Lake County v. Jarnecke*, 164 Ind. 658, 74 N. E. 520; (1905) *Laporte Carriage Co. v. Sullender*, 165 Ind. 290, 75 N. E. 277; (App. 1908) *Zeller, McClellan & Co. v. Vinardi*, 42 Ind. App. 232, 85 N. E. 378; (1908) *Lagler v. Bye*, 42 Ind. App. 592, 85 N. E. 36; (Supp. 1910) *Town of Windfall City v. State*, 92 N. E. 57.

[b] (App. 1893)

Rev. St. 1881, § 3261, provides that lands lying within the limits of any city that are not platted as city property, and are "not used for other than agricultural purposes," or are "wholly unimproved," shall not be taxed at a higher aggregate percentage upon the appraised value thereof than the aggregate percentage of the tax levy in the civil township wherein such

property is situated. The complaint in an action brought under this section to recover taxes paid alleged that the lands erroneously assessed "were used for agricultural purposes." *Held* insufficient to show a cause of action, as there was no affirmative allegation that the lands were "not used for other than agricultural purposes," or were "wholly unimproved."—*Fleming v. City of Indianapolis*, 6 Ind. App. 80, 32 N. E. 1135.

[c] (Sup. 1897)

Where a breach of statutory duty is alleged, and exceptions are found in the statutory declaration of duty, the pleader must show that the breach is not included in the exception; but if the exception is stated in a subsequent clause or section of the statute, or if it is declared in another statute, then such exception should be shown by way of defense to the action.—*Cleveland, C., C. & St. L. Ry. Co. v. Gray*, 46 N. E. 675, 148 Ind. 206.

[d] (App. 1905)

Where a statute imposing a duty contains an exception in an action for damages for a violation of the statute, the complaint must state facts to show that the case does not fall within the exception.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Newsom*, 74 N. E. 21, 35 Ind. App. 299.

Where a complaint alleges a failure of a statutory duty, it is sufficient to allege the failure substantially in the language of the statute—*Id.*

[e] (App. 1908)

Where an action is founded upon a statute imposing a penalty, but exempting certain acts from its operation, the complaint must allege facts sufficient to take the case without the exception, or it will be bad on demurrer.—*Chicago & E. I. R. Co. v. Hamilton*, 42 Ind. App. 512, 85 N. E. 1044.

In an action based upon Act Feb. 28, 1903 (Acts 1903, p. 113, c. 66), limiting the hours of service of railroad employes, and imposing penalties for its violation, but providing that it shall not apply in cases of accident, wreck, or other unavoidable cause, an allegation that no necessity for plaintiff's continuous duty existed on account of any accident, wreck, or unavoidable cause was not equivalent to an allegation that the continuous service was not in case of accident, wreck, or other unavoidable cause, and was insufficient to take the case out of the exception.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 10, 133.

See, also, 31 Cyc. p. 115.

§ 64. Duplicity.

Allegations relating to different cause of action as surplusage, see ante, § 35.

As defense reached by general demurrer, see post, § 205.

As objection reached by special demurrer, see post, § 207.

Ground for demurrer, see post, §§ 192, 193.

Ground for motion to strike matter from pleading, see post, § 362.

Ground for striking out pleadings, see post, § 355.

In rejoinder, see post, § 183.

In plea or answer, see post, § 99.

Motions presenting objection, see post, § 341.

Motion to require separate statement and numbering of causes of action, see post, § 368.

Waiver of objection, see post, §§ 404, 406.

[a] (Sup. 1871)

A complaint for trespass on land which avers consequential injury to personal property does not contain two causes of action. The injury averred to the personal property is only a matter of aggravation of the damages.—*Loeb v. Mathis*, 37 Ind. 306.

[b] (Sup. 1873)

To render a pleading double, there must be in substance two good causes of action or defense. The matter must be so pleaded that issue may be taken thereon. Matter that is immaterial will not bring a pleading within the rule against duplicity.—*Booher v. Goldsborough*, 44 Ind. 490.

[c] (Sup. 1876)

In an action against the widow of an intestate to foreclose a mortgage given by the intestate to secure the payment of two notes executed by him to plaintiff, it was not improper to combine both notes and the mortgage in one paragraph of the complaint.—*Collins v. Frost*, 54 Ind. 242.

[d] (Sup. 1876)

A single count on several notes made by the same person is good.—*Ball v. Nash*, 55 Ind. 9.

[e] In a declaration on a bond, several breaches may be assigned in the same count.—(Sup. 1876) *Richardson v. State ex rel. Crow*, 55 Ind. 381; (1883) *McFail v. Howe Sewing Mach. Co.*, 90 Ind. 148.

[f] (Sup. 1877)

A demand for recovery for extra services ought not to be joined in the same paragraph of a complaint for particular services rendered pursuant to a contract therefor.—*Killian v. Eigenmann*, 57 Ind. 480.

[g] (App. 1893)

A complaint alleged that defendants had connected with a public ditch bordering on plaintiff's land another ditch, which diverted large quantities of water previously accustomed to flow off in another course, so overtaxing the public ditch and overflowing plaintiff's land, and also that defendants had cut a third ditch partially over plaintiff's land, connecting with the public ditch, so causing water to flow on plaintiff's land. *Held*, that the construction by defendants of the two ditches connecting with the public ditch, being parts of one plan to drain defendant's land through plaintiff's by means of a public ditch, is one wrong, which

may be properly charged in one paragraph of complaint.—*Young v. Gentis*, 7 Ind. App. 190, 32 N. E. 796.

[b] (App. 1894)

The burning of personalty and injury to realty can be charged in the same paragraph of a complaint, when caused by the same negligent act of defendant.—*Chicago & E. R. Co. v. Kern*, 9 Ind. App. 505, 36 N. E. 381.

[l] (Sup. 1886)

Separate and independent causes of action, amounting to several hundred in number, and covering a period of six years, may, where all are based upon similar facts showing a failure on the part of a common carrier to furnish transportation facilities to a shipper, be combined in one paragraph of his complaint.—*Chicago, St. L. & P. R. Co. v. Wolcott*, 141 Ind. 267, 39 N. E. 451, 50 Am. St. Rep. 320.

[j] (App. 1896)

A complaint alleging that plaintiff now is, and since a certain time has been, the owner of certain land, but that during a part of that time his wife held the same in trust for him, and that during said time defendant wrongfully mined and removed coal from said land, and demanding damages for the trespass, contains but one cause of action, the establishment of the trust relation which once existed between plaintiff and his wife being merely incidental to his right to recover for the trespass.—*Sunnyside Coal & Coke Co. v. Reitz*, 14 Ind. App. 478, 39 N. E. 541, 43 N. E. 46.

[k] (App. 1896)

While a party has a right to elect and treat a transaction as a tort or as a contract, he cannot properly commingle both in the same paragraph of complaint.—*Anderson Foundry & Machine Works v. Myers*, 44 N. E. 193, 15 Ind. App. 385.

[i] (App. 1899)

A single paragraph in a complaint for personal injuries may not charge both willfulness and negligence, but must proceed on the theory of either the one or the other.—*Dull v. Cleveland, C. & St. L. Ry. Co.*, 52 N. E. 1013, 21 Ind. App. 571.

[m] (App. 1900)

A complaint for injuries sustained through the negligence of an ambulance driver charged that defendants did certain acts "wrongfully," and also "unmindful of their duties to pedestrians on the streets of said city." Held, that the word "wrongfully" was not used as synonymous with "willfully," and hence the complaint was not bad for duplicity in charging a willful act and a negligent act.—*Green v. Eden*, 56 N. E. 240, 24 Ind. App. 583.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 134-137; 7 CENT. DIG. Bills & N. § 1453.

See, also, 31 Cyc. pp. 119-121.

§ 65. Excusing nonjoinder of parties.

[a] (Sup. 1824)

Where the declaration on a bond by the survivor of several joint obligees does not allege the death of the other obligees on oyer of the bond, defendant will be entitled to judgment on his demurrer assigning the variance.—*Hansel v. Morris*, 1 Blackf. 307.

[b] (Sup. 1864)

A complaint which states that "B., who has an interest in common with persons whom it would be impracticable to bring before the court on account of their great number, and who sues for the benefit of the whole, complains," etc., is sufficient.—*Sourse v. Marshall*, 23 Ind. 104.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 138.

See, also, 31 Cyc. p. 104.

§ 67. Anticipating defenses.

Anticipating affirmative matter by way of reply, see post, § 79.

Contributory negligence, see NEGLIGENCE, § 113.

In actions against railroad company for cost of constructing right of way fences, see RAILROADS, § 104.

In actions by widow for distributive share of husband's estate, see EXECUTORS AND ADMINISTRATORS, § 443.

In actions for price of goods, see SALES, § 353.

In actions on insurance policies, see INSURANCE, § 639.

In actions to enforce street assessment, see MUNICIPAL CORPORATIONS, § 567.

Limitations, see LIMITATION OF ACTIONS, §§ 176-179.

Negating contributory negligence in action against city for injuries from defect in street, see MUNICIPAL CORPORATIONS, § 816.

Statute of frauds, see FRAUDS, STATUTE OF, § 149.

[a] (Sup. 1866)

The plaintiff cannot obtain any advantage by inserting in his complaint averments which are not necessary to make out his cause of action, but are intended to anticipate the defense.—*List v. Kortepeter*, 26 Ind. 27.

[b, c] (Sup. 1878)

In an action for damages against an adjoining proprietor for overflowing the plaintiff's land, the injury resulting from the digging of a ditch by said proprietor on his own land, the fact that such act was right and lawful, or was done by the license and express permission of the plaintiff, is matter of defense; and the complaint need not allege that such act was wrongfully and unlawfully done, or without such license and permission.—*Wilkinson v. Applegate*, 64 Ind. 98.

[d] (Sup. 1879)

A complaint to recover the agreed rent under a lease of coal lands, providing that the

stipulated payments of rent and royalty should not be made if no coal was found and the lease abandoned, need not negative the fact of such abandonment; that being matter of defense.—*McDowell v. Hendrix*, 67 Ind. 513.

[e] (Sup. 1881)

It is improper to anticipate in the complaint matters of defense and of reply thereto.—*Uhl v. Harvey*, 78 Ind. 26.

[f] (Sup. 1881)

In an action for injuries to plaintiff's water power by the raising of defendant's dam lower down the stream, plaintiff was not bound to negative license or authority in defendants to raise such dam, as a part of the complaint, though such license and authority, if alleged in the answer, would constitute a good defense.—*Williamson v. Yingling*, 80 Ind. 379.

[g] (Sup. 1882)

It is not necessary in a complaint to anticipate possible objections that do not appear.—*Pine Civil Tp. v. Huber Mfg. Co.*, 83 Ind. 121.

[h] (Sup. 1887)

While, as a rule, a complaint should not anticipate the defense, yet, where, in a suit on a promissory note, the anticipated defense is a written release, so indorsed on the note as to become, in a sense, a part of the cause of action, a statement of such anticipated defense, and the facts showing it to be unavailable, is proper; but, if such facts are not sufficient to defeat or avoid the defense, the complaint will be bad on demurrer.—*Latta v. Miller*, 109 Ind. 302, 10 N. E. 100.

[i] (Sup. 1887)

Where a pleader, in stating his cause of action, states material and relevant facts which constitute a defense, his complaint will be bad; for, although he is not bound to anticipate the defense, yet, if he undertakes to do so, and states facts constituting a defense, his complaint will fall before a demurrer.—*Knopf v. Morel*, 111 Ind. 570, 13 N. E. 51.

[j] (App. 1893)

The plaintiff in his complaint need not anticipate the defenses which defendant might avail itself of in its answers, but, if he could plead matters which would avoid such defenses, they were proper in the form of a reply.—*Phenix Ins. Co. of Brooklyn v. Lorenz*, 33 N. E. 444, 34 N. E. 495, 7 Ind. App. 266.

[k] Where a complaint states a defense to the cause of action pleaded, and fails to state facts avoiding such defense, it will be insufficient to withstand a demurrer.—(App. 1893) *Jessup v. Jessup*, 34 N. E. 1017, 7 Ind. App. 573; (1894) *Town of Andrews v. Sellers*, 38 N. E. 1101, 11 Ind. App. 301; (1900) *Sutton v. Todd*, 55 N. E. 980, 24 Ind. App. 519; (Sup. 1908) *Karr v. Board of Com'rs of Putnam County*, 170 Ind. 571, 85 N. E. 1.

[l] (Sup. 1901)

Where, in an action against a telegraph company for failure to transmit and deliver a message, the complaint alleged that plaintiff tendered a message to defendant to transmit, and that it accepted and undertook to deliver the message, the complaint need not allege that there was a revenue stamp on the message, as required by Revenue Law 1898, §§ 7, 18, since a failure to affix such stamp, if a defense to the action, to be available must be set up in the answer, and need not be anticipated in the complaint.—*Western Union Tel. Co. v. Henley*, 60 N. E. 682, 157 Ind. 90.

[m] (Sup. 1901)

Where a complaint in an action by a husband alleged that the loss of the services of the wife and the expense for care and medical attention were the result of the injuries sustained by the wife, it was not necessary to aver that plaintiff used reasonable diligence to provide medical attention and other care for his wife, for, if the effects of the injury were aggravated by the failure to use ordinary care to restore the health of such wife, such neglect was a matter of defense and might be proved under the general denial in mitigation of damages.—*Indianapolis St. Ry. Co. v. Robinson*, 61 N. E. 936, 157 Ind. 414.

[n] (Sup. 1903)

The mere fact that a complaint otherwise good sets out the defense does not make the pleading bad, if it goes far enough to exhibit sufficient matter in avoidance.—*Lake Erie & W. R. Co. v. Holland*, 69 N. E. 138, 162 Ind. 406, 63 L. R. A. 948.

[o] (Sup. 1907)

It is not anticipating a defense to plead facts which bring plaintiff's case within an exception.—*Cleveland, C., C. & St. L. Ry. Co. v. Moore*, 170 Ind. 328, 82 N. E. 52, 84 N. E. 540.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 139.

See, also, 31 Cyc. pp. 109, 110.

§ 68. Allegations on knowledge, or on information and belief.

In bill for discovery, see DISCOVERY, § 19.

[a] (Sup. 1905)

An averment in a complaint of a want of knowledge negatives both actual and constructive knowledge.—*Consolidated Stone Co. v. Staggs*, 164 Ind. 331, 73 N. E. 695.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 140.

See, also, 31 Cyc. pp. 108, 109.

§ 69. Admissions.

By demurrer, see post, § 214.

In answer, see post, §§ 127-129.

[a] (App. 1906)

In an action to vacate an execution sale, an allegation in the complaint that after the

property was sold the execution creditor by its attorneys receipted to the sheriff on the execution for \$582.92, and that the execution was afterwards returned satisfied, constituted an admission that the attorney had authority to execute such receipt.—*Fuller v. Exchange Bank*, 78 N. E. 206, 38 Ind. App. 570.

§ 71. Damages.

Amendment or further pleading after demurrer sustained, see post, § 225.

Demand for excessive or unauthorized damages as ground for demurrer, see post, § 193.

[a] (Sup. 1845)

A declaration is not objectionable because it claims less than the sum mentioned in the queritur.—*Thompson v. Weaver*, 7 Blackf. 552.

[b] (Sup. 1857)

Where, in a complaint, after stating the facts, the prayer is that the defendant be compelled to reconvey land, account for the profits, and for general relief, and the value of the rents and profits is elsewhere laid, under a videlicet at \$400, it was held on demurrer, that the complaint was sufficient, but that it is always safe to make the conclusion specific.—*Colson v. Smith*, 9 Ind. 8.

[c] (Sup. 1892)

Where the complaint alleges facts constituting a cause of action, the fact that special damages which cannot be recovered are claimed does not render the complaint insufficient.—*Hoosier Stone Co. v. Louisville, N. A. & C. Ry. Co.*, 31 N. E. 365, 131 Ind. 575.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 142.

See, also, 31 Cyc. p. 109.

§ 72. Prayer for relief.

Aided by verdict or judgment, see post, § 433.

Amendment of pleading as to relief prayed, see post, § 250.

Conformity of judgment to prayer for relief, see JUDGMENT, § 252.

Defect in, as objection reached by general demurrer, see post, § 205.

Effect as to construction of pleading, see ante, § 34.

Effect as to separate counts on same cause of action, see ante, § 53.

Effect in determining theory or form of action, see ante, § 49.

Effect of bad prayer for relief, see ante, § 38.

Formal conclusion of plea, see post, § 97.

In action for foreclosure, see MORTGAGES, § 453.

In action for separate maintenance, see HUSBAND AND WIFE, § 296.

In suit to satisfy fraudulent conveyance, see FRAUDULENT CONVEYANCES, § 265.

Striking out matters from prayer for relief, see post, § 362.

Time to amend, see post, § 245.

Unauthorized claim for damages, see ante, § 71.

Want of or defective prayer as ground for demurrer, see post, § 193.

[a] (Sup. 1855)

The prayer of a complaint cannot enlarge its allegations—*Board of Com'rs of La Grange County v. Cutler*, 7 Ind. 6.

[b] (Sup. 1868)

The fact that one of the paragraphs of a complaint contains no prayer for relief does not render the complaint insufficient. That the complaint should demand the relief to which the plaintiff supposes himself entitled is all that is required.—*Malady v. McNary*, 30 Ind. 273.

[c] (Sup. 1874)

It is sufficient in a complaint to state the amount demanded at the conclusion thereof, without stating the amount of damages claimed at the conclusion of each paragraph.—*Spears v. Ward*, 48 Ind. 541.

[d] (Sup. 1876)

Claim for relief should not be appended to each count, but be made only at the end of the complaint.—*Burbank v. Dyer*, 54 Ind. 392.

[e] (Sup. 1877)

An averment in a complaint for damages resulting from a tort committed by the defendant, that such tort is "to the damage of the plaintiff" in a specified sum, is a sufficient prayer for relief.—*Louisville, N. A. & C. Ry. Co. v. Smith*, 58 Ind. 575.

[f] (Sup. 1881)

A bad prayer for relief or a prayer for improper relief will not vitiate a pleading otherwise sufficient.—*Mark v. Murphy*, 76 Ind. 534.

[g] (Sup. 1881)

Where a complaint shows a right to some relief, it must be upheld, though it may contain many redundant allegations, and may not entitle plaintiff to all the relief claimed.—*Bennett v. Gaddis*, 79 Ind. 347.

[h] (Sup. 1886)

A complaint is sufficient to withstand a demurrer if the facts stated therein show that plaintiff is entitled to any of the relief demanded.—*United States Saving Fund & Investment Co. v. Harris*, 142 Ind. 226, 40 N. E. 1072, 41 N. E. 451.

[i] (Sup. 1898)

In an action to avoid a settlement under a contract because of alleged fraud, where facts are stated entitling plaintiff to such relief, and there is a general prayer for judgment and other proper relief, the complaint is sufficient, though it contains no specific prayer asking that the settlement be set aside.—*McIntosh v. Zaring*, 49 N. E. 104, 150 Ind. 301.

[j] (App. 1899)

A complaint is not bad for asking more than is necessary to proper relief, where plaintiff is entitled to have his prayer granted for a portion of the relief sought.—*Fireman's Fund*

Ins. Co. of San Francisco, Cal., v. Dunn, 53 N. E. 251, 22 Ind. App. 332.

[k] (*App.* 1899)

A complaint in an action to recover commission for the sale of land, which sets forth a prayer for judgment before the allegation of the value of the services, is not necessarily defective for that reason.—*Cannon v. Castleman*, 55 N. E. 111, 24 Ind. App. 188.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 143, 144;
28 CENT. DIG. Insurance, § 1590.

See, also, 31 Cyc. pp. 110–112.

§ 74. **Conformity to process, and variance.**

Aider by verdict or judgment, see post, § 433.
Form of plea in abatement for variance, see post, § 106.

Oyer as condition precedent to objection on ground of variance, see post, § 306.

[a] (*Sup.* 1839)

Where the process states a special capacity in which the plaintiff sues, the declaration must conform to it; but where the writ is general, the declaration may describe the parties in a particular character.—*Cole v. Peniwell*, 5 Blackf. 175.

[b] (*Sup.* 1846)

In an action of replevin, the first count charged the tortious taking and unlawful detaining of the plaintiff's horse. The writ commanded the sheriff to summon the defendant to answer the plaintiff concerning the unlawful detention of the plaintiff's horse, etc. *Held*, on demurrer to that count, that the variance was fatal.—*Barnes v. Tannehill*, 7 Blackf. 604.

[c] (*Sup.* 1846)

According to the act of 1843, if a writ be in trespass, and the declaration describe a cause of action in case, or if a writ be in case, and the declaration describe a cause of action in trespass, the declaration is not objectionable on account of the variance.—*Hines v. Kinnison*, 8 Blackf. 119.

[d] (*Sup.* 1858)

Where the writ is in the name of T. and E. "plaintiffs," and the complaint is filed in the name of T. and E. "partners," the variance will not support a motion to dismiss the suit.—*Dunkin v. Taylor*, 10 Ind. 422.

[e] (*Sup.* 1873)

A variance between the summons and the complaint as to the title of the court is not sufficient ground to move to set aside the summons.—*Hughes v. Osborn*, 42 Ind. 450.

[f] (*Sup.* 1878)

The complaint in an action against county commissioners designated them as the "Commissioners of J. County." *Held*, that a summons issued against them by name as the "Commissioners of the County of J." was sufficient.—

Board of Com'rs of Jennings County v. Verbar, 63 Ind. 107.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 146–148.

See, also, 31 Cyc. pp. 113, 114.

III. **PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE.**

Affidavit as answer in abatement or bar, see AFFIDAVITS, § 1.

Aider by verdict or judgment, see post, § 434.

Allegations as to ground for rescission of insurance policy, see INSURANCE, § 249.

Amendment, see post, §§ 255–266.

Answer as mode of objection to defect of parties in general, see PARTIES, § 75.

Answer as mode of objection to misjoinder of parties defendant, see PARTIES, § 92.

Answer as mode of objection to misjoinder of parties plaintiff, see PARTIES, § 88.

Answer as mode of objection to misnomer or misdescription of parties, see PARTIES, § 94.

Answer as mode of objection to nonjoinder of party defendant, see PARTIES, § 84.

Answer as mode of objection to nonjoinder of party plaintiff, see PARTIES, § 80.

Answer as mode of objection to want of capacity or interest to sue, see PARTIES, § 76.

Answer to supplemental pleading, see post, § 283.

Anticipating defenses in declaration or complaint, see ante, § 67.

Defects reached by general demurrer, see post, § 205.

Demurrer incorporated in answer, see post, § 202.

Direction in summons for defendant to appear and answer, see PROCESS, § 33.

Effect of demurrer as opening record, see post, § 217.

Filing answer as waiver of demurrer, see post, § 212.

Form and contents of pleading as affecting right to open and close at trial, see TRIAL, § 25.

Grounds for demurrer, see post, § 194.

In equity, see EQUITY, §§ 156–202.

In justices' courts, see JUSTICES OF THE PEACE, §§ 92, 93.

New trial to test sufficiency of answer, see NEW TRIAL, § 18.

Objections to complaint by answer or demurrer, see post, § 193.

On appeal from precept for enforcement of municipal assessment, see MUNICIPAL CORPORATIONS, § 532.

Operation and effect as appearance, see APPEARANCE, §§ 7–10.

Pleading contract or transaction within statute of frauds, see FRAUDS, STATUTE OF, § 147.

Pleading estoppel in pais as defense, see ESTOPPEL, § 112.

Pleading payment, see PAYMENT, §§ 55, 59, 60.

Pleading release as defense, see RELEASE, §§ 45, 46.

Pleading *res judicata* as defense, see JUDGMENT, §§ 948, 949.
 Pleading statute of frauds as defense, see FRAUDS, STATUTE OF, §§ 151-155.
 Pleading statute of limitations as defense, see LIMITATION OF ACTIONS, §§ 181-185.
 Plea of discharge in bankruptcy, see BANKRUPTCY, § 435.
 Plea of tender, see TENDER, § 22.
 Plea or answer to amended pleading, see post, § 253.
 Plea or answer with demurrer, see post, § 188.
 Proposed answer on motion to open or set aside judgment by default, see JUDGMENT, § 161.
 Raising question of jurisdiction by plea, see ABATEMENT AND REVIVAL, § 3.
 Refusal of change of venue pending discharge of rule to answer, see VENUE, § 37.
 Review of decisions, see APPEAL AND ERROR, § 194.
 Special demurrer to, see post, § 208.
 Waiver of objections, see post, § 409.
 Withdrawal, see post, § 339.

In actions by or against particular classes of persons.

See—

Assignees or trustees in bankruptcy. BANKRUPTCY, § 302.
 Bankrupts. BANKRUPTCY, §§ 390, 391.
 Consolidated corporations. CORPORATIONS, § 591.
 CORPORATIONS, §§ 513-515.
 Corporations and members thereof. CORPORATIONS, § 189.
 Creditors against bankrupts. BANKRUPTCY, § 376.
 EXECUTORS AND ADMINISTRATORS, §§ 443, 444, 446, 544.
 Firms or partners. PARTNERSHIP, §§ 213, 214.
 Foreign corporations. CORPORATIONS, § 672.
 Guarantors. GUARANTY, § 86.
 Guardians. GUARDIAN AND WARD, § 130.
 HUSBAND AND WIFE, §§ 229, 230.
 INFANTS, §§ 92-95.
 INSANE PERSONS, § 97.
 Members of ditching association. DRAINS, § 21.
 Owner of property taken for public use. EMINENT DOMAIN, § 293.
 Partners after dissolution of partnership. PARTNERSHIP, § 296.
 Receivers of mutual insurance companies. INSURANCE, § 71.
 Sureties. PRINCIPAL AND SURETY, § 156.
 Surviving partners or representatives of deceased partners. PARTNERSHIP, § 258.

In particular actions or proceedings.

See—

Accounting by pledgee. PLEDGES, § 51.
 Annexation of territory to township. TOWNS, § 9.
 Arbitration bonds and agreements. ARBITRATION AND AWARD, § 25.
 ASSAULT AND BATTERY, § 24.
 Assigned claims. ASSIGNMENTS, § 131.

ASSUMPSIT, ACTION OF, § 20.
 ATTACHMENT, § 211.
 Award. ARBITRATION AND AWARD, § 85.
 Bail bonds. BAIL, § 89.
 Bastardy proceedings. BASTARDS, § 49.
 BILLS AND NOTES, §§ 472-485.
 Bonds. BONDS, § 125.
 Of executors and administrators. EXECUTORS AND ADMINISTRATORS, § 537 (8).
 Of guardians. GUARDIAN AND WARD, § 182.
 Of highway contractors. HIGHWAYS, § 113.
 Of indemnity. INDEMNITY, § 15.
 Of justices of the peace. JUSTICES OF THE PEACE, § 29.
 Of public officers—
 OFFICERS, § 141.
 SHERIFFS AND CONSTABLES, § 168.
 TAXATION, § 570.
 UNITED STATES MARSHALS, § 36.
 Or recognizances in bastardy proceedings. BASTARDS, § 47.
 Or undertakings in replevin. REPLEVIN, § 133.
 Breach of contract. CONTRACTS, §§ 338-344.
 Of indemnity. INDEMNITY, § 15.
 Of sale—
 SALES, §§ 378, 412.
 VENDOR AND PURCHASER, § 349.
 To furnish means of transportation for live stock. CARRIERS, § 227.
 Breach of covenant. COVENANTS, § 115.
 Of marriage promise. BREACH OF MARRIAGE PROMISE, § 18.
 Of warranty. SALES, § 435.
 CANCELLATION OF INSTRUMENTS, § 39.
 Claims against decedents' estates. EXECUTORS AND ADMINISTRATORS, § 251.
 Collection of drainage assessments. DRAINS, § 90.
 Compensation of arbitrators. ARBITRATION AND AWARD, § 41.
 Of broker. BROKERS, § 82.
 Of insurance agent. INSURANCE, § 84.
 Of officers and agents of corporations. CORPORATIONS, § 308.
 Of physician or surgeon. PHYSICIANS AND SURGEONS, § 24.
 Of school-teacher. SCHOOLS AND SCHOOL DISTRICTS, § 145.
 COMPROMISE AND SETTLEMENT, § 22.
 Condemnation proceedings. EMINENT DOMAIN, § 192.
 Confirmation or trial of tax title. TAXATION, § 809.
 Contempt proceedings. CONTEMPT, § 58.
 Contest or setting aside will or probate. WILLS, § 283.
 Contract of suretyship. PRINCIPAL AND SURETY, § 156.
 Conversion of or injury to mortgaged property. CHATTEL MORTGAGES, § 177.
 Criminal conversation. HUSBAND AND WIFE, § 347.
 Damages for violation of civil rights laws. CIVIL RIGHTS, § 13.

DEATH, § 54.
 DEBT, ACTION OF, § 12.
 Debt secured by pledge. PLEDGES, § 55.
 Delay in transmission or delivery of telegraph or telephone message. TELEGRAPHS AND TELEPHONES, § 78.
 Determination, establishment, and protection of water rights. WATERS AND WATER COURSES, §§ 49, 107, 152.
 Dissolution and accounting of partnership. PARTNERSHIP, § 327.
 Distribution of estates of decedents. EXECUTORS AND ADMINISTRATORS, § 314.
 Diversion of waters. WATERS AND WATER COURSES, § 87.
 DIVORCE, §§ 96-99.
 DOWER, § 78.
 Drainage proceedings. DRAINS, § 31.
 EJECTMENT, §§ 68-73.
 Election contests. ELECTIONS, § 286.
 Enforcement of liability of officers and agents of corporation for corporate debts and acts. CORPORATIONS, § 360.
 Of liability of stockholders for corporate debts and acts. CORPORATIONS, § 268.
 Of mechanic's lien. MECHANICS' LIENS, § 272.
 Of right of exemption—
 EXEMPTIONS, § 147.
 HOMESTEAD, § 213.
 Of tax in aid of railroad. COUNTIES, § 194.
 Of vendor's lien. VENDOR AND PURCHASER, § 280.
 Establishment and enforcement of trust. TRUSTS, § 371.
 And protection of easement. EASEMENTS, § 61.
 Of claim to property garnished. GARNISHMENT, § 216.
 Of claim to property taken on execution. EXECUTION, § 192.
 Of highway. HIGHWAYS, § 32.
 Of title before partition. PARTITION, § 17.
 FALSE IMPRISONMENT, § 20.
 Foreclosure of mechanic's lien. MECHANICS' LIENS, § 317.
 Of mortgage—
 CHattel MORTGAGES, § 277.
 MORTGAGES, §§ 454, 455.
 FRAUD, § 48.
 Gambling contracts. GAMING, § 48.
 GARNISHMENT, §§ 138-148.
 Gravel road certificates. HIGHWAYS, § 141.
 GUARANTY, § 86.
 Infringement of trade-mark or trade-name. TRADE-MARKS AND TRADE-NAMES, § 92.
 INJUNCTION, § 119.
 Injuries by or to artificial ponds, reservoirs, channels, and dams. WATERS AND WATER COURSES, § 179.
 By servants. MASTER AND SERVANT, § 329.
 From defects in demised premises. LANDLORD AND TENANT, § 169.
 From defects or obstructions in bridges. BRIDGES, § 46.

Injuries, etc.—(Cont'd).

From defects or obstructions in highways. HIGHWAYS, § 208.
 From defects or obstructions in streets. MUNICIPAL CORPORATIONS, § 816.
 From drainage or discharge of surface waters. WATERS AND WATER COURSES, § 126.
 From fires caused by operation of railroads. RAILROADS, § 478.
 From flowage. WATERS AND WATER COURSES, § 179.
 From negligence. NEGLIGENCE, §§ 115-117.
 From negligence or malpractice of physician or surgeon. PHYSICIANS AND SURGEONS, § 18.
 From negligence or misconduct of sheriff or constable. SHERIFFS AND CONSTABLES, § 137.
 To animals on or near railroad tracks. RAILROADS, § 439.
 To passengers. CARRIERS, §§ 314, 343.
 To persons on or near street railroad tracks. STREET RAILROADS, § 110.
 To servants. MASTER AND SERVANT, § 262.
 Insurance policy. INSURANCE, §§ 640, 815.
 Premium. INSURANCE, § 188.
 Premium notes. INSURANCE, § 197.
 INTERPLEADER, § 26.
 Judgment. JUDGMENT, §§ 914, 939.
 LIBEL AND SLANDER, §§ 90-95.
 Loss of or injury to goods in course of transportation. CARRIERS, § 131.
 To goods stored. WAREHOUSEMEN, § 34.
 To live stock in course of transportation. CARRIERS, § 227.
 MALICIOUS PROSECUTION, § 53.
 MANDAMUS, § 164.
 Negligence or default of bank as to collections. BANKS AND BANKING, § 175.
 Or misconduct of attorney. ATTORNEY AND CLIENT, § 129.
 Or misconduct of justice of the peace. JUSTICES OF THE PEACE, § 28.
 Obstruction or repulsion of flow of surface waters. WATERS AND WATER COURSES, § 126.
 PARTITION, § 56.
 Penalty for negligence or default in transmission or delivery of telegraph or telephone message. TELEGRAPHS AND TELEPHONES, § 78.
 For violation of liquor laws. INTOXICATING LIQUORS, § 187.
 For violation of, regulations, relating to telegraph or telephone companies. TELEGRAPHS AND TELEPHONES, § 78.
 Permitting escape of prisoners arrested in civil proceedings. PRISONS, § 16.
 Pollution of surface waters. WATERS AND WATER COURSES, § 126.
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QUIETING TITLE, §§ 37-39.
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CARRIERS, § 202.
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 Of moneys collected by attorney. **ATTORNEY AND CLIENT**, § 128.
 Of possession of leased property. **LANDLORD AND TENANT**, § 285.
 Of public officer. **OFFICERS**, § 83.
REFORMATION OF INSTRUMENTS, § 38.
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CARRIERS, § 45.
 Relating to usury. **USURY**, § 111.
 Removal of administrator. **EXECUTORS AND ADMINISTRATORS**, § 35.
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 Or transfer of mortgaged property. **CHATTEL MORTGAGES**, § 229.
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 Restraining enforcement of taxes. **TAXATION**, § 611.
 Return to writ of habeas corpus. **HABEAS CORPUS**, §§ 73-79.
 Review of judgment. **JUDGMENT**, § 335.
 Revival of judgment. **JUDGMENT**, § 871.
REWARDS, § 15.
 Royalties on patented inventions. **PATENTS**, § 219.
 Sale of decedent's property. **EXECUTORS AND ADMINISTRATORS**, § 338.
 Of land to enforce assessment for public improvements. **MUNICIPAL CORPORATIONS**, § 567.
SCIRE FACIAS, § 10.
 Separate maintenance. **HUSBAND AND WIFE**, § 296.
 Services or wages of child. **PARENT AND CHILD**, § 6.
 Supplies and other expenditures for paupers. **PAUPERS**, § 52.
 Setting aside award. **ARBITRATION AND AWARD**, § 78.
 Drainage assessments. **DRAINS**, § 82.
 Execution sale. **EXECUTION**, § 256.
 Transfer in fraud of creditors or subsequent purchasers. **FRAUDULENT CONVEYANCES**, § 266.
SPECIFIC PERFORMANCE, § 116.
 Subscriptions to corporate stock. **CORPORATIONS**, § 90.
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TORTS, § 26.
TRESPASS, § 41.
TROVER AND CONVERSION, § 33.
USE AND OCCUPATION, § 8.
WORK AND LABOR, § 23.
 Wrongful discharge of servant. **MASTER AND SERVANT**, § 39.
 Enforcement of taxes. **TAXATION**, § 613.

(A) DEFENSES IN GENERAL.

§ 76. Nature and scope of defense.

Answers and counterclaims by different defendants, see post, § 84.

[a] (Sup. 1842)

A plea commencing in bar and concluding in abatement is to be considered a plea in bar; and, if it contain no sufficient matter in bar, it may be demurred to as a plea in bar.—*Lowe v. Blair*, 6 Blackf. 282.

[b] (Sup. 1844)

In an action on a note, a plea stating that it was given to a certain person in consideration of a bond to convey certain land as a commissioner appointed by the probate court on a stipulation that the note was to be returned in case the sale was set aside, and that such person had not made or tendered the conveyance, and could not do so, wherefore the consideration had failed, is a good plea in bar.—*Henton v. Beeler*, 7 Blackf. 150.

[c] (Sup. 1887)

In an action to foreclose a mortgage, a plea setting up an agreement to extend the time for the payment of the first note, tending to show that the action was prematurely brought, is available, if for any purpose, as a plea in abatement of the action.—*Moore v. Sargent*, 112 Ind. 484, 14 N. E. 466.

[d] (Sup. 1905)

The purpose of an answer is to defeat the action and bar recovery, while a counterclaim neither admits nor denies the allegations of the complaint, but states a cause of action in favor of defendant against the plaintiff.—*Stoner v. Swift*, 164 Ind. 632, 74 N. E. 248.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. § 156.

See, also, 31 Cyc. pp. 126, 127.

§ 78. Necessity for defense.

[a] (Sup. 1856)

A defendant who seeks to defeat a prima facie case made by the plaintiff by proof of an affirmative fact must plead it.—*Millhollin v. Jones*, 7 Ind. 715.

[b] (Sup. 1857)

All defenses, except the mere denial of facts which the plaintiff, to sustain his action, is bound to prove, must be specially pleaded.—*Hubler v. Pullen*, 9 Ind. 273, 68 Am. Dec. 620.

[c] (Sup. 1893)

Whether fraud was committed against a defendant or not could not excuse him from pleading any defense which he might have to the complaint.—*Gilmore v. McClure*, 33 N. E. 351, 133 Ind. 571.

[d] (App. 1897)

The failure of defendants to demur or answer the complaint was a confession that the complaint was true as to the facts stated.—

Albany Furniture Co. v. Merchants' Nat. Bank, 47 N. E. 227, 17 Ind. App. 531, 60 Am. St. Rep. 178.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 158, 159.

See, also, 31 Cyc. p. 128.

§ 79. Matter constituting defense in general.

[a] (Sup. 1858)

Under Code 1852, §§ 56, 790, the defendant, in an action previously commenced, has the right to file an answer availing himself of equitable defenses.—*Overhiser v. McCollister*, 10 Ind. 41.

[b] (Sup. 1881)

Defendants need not in their answer anticipate affirmative matter which is proper by way of reply.—*Cooper v. Metzger*, 74 Ind. 544.

[c] (Sup. 1889)

Rev. St. 1881, § 1072, does not recognize any such pleading as a disclaimer, except in actions for partition and to quiet title.—*Walker v. Steele*, 22 N. E. 142, 23 N. E. 271, 121 Ind. 436.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 160, 161.

See, also, 31 Cyc. p. 129.

§ 80. Partial defenses.

Demurrer to pleading good in part, see post, § 204.

Ground for demurrer, see post, § 194.

In action for wrongful discharge of servant, see **MASTER AND SERVANT**, § 39.

In reply to new matter in answer, see post, §§ 174, 176.

Partial defense by way of set-off, see post, § 144.

Plea or answer to part of cause of action or pleading of plaintiff, see post, § 88.

Rejoinder answering part of replication, see post, § 183.

Surrejoinder answering part of rejoinder, see post, § 184.

[a] An answer directed to the whole complaint, but which answers only a part of the cause of action, is bad.—(Sup. 1820) *Posey v. Bullitt*, 1 Blackf. 512; (1822) *Stipp v. McCarty*, Id. 518; (1837) *Griffith v. Fischli*, 4 Blackf. 427; (1838) *Foley v. Cowgill*, 5 Blackf. 18, 32 Am. Dec. 49; (1839) *Plant v. Wormager*, 5 Blackf. 236; (1840) *Rust v. Smith*, Id. 352; (1840) *White v. Conover*, Id. 462; (1841) *Howk v. Pollard*, 6 Blackf. 108; (1843) *Hickley v. Grosjean*, Id. 351; (1844) *Mullikin v. State*, 7 Blackf. 77; (1845) *Mahan v. Sherman*, Id. 378; (1845) *Cottingham v. State ex rel. Hare*, Id. 405; (1845) *Jacobs v. Finkel*, Id. 432; (1845) *Conard v. Dowling*, Id. 481; (1848) *Cornwell v. Hungate*, 1 Ind. 156; (1853) *Puett v. State Bank*, 4 Ind. 45; (1858) *Rose v. North River Bank*, 11 Ind. 268; (1858) *Pursell v. Pappenheimer*, Id. 327; (1859) *Roedel v. Kalb*, Id. 509; (1859) *Conwell*

v. Finnell, Id. 527; (1860) *Brown v. Perry*, 14 Ind. 32; (1861) *Miller v. Rigney*, 16 Ind. 327; (1862) *Engler v. Davis*, 18 Ind. 296; (1862) *Dayhuff v. Saville*, Id. 384; (1862) *Free v. Haworth*, 19 Ind. 404; (1863) *McDougle v. Gates*, 21 Ind. 65; (1863) *Louis' Adm'r v. Arford*, Id. 235; (1864) *McClintic's Adm'r v. Cory*, 22 Ind. 170; (1864) *Richardson v. Hickman*, Id. 244; (1864) *Feaster v. Woodfill*, 23 Ind. 493; (1867) *Stone v. Lewman*, 28 Ind. 97; (1867) *Traster v. Snelson's Adm'r*, 29 Ind. 96; (1868) *Conger v. Parker*, Id. 380; (1868) *Webster v. Metropolitan Washing Mach. Co.*, Id. 453; (1868) *Rogers v. Place*, Id. 577; (1868) *New El River Draining Ass'n v. Durbin*, 30 Ind. 173; (1871) *Trisler v. Trisler*, 38 Ind. 282; (1872) *Sanders v. Sanders*, 39 Ind. 207; (1873) *Gullick v. Connely*, 42 Ind. 134; (1873) *Beeson v. Howard*, 44 Ind. 413; (1873) *Jackson v. Fobender*, 45 Ind. 305; (1874) *Lancaster v. Gould*, 46 Ind. 397; (1874) *Adkins v. Adkins*, 48 Ind. 12; (1874) *Keller v. Boatman*, 49 Ind. 104; (1875) *Putnam v. Tennyson*, 50 Ind. 456; (1875) *Jones v. Frost*, 51 Ind. 69; (1875) *McMahan v. Spinning*, Id. 187; (1876) *Reid v. Huston*, 55 Ind. 173; (1878) *Price v. Sanders*, 60 Ind. 310; (1878) *Welshbillig v. Dienhart*, 65 Ind. 94; (1879) *Root v. Hibben*, 66 Ind. 247; (1879) *Smith v. Little*, 67 Ind. 549; (1880) *Ellis v. Gregory*, 70 Ind. 140; (1880) *Ward v. Polk*, Id. 309; (1880) *Frazee v. Frazee*, Id. 411; (1880) *Stahl v. Hammontree*, 72 Ind. 103; (1881) *Farman v. Chamberlain*, 74 Ind. 82; (1881) *Pouder v. Tate*, 76 Ind. 1; (1881) *Moffitt v. Roche*, Id. 75; (1881) *Robbins v. Magee*, Id. 381; (1881) *Marshall v. Stewart*, 80 Ind. 189; (1881) *Douch v. Bliss*, Id. 316; (1882) *Johnson School Tp. v. Citizens' Bank of Greenfield*, 81 Ind. 515; (1883) *Franklin Life Ins. Co. v. Dehority*, 89 Ind. 347; (1883) *Axt v. Jackson School Tp.*, 90 Ind. 101; (1884) *Hunt v. State ex rel. Edger*, 93 Ind. 311; (1884) *Fisse v. Katzentine*, Id. 490; (1884) *State ex rel. Dunham v. Roche*, 94 Ind. 372; (1884) *Hake v. Brames*, 95 Ind. 161; (1884) *First Nat. Bank v. Nugen*, 99 Ind. 160; (1885) *McCaslin v. State ex rel. Auditor of State*, Id. 423; (1891) *Roberts v. Abbott*, 26 N. E. 565, 127 Ind. 83; (App. 1891) *Dunn v. Barton*, 28 N. E. 717, 2 Ind. App. 444; (Sup. 1892) *Shortle v. Terre Haute & I. R. Co.*, 131 Ind. 338, 30 N. E. 1084; (1902) *D. M. Osborne & Co. v. Hanlin*, 63 N. E. 572, 158 Ind. 325; (App. 1910) *Raley v. Evansville Gas & Electric Light Co.*, 91 N. E. 571.

[b] (Sup. 1837)

A plea which proposes in the beginning to answer but one of several counts, and in the body and close attempts to include the whole declaration, is bad.—*Davis v. Bush*, 4 Blackf. 330.

[c] A plea which sets up an entire failure of consideration, but shows only a partial failure, is bad.—(Sup. 1841) *Street v. Mullin*, 5 Blackf. 563; (1857) *Manly v. Hubbard*, 9 Ind. 230; (1861) *Tyler v. Borland*, 17 Ind. 298.

[d] (Sup. 1846)

A plea, in answer to a complaint in two counts, professing to answer the whole complaint, but in fact answering only one count, is bad.—*Mahan v. Sherman*, 8 Blackf. 63.

[e] (Sup. 1858)

There may be many actions for continuing breaches of a continuing covenant. Therefore an answer alleging a former action on the same covenant does not go to the whole cause of action.—*Leach v. Leach*, 10 Ind. 271.

[f] (Sup. 1859)

A plea, to be good, must answer all that it assumes in the introductory part to answer.—*Smith v. Baxter*, 13 Ind. 151.

[g] (Sup. 1861)

In an action on a note, a demurrer is rightly sustained to a plea in defense which states that usurious interest was included in the note, when this plea purports to go in bar of the whole action; and it is competent only as a bar in part.—*Moorman v. Barton*, 16 Ind. 206.

[h] (Sup. 1861)

An answer setting up a defense of usury in bar of the whole cause of action is bad on demurrer.—*Webb v. Deitch*, 17 Ind. 521; *McIntire v. Whitney*, Id. 328.

[i] (Sup. 1862)

A paragraph assuming to answer more than the matter pleaded will bar is bad on demurrer.—*Johnson v. Seymour*, 19 Ind. 24.

[j] (Sup. 1863)

An answer alleging a partial failure of consideration in bar to the whole complaint is bad.—*Caldwell v. Bank of Salem*, 20 Ind. 294.

[k] (Sup. 1872)

A paragraph of an answer which assumes to answer the whole complaint or some entire item or particular portion thereof, while the facts pleaded only amount to an answer to a part, is bad.—*Yancy v. Teter*, 39 Ind. 305.

[l] (Sup. 1873)

A plea in confession and avoidance, which is pleaded in bar of the entire cause of action, but which constitutes only a partial defense, is bad.—*Alvord v. Essner*, 45 Ind. 156.

[m] A plea filed as an answer to several paragraphs of a complaint is not sufficient on demurrer unless good as an answer to each of them.—(Sup. 1874) *Allen v. Randolph*, 48 Ind. 496; (1882) *Swihart v. Shaffer*, 87 Ind. 208; (1886) *Falmouth & L. P. Turnpike Co. v. Shawhan*, 107 Ind. 47, 5 N. E. 408.

[n] (Sup. 1875)

In an action on a note and to foreclose a mortgage, an answer which contains no defense to the note, but simply goes to the foreclosure of the mortgage, is not sufficient as an answer to the whole complaint.—*Gordon v. Culbertson*, 51 Ind. 334.

[o] (Sup. 1878)

In an action on a promissory note against the maker and an indorser, the complaint contained two counts, one upon the note, alleging its indorsement to the plaintiff, and the other upon a judgment obtained against the maker and the plaintiff by an indorsee of the latter, which judgment had been assigned by such indorsee to the plaintiff. The answer, which was to the whole complaint, set up such former recovery upon the note, and a demurrer thereto was sustained. *Held* that, although such answer was sufficient as to the first count, it was insufficient as to the second, and that the demurrer was properly sustained.—*Pickrell v. Frankem*, 64 Ind. 25.

[p] (Sup. 1879)

In an action against a copartnership on two promissory notes and an account, two of the defendants answered separately that they were not liable on the "note." *Held*, that the answer, being to the whole complaint and answering only a part thereof, was insufficient.—*Root v. Hibben*, 66 Ind. 247.

[q] (Sup. 1881)

In an action to recover real estate described in the complaint as bounded by the eastern boundary of a town, an answer that defendant was not in possession of any part of the land lying east of said line and disclaiming title thereto, but averring that plaintiff had no title to any land lying west of such line, does not respond to the complaint.—*Hill v. Forkner*, 76 Ind. 115.

[r] (Sup. 1883)

Plaintiff joined with her husband in a conveyance of his land, reserving as the only consideration a charge on the land for the support of the grantors during their lives, and providing for reversion back of the land to the grantor on breach of the condition. In an action against a grantee in the deed, the plaintiff averred in her complaint of which she made the deed a part that at the time the conveyance was made her husband owned the land described in the deed, and that plaintiff as his wife joined him in the conveyance; that the only consideration for the deed was the incumbrance placed on the land for the support and maintenance of the grantors as therein provided; that defendant accepted the deed, and entered into possession of the real estate, and had since occupied and enjoyed the rents and profits thereof; that since the execution of the deed the marriage relation between plaintiff and her husband had been dissolved; that defendant's proportion of the expense of plaintiff's support had been of the value of \$50 per annum since the making of the deed; that defendant had failed and refused to furnish such support to plaintiff's damage in the sum of \$250 which she averred was due and unpaid, and for which she prayed judgment and other proper relief. *Held*, that an answer that defendant supported plaintiff according to the provisions of the deed until she abandoned her husband was demurrable, because,

while purporting to answer the whole complaint, it was only a partial answer.—*Copeland v. Copeland*, 89 Ind. 29.

[s] (*Sup.* 1883)

Where, in the same action, plaintiff seeks to recover from one of defendants the amount of a judgment against him to which plaintiff had been subrogated, and also to set aside as fraudulent a deed from the judgment debtor to another defendant, an answer by the debtor which merely meets the averments of the complaint concerning the fraudulent conveyance is bad on demurrer.—*Robertson v. Huffman*, 92 Ind. 247.

[t] (*Sup.* 1883)

The rule that an answer professing to answer an entire complaint must do so means that all the material parts of the complaint shall be answered, and does not mean that the bad or immaterial parts must be answered.—*State ex rel. Jones v. Cloud*, 94 Ind. 174.

[u] (*Sup.* 1884)

An answer averring payment in part, when pleaded in bar of the entire action, is demurrable.—*State ex rel. Dunham v. Roche*, 94 Ind. 372.

[v] (*Sup.* 1884)

To withstand a demurrer, an answer to the whole complaint, containing several paragraphs, must be sufficient as to each of them.—*Petty v. Trustees of Church of Christ, etc.*, 95 Ind. 278.

[vv] (*Sup.* 1886)

An answer must respond to the entire complaint, or to so much thereof as it purports to answer, or it will be bad on demurrer for want of sufficient facts.—*McLead v. Aetna Life Ins. Co.*, 107 Ind. 394, 8 N. E. 230.

[w] (*App.* 1891)

Where one paragraph charges a willful injury, and another charges an injury caused by negligence, an answer which assumes to answer the entire complaint, but which is only responsive to the charge of negligence, is bad.—*Louisville, E. & St. L. R. Co. v. Hart*, 2 Ind. App. 130, 28 N. E. 218.

[ww] (*Sup.* 1894)

An answer, insufficient as to a part of a complaint, is demurrable, though good as to the rest.—*Taylor v. Calvert*, 138 Ind. 67, 37 N. E. 531.

[x] (*Sup.* 1894)

Error is not assignable on an order sustaining a demurrer to a paragraph of the answer which fails to show to what part of the complaint it is addressed.—*Sparta School Tp. in Dearborn County v. Mendell*, 138 Ind. 188, 37 N. E. 604.

[xx] (*App.* 1894)

In an action to recover a specific sum as the purchase price of a reaping machine, and another specific sum as the purchase price of a tarpaulin, an answer which seeks to defeat

a recovery in any amount by reason of the alleged failure of the warranty of the machine is bad, since it does not fully answer the complaint.—*Walter A. Wood Mowing & Reaping Mach. Co. v. Niehaus*, 8 Ind. App. 502, 35 N. E. 1112.

[y] (*Sup.* 1896)

Where a plea is not, strictly speaking, a defense to the cause of action, but sets up a cross demand, it is not bad in failing to respond to so much of the claim sued on as may exceed the cross demand, though it be directed to the entire cause of action.—*Stotsenburg v. Fordice*, 142 Ind. 490, 41 N. E. 313.

[yy] (*App.* 1895)

In an action for public printing, a special answer to the whole complaint, alleging that plaintiffs are not entitled to recover at the rate fixed by law, but only for the reasonable value, not to exceed a certain amount, without any offer of judgment as to the amount admitted to be recoverable, is bad on demurrer.—*Board of Com'rs of Miami County v. Woodring*, 12 Ind. App. 173, 40 N. E. 31.

[z] (*App.* 1907)

Where one paragraph of an answer was offered as a defense to the entire complaint but did not meet all the material averments thereof, it was demurrable.—*Jonas v. Hirshberg*, 40 Ind. App. 88, 79 N. E. 1058.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. § 162.

See, also, 31 Cyc. pp. 140-142.

§ 81. Matters arising after commencement of suit and before plea or answer.

[a] (*Sup.* 1842)

No matter of defense arising after action brought can be pleaded in bar.—*White v. Guest*, 6 Blackf. 228.

[b] (*Sup.* 1870)

An answer, pleaded in form in bar of an action generally, setting up a tender alleged to have been made after the filing of the plaintiff's complaint, without expressly showing that the action had been commenced, though asking judgment for costs only from the time of making the tender, is bad on demurrer.—*Ireland v. Montgomery*, 34 Ind. 174.

[c] (*Sup.* 1873)

A defendant cannot set up a defense that did not exist at the commencement of the action.—*Musselman v. Manly*, 42 Ind. 462.

[d] (*Sup.* 1878)

Payment of a debt sued for, made after suit begun, may be pleaded in bar of the further maintenance of the action.—*Herod v. Snyder*, 61 Ind. 453.

[e] (*App.* 1882)

An agreement, after suit is brought, to extend the time of payment of an indebtedness,

cannot be pleaded as a bar to the action.—*Foster v. Daily*, 3 Ind. App. 530, 30 N. E. 4.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 163.

See, also, 31 Cyc. pp. 129, 131.

§ 82. Right to defend, and leave of court.

To demur, see post, § 197.

[a] (Sup. 1865)

It is not error for the court to refuse leave to file an answer setting up a sham defense.—*Cox v. Pruitt*, 25 Ind. 90.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 164.

See, also, 31 Cyc. p. 130.

§ 83. Rule to plead.

Extension of time for compliance with rules, see post, § 85.

[a] (Sup. 1838)

Neither party to plead nor rule days are authorized by the statute.—*Runnion v. Crane*, 4 Blackf. 466.

[b] (Sup. 1877)

Where defendant does not appear to an action, the court cannot, on the first day of the return term, grant a rule that he answer on the next call of the cause.—*Jelley v. Gaff*, 56 Ind. 331.

After an appearance to the action by defendant a rule to answer the complaint may be granted against him on the first or any subsequent day of the term.—Id.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 165, 166.

See, also, 31 Cyc. pp. 137, 138.

§ 84. Joint or separate pleas or answers of codefendants.

In action by or against husband or wife, or both, see HUSBAND AND WIFE, § 229.

Joint demurrers, see post, § 193.

[a] (Sup. 1834)

If the magistrate who issues a warrant, and the officer who executes it, be sued in trespass by the party arrested, and join in a plea of justification, the plea must be a good defense as to both, or it is not good as to either.—*Poult v. Slocum*, 3 Blackf. 421.

[b] (Sup. 1853)

In actions ex contractu, when the defense is in its nature joint, several defendants may join in the same plea, or they may sever; and one may plead in abatement, another in bar, and another may demur.—*Troutner v. Parent*, 4 Ind. 232.

[c] (Sup. 1860)

In a proceeding in attachment the defendants answered jointly to the affidavit, and one of the defendants answered separately to the same. Held that, as the joint denial covered

all that was embraced in the separate answer, the latter was properly rejected.—*Wharton v. Chipman*, 15 Ind. 434.

[d] (Sup. 1863)

A defendant answered in several paragraphs, of which one was the general denial, and his codefendants answered that they were sureties only. Afterwards an entry stated the defendants appeared and "withdrew their answers, except the general denial, in these words." A paragraph followed which was a general denial by all the defendants. Held, that an answer by all the defendants was of record.—*Miller v. McDonald*, 20 Ind. 36.

[e] (Sup. 1863)

Where two defendants join in a plea sufficient only for one, it is bad as to both.—*Ward v. Bennett*, 20 Ind. 440.

[f] (Sup. 1883)

An answer which is bad for argumentativeness as to one of several defendants answering jointly is bad as to all.—*Black v. Richards*, 95 Ind. 184.

[g] (Sup. 1889)

Plaintiff alleged that his father held certain real estate in trust for plaintiff; that he died leaving the trust unexecuted; that before his death he executed his last will, whereby he devised said real estate to defendant K. Then followed a prayer for execution of a deed, for possession, and a decree quieting title. Another paragraph of the complaint contained an ordinary complaint in ejectment, while another was for the specific performance of a parol contract of purchase. Held, that a paragraph of the answer, pleaded as the separate answer of K., which alleged adverse possession for 20 years, and that the cause of action did not accrue within 20 years next before commencement of the action, was not demurrable.—*Martin v. Martin*, 118 Ind. 227, 20 N. E. 763.

[h] (Sup. 1889)

In an action by a town to recover the cost of building a sidewalk, an order sustaining a demurrer to a joint answer of all the defendants containing a general denial is reversible error.—*Powers v. Town of New Haven*, 120 Ind. 185, 21 N. E. 1083.

[i] (App. 1894)

Under Rev. St. 1894, § 357, providing that several defendants may answer jointly or severally, as the facts set forth in the complaint may require, each defendant may make his own defense, and sustain it by whatever proof he can produce.—*C. Aultman & Co. v. Forgy*, 10 Ind. App. 397, 36 N. E. 939.

[j] (App. 1896)

An answer pleaded jointly is demurrable unless good as to all.—*Supreme Council of the Catholic Benevolent Legion v. Boyle*, 15 Ind. App. 342, 44 N. E. 56.

[k] (Sup. 1909)

The rule that a pleading cannot be made to perform the double office of an answer and counterclaim is not applied to pleadings filed by different parties as a several plea for each.—*Cleveland, C., C. & St. L. R. Co. v. Rudy*, 89 N. E. 951.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 168–171.

See, also, 31 Cyc. pp. 138–140.

§ 85. Time to plead in general.**[a] (Sup. 1838)**

A party cannot be required to perfect his pleading in vacation.—*Runnion v. Crane*, 4 Blackf. 466.

[b] (Sup. 1849)

After the rule day, pleas can be filed only by order of court on affidavit of merits.—*Shoaff v. Jones*, 1 Ind. 564, *Smith*, 397.

[c] (Sup. 1861)

Where the court have once extended the time for a compliance with the rule to answer, it is within its discretion whether or not it will allow a second extension.—*Van Allen v. Spadone*, 16 Ind. 319.

[d] (Sup. 1872)

There is no law to prevent a defendant from filing an answer, or amended or additional answer, in vacation, when the other party has not completed the issues by reply.—*Welch v. Bennett*, 39 Ind. 136.

[e] (Sup. 1833)

It is not error to refuse to extend the time to answer, where no reason for the extension was given.—*Main v. Ginthert*, 92 Ind. 180.

[f] (App. 1897)

There was no abuse of discretion in allowing defendants to file an answer over two years after their appearance, the cause having been continued from term to term without objection by plaintiffs, and without any request for a rule requiring defendants to answer.—*Thompson v. Shewalter*, 46 N. E. 601, 17 Ind. App. 290.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 172–178.

See, also, 31 Cyc. pp. 131–138.

§ 87. Mode of pleading defenses in general.**[a] (Super. 1871)**

All matters of defense, except the mere denial of the facts alleged by the plaintiff, must be pleaded specially.—*Sneaghan v. Briggs, Wils.* 75.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 180.

See, also, 31 Cyc. pp. 142, 143.

§ 88. Plea or answer to part of cause of action or pleading of plaintiff.

Demurrer to part of pleading, see post, §§ 203, 204.

Effect of demurrer to, as opening record, see post, § 217.

In action to enforce assessment for public improvement, see **MUNICIPAL CORPORATIONS**, § 567.

Judgment on pleadings, see post, § 345.

[a] (Sup. 1820)

If to a declaration containing two counts, one on a bond, and the other for goods sold and delivered, the defendant plead non est factum to the first count, without noticing the second, the plea cannot be objected to for not answering the whole declaration.—*Posey v. Bullitt*, 1 Blackf. 99.

If a plea purport to be an answer to a part of the declaration only, and be an answer but to a part, the plea is good quoad hoc, and, in such a case, the plaintiff should take issue on the plea, and pray judgment for so much as remains unanswered.—*Id.*

[b] (Sup. 1824)

Debt on a bond for \$400, payable on the 1st of November, 1819. Plea, as to \$42.50, payment, and, as to interest before the 24th of March, 1823, the plaintiff's covenant that the sum due on the bond, which had been given for a tract of land, should not be payable, or bear interest, until he should execute the title, which he had not done until that time. *Held*, that the plea was a good bar to that part of the action which it professed to answer.—*Funkhouser v. Purdy*, 1 Blackf. 294.

[c] (Sup. 1841)

A plea professing to answer a part of the cause of action, and being an answer to such part, though not drawn with technical accuracy, ought not to be rejected on motion.—*Culbertson v. Stanley*, 6 Blackf. 67.

[d] (Sup. 1842)

If a plea profess to answer only a part of the cause of action, it can be considered as an answer only to that part, though it contains a legal defense to the whole declaration.—*Cross v. Watson*, 6 Blackf. 129.

[e] (Sup. 1845)

A plea professing to answer "part of the declaration," without specifying what part, is valid, if it directly deny a particular and material allegation in the declaration; but the sustaining of a demurrer to such plea is no cause for reversing a judgment for the plaintiff, if that part of the declaration denied by the plea was not taken into consideration in assessing the damages.—*Cottingham v. State ex rel. Hare*, 7 Blackf. 403.

[f] (Sup. 1865)

Complaint in three paragraphs for trespass to land. Each paragraph alleged the trespass to have been committed on the same day, "and

at divers other times since that time and before the commencement of this action," and the act of trespass was described in all of the paragraphs in the same terms. *Held*, that each paragraph of the complaint covered all of the alleged trespasses, and, in justifying by answer the trespasses charged in one paragraph, the defendant in fact justified all, though his answer in terms professed to be directed to one paragraph only of the complaint.—*Holcraft v. King*, 25 Ind. 352.

[g] (Sup. 1572)

A pleading which, professing to answer an entire paragraph, only answers as to a part thereof, is bad.—*Bouslog v. Garrett*, 39 Ind. 338.

[h] (Sup. 1881)

Where an answer, which is pleaded only to the good paragraphs of a complaint, is sufficient as to them, it is not bad on demurrer because it fails to answer the entire complaint.—*Worley v. Moore*, 77 Ind. 567.

[i] (Sup. 1883)

Where a paragraph of an answer is limited to a part only of the complaint, and to that portion constitutes a good defense, it is sufficient.—*Matlock v. Hawkins*, 92 Ind. 225.

[j] (Sup. 1883)

An answer to a suit on a bond, alleging several breaches, purporting to answer the entire complaint, if insufficient as to one, is bad as a whole.—*State ex rel. Dunham v. Roche*, 94 Ind. 372.

[k] (Sup. 1885)

A paragraph of an answer which is expressly limited to a part of the complaint cannot be declared bad on demurrer merely because it fails to answer the whole complaint.—*Cooper v. Jackson*, 99 Ind. 566.

[l] (Sup. 1896)

Where pleadings called "partial answers" were not answers at all, but were essentially different paragraphs of a cross-complaint or counterclaim, setting up matters not in bar of the action, but asking for affirmative relief, and such relief was granted by way of a money judgment against plaintiff though all the relief asked in the complaint was awarded, such alleged defenses were not objectionable for failure to point out the particular part of the cause of action sought to be barred thereby.—*Board of School Com'rs of City of Indianapolis v. Center Tp.*, 42 N. E. 808, 143 Ind. 391.

[m] (Sup. 1904)

The fact that a paragraph of the answer purports to be only a partial answer does not render it insufficient as to such part if it alleges facts sufficient to constitute a defense.—*Board of Com'rs of Clinton County v. Davis*, 60 N. E. 680, 162 Ind. 60, 64 L. R. A. 780.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 181-183.

See, also, 31 Cyc. pp. 142, 143.

§ 89. Pleading different pleas or defenses together.

As affecting right to open and close at trial, see TRIAL, § 25.

Duplicity, see post, § 99.

Election between defenses, see post, § 369.

Ground for demurrer, see post, § 194.

In replication or reply, see post, § 173.

Joint or several motions to make pleading more definite and certain, see post, § 367.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 184-194; 32

CENT. DIG. Label, §§ 228-230.

See, also, 31 Cyc. pp. 143-157.

§ 90. — In general.

[a] (Sup. 1854)

In an action of libel, where the answer contains in one paragraph a general denial and an averment that the publication is true, the latter may be struck out as surplusage, if another paragraph contains a sufficient plea of justification.—*Johnson v. Stebbins*, 5 Ind. 364.

[b] (Sup. 1858)

Special denials, substantially embraced in the general denial pleaded, are demurrable.—*Ensey v. Cleveland & St. L. R. Co.*, 10 Ind. 178.

[c] (Sup. 1862)

One good defense is as good as many.—*Wilson v. Madison, etc., R. Co.*, 18 Ind. 226.

[d] (Sup. 1864)

Want of consideration and failure of consideration are not identical in their nature, and may be separately pleaded in answer to the same action.—*McClintic's Adm'r v. Cory*, 22 Ind. 170.

[e] (Sup. 1870)

The plea of justification may be joined with a plea of the general issue or general denial, as to the same charge.—*Weston v. Lumley*, 33 Ind. 486.

[f] (Sup. 1872)

To a complaint in two paragraphs, one for the possession of real estate, and the other to quiet the title of the plaintiff, an answer of former adjudication and judgment of title in the defendant is good as to each paragraph.—*Campbell v. Cross*, 39 Ind. 155.

[g] (Sup. 1882)

Where an answer contains paragraphs in confession and in denial, the facts put in denial are not admitted by the paragraphs in confession.—*Smelser v. Wayne & U. S. L. Turnpike Co.*, 82 Ind. 417.

[h] (Sup. 1883)

An answer may deny some of the allegations of the complaint and confess and avoid others.—*State ex rel. White v. St. Paul & M. Turnpike Co.*, 92 Ind. 42.

[i] (Sup. 1892)

Where defendant pleads the general denial to a complaint which avers defendant's

negligence, and negatives the existence of contributory negligence by plaintiff, a demurrer is properly sustained to special paragraphs of the answer which do not confess and avoid, but assert argumentatively, that plaintiff never had any cause of action because defendant was not negligent, since evidence in support of such special paragraphs is admissible under the general denial.—*Hoosier Stone Co. v. McCain*, 133 Ind. 231, 31 N. E. 956.

[j] (*Sup.* 1894)

Where the facts alleged in one count of an answer are but special negations of the facts alleged in the complaint, and admissible under the general denial, which is also pleaded, a demurrer thereto will be sustained.—*Tewksbury v. Howard*, 138 Ind. 103, 37 N. E. 855.

[k] (*App.* 1896)

Where a party files a general denial, together with other paragraphs containing allegations which are merely negations of facts alleged in the complaint, and which are therefore nothing more than special or argumentative denials, there is no available error in sustaining demurrers to such special denials.—*Gifford v. Hess*, 15 Ind. App. 450, 43 N. E. 906.

[l] (*App.* 1900)

Where payment and the general denial were pleaded, a demurrer to a further defense as a plea in bar that for a valuable consideration plaintiff had released to defendants the cause of action sued on, was properly sustained.—*Whiteley Malleable Castings Co. v. Bevington*, 58 N. E. 268, 25 Ind. App. 391.

[m] (*Sup.* 1905)

In an action on a special contract defendant may answer by general denial, and prove a different contract from that sued on, and defeat a recovery, or he may answer by general denial, and also by a special paragraph setting up the contract, which he admits having made in respect to the same subject-matter, but in such different terms as he understands the facts to warrant.—*Fudge v. Marquell*, 72 N. E. 565, 73 N. E. 895, 164 Ind. 447.

[n] (*App.* 1905)

Under *Burns' Ann. St.* 1901, § 350, authorizing a defendant to set forth in his answer as many grounds of defense, counterclaim, and set-off, whether legal or equitable, as he shall have, in an action to cancel a note and mortgage on the ground of an alleged breach of warranty in the deed of the land from defendant to complainant it was proper for defendant to seek in one paragraph of his answer a reformation of the deed and mortgage, and in another their cancellation.—*Johnson v. Sherwood*, 73 N. E. 180, 34 Ind. App. 490.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 184, 185, 187, 190, 194.

See, also, 31 Cyc. pp. 143, 144.

§ 91. — Dilatory pleas or matter in abatement and other pleas or defenses.

See ABATEMENT AND REVIVAL, §§ 82, 85.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 186; 1 CENT. DIG. Abate. & R. § 508.

See, also, 31 Cyc. pp. 155-157.

§ 92. — Joinder of set-off or counterclaim with other defense.

[a] A pleading cannot be both an answer and a counterclaim.—(*Sup.* 1873) *Campbell v. Routt*, 42 Ind. 410; (1876) *Indiana State Board of Agriculture v. Gray*, 54 Ind. 91; (1878) *Hadley v. Prather*, 64 Ind. 137; (1878) *Wilson v. Carpenter*, 62 Ind. 495; (1880) *Blakely v. Boruff*, 71 Ind. 93; (1881) *Rucker v. Steelman*, 73 Ind. 396; (*App.* 1896) *Huber Mfg. Co. v. Busey*, 16 Ind. App. 410, 43 N. E. 967; (*Sup.* 1898) *No. 2 Indiana Mut. Building & Loan Ass'n v. Crawley*, 51 N. E. 406, 151 Ind. 413; (1905) *Stoner v. Swift*, 164 Ind. 652, 74 N. E. 248; (*App.* 1905) *Johnson v. Sherwood*, 34 Ind. App. 490, 73 N. E. 180; (1907) *Excelsior Clay Works v. De Camp*, 40 Ind. App. 26, 80 N. E. 981; (*Sup.* 1909) *Cleveland, C., C. & St. L. Ry. Co. v. Rudy*, 89 N. E. 951.

[b] A pleading cannot be both an answer and a cross complaint.—(*Sup.* 1879) *McCardle v. Barricklow*, 68 Ind. 356; (1880) *Washburn v. Roberts*, 72 Ind. 213; (1882) *Cox v. Dill*, 85 Ind. 334; (1886) *Conger v. Miller*, 104 Ind. 592, 4 N. E. 300; (1886) *Rausch v. Trustees of United Brethren in Christ's Church*, 107 Ind. 1, 8 N. E. 25; (1892) *Crow v. Carver*, 32 N. E. 569, 133 Ind. 260; (*App.* 1898) *Stout v. Harlem*, 20 Ind. App. 200, 50 N. E. 492, 48 N. E. 235.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 188; 32 CENT. DIG. Libel, § 228.

See, also, 31 Cyc. p. 153.

§ 93. — Inconsistent defenses.

Ground for demurrer, see post, § 194.

Separate statement of defenses, see post, § 94.

[a] (*Sup.* 1844)

To a debt on a writing obligatory the pleas were nil debet and payment, and judgment was rendered by default. *Held*, that the judgment was erroneous.—*Collins v. Harbold*, 7 Blackf. 157.

[b] (*Sup.* 1857)

It is not a ground of demurrer to an answer that it contains denials of the plaintiff's allegations and affirmative matter in avoidance.—*Conwell v. Smith*, 8 Ind. 530.

[c] (*Sup.* 1858)

A contract cannot be confessed and avoided, and also denied as set forth, in the same paragraph of the answer.—*Cronk v. Cole*, 10 Ind. 485.

Where, in an action on a contract, the answer sets up in avoidance false and fraudulent representations of the plaintiff, and also contains matter amounting to a denial that the defendant made the contract, the denial, being inconsistent with the main design of the answer to set up fraud in avoidance of the contract, may be regarded as surplusage.—*Id.*

[d] (Sup. 1360)

After a general denial has been entered, a subsequent special answer denying plaintiff's competency to sue is inconsistent with the general denial, which admits capacity to sue.—*Jones v. Cincinnati Type Foundry Co.*, 14 Ind. 89.

[e] (Sup. 1866)

The answer to an action upon a promissory note contained a denial, under oath, of the execution of the note, and in a second paragraph, which was not sworn to, alleged that the note was materially altered after its delivery. A demurrer was sustained to the second paragraph. *Held*, that there was no error. The first paragraph admitted whatever defense would have been admissible in evidence under the second.—*Conner v. Sharpe*, 27 Ind. 41.

[f] (App. 1893)

In an action against a tornado insurance company, the complaint alleged that the property insured was destroyed by a cyclone or hurricane, and the answer denied that the loss was occasioned by a tornado, cyclone, or hurricane, and alleged that it was caused by a very high wind forcing a steamboat against it. *Held*, that the special allegations of the answer were inconsistent with the general denial, and controlled it, and that the answer was therefore insufficient.—*Queen Ins. Co. v. Hudnut Co.*, 8 Ind. App. 22, 35 N. E. 397.

[g] (App. 1896)

Where there are two paragraphs of answer, one in confession and the other in denial, plaintiff cannot treat the answer in confession as dispensing with proof of the facts put in issue by the paragraph in denial.—*People's Mut. Ben. Soc. v. Templeton*, 44 N. E. 809, 16 Ind. App. 126.

[h] (App. 1896)

An answer in bar must deny, or confess and avoid; it cannot do both. It must proceed upon a definite theory, either of denial of the cause of action or of confessing it and showing new matter in avoidance.—*School City of Lafayette v. Bloom*, 46 N. E. 1016, 17 Ind. App. 461.

[i] (Sup. 1905)

In an action on a note for \$765, payable to M., an answer under oath, admitting the signing and delivery of a note for \$700, payable to F., but alleging that after its execution it was altered without defendant's knowledge or consent by raising the face to \$765,

and substituting M. as payee, was not inconsistent with a general plea of non est factum.—*Fudge v. Marquell*, 72 N. E. 565, 73 N. E. 895, 164 Ind. 447.

[j] (App. 1907)

Confession, avoidance, and denial cannot be pleaded in the same paragraph.—*Merchants' Nat. Bank v. McClellan*, 40 Ind. App. 1, 80 N. E. 854.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 189; 32 CENT. DIG. Libel, §§ 229, 230.

See, also, 31 Cyc. pp. 147-153; note, 48 L. R. A. 177.

§ 94. — Separate statement of defenses.

[a] (Sup. 1857)

Wherever a party, assuming that he has different grounds of defense, whether they really amounted to such or not, sets them up in separate paragraphs, he must number them, or the answer will be bad on demurrer.—*Wilson v. Evansville & C. R. Co.*, 9 Ind. 510.

[b] (Sup. 1864)

Want of consideration and failure of consideration may be separately pleaded in an answer in an action on a contract, as they are not identical in their nature.—*McClintic's Adm'r v. Cory*, 22 Ind. 170.

[c] (Sup. 1880)

The entire complaint, or so much thereof as is pretended to be answered, must be answered by each paragraph of the answer, to render it good.—*Lash v. Rendell*, 72 Ind. 475.

[d] (Sup. 1884)

The sufficiency of a paragraph of an answer depends upon the facts stated therein, and not upon matters appearing elsewhere in the record.—*McComas v. Haas*, 93 Ind. 276.

[e] (App. 1899)

Where an answer consists of several paragraphs, each paragraph, in order to be sustained on demurrer, must state a sufficient defense to the entire complaint.—*Dekalb Nat. Bank v. Nicely*, 55 N. E. 240, 24 Ind. App. 147.

[f] (Sup. 1905)

Under Burns' Ann. St. 1901, § 350, authorizing a defendant to file as many defenses as he may have either legal or equitable, defendant is entitled to answer in denial and in confession and avoidance at the same time, and one of such defenses may not be used to destroy the other, so long as they are set forth in separate paragraphs.—*Fudge v. Marquell*, 72 N. E. 565, 73 N. E. 895, 164 Ind. 447.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. §§ 191, 192.

See, also, 31 Cyc. pp. 144-146.

§ 95. — Reference from one plea or paragraph to another.

Reference from one count or paragraph of declaration or complaint to another, see ante, § 54.

[a] (Sup. 1866)

To a complaint consisting of several paragraphs, separate answers were filed; the fifth answer being directed to the second paragraph of the complaint. The sixth answer, which was directed to the third paragraph of the complaint, was as follows: "And for a further answer to the third paragraph of the complaint, the defendant says that the matters in the above fifth plea contained are true, in manner and form as therein alleged," etc. *Held*, that such a mode of pleading is not sanctioned by the Code.—*Woodward v. Wilcox*, 27 Ind. 207.

[b] (Sup. 1880)

Paragraphs of answer which omit necessary allegations cannot be cured by reference to other paragraphs of the answer containing such allegations.—*Field v. Burton*, 71 Ind. 380.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. § 193.

See, also, 31 Cyc. pp. 145, 146.

§ 96. Statement of defense.

[a] (Sup. 1882)

Allegations of a complaint denied by an answer cannot be considered in determining the sufficiency of the answer.—*Hays v. Carr*, 83 Ind. 275.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. § 195.

See, also, 31 Cyc. pp. 129, 130.

§ 97. Formal commencement and conclusion of pleas.

In action on judgment, see JUDGMENT, § 914.

[a] (Sup. 1818)

In an action of covenant, a plea of covenants performed should not conclude to the country.—*Dougherty v. Wilson*, 1 Blackf. 478.

[b] (Sup. 1844)

A plea putting in issue matters of fact and of record should conclude to the country, and the issue should be tried by a jury.—*Grimes v. Alsop*, 7 Blackf. 269.

[c] (App. 1892)

The fact that a note sued on is not due is a matter in abatement; and, if this can be made apparent only by facts involving a reformation of the note sued on, the answer must contain a prayer for reformation.—*Norris v. Scott*, 6 Ind. App. 18, 32 N. E. 103, 865.

[d] (App. 1893)

Where a plea in abatement in an action on a note is coupled with matters which show that it can only be sustained by proving facts, necessitating a reformation of the instrument,

such plea is insufficient, unless it contains a prayer for reformation.—*Scott v. Norris*, 6 Ind. App. 102, 32 N. E. 332, 33 N. E. 227.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. §§ 167, 196-199.

See, also, 31 Cyc. pp. 159-162.

§ 98. Responsiveness of plea or answer.

Answer in suit to foreclose mechanic's lien, see MECHANICS' LIENS, § 272.

Contest of wills, see WILLS, § 283.

Failure to respond to complaint as ground for demurrer, see post, § 194.

Partial defenses, see ante, § 80.

Striking out irresponsible answer, see post, § 359.

[a] (Sup. 1854)

To a declaration that plaintiff purchased of defendant certain land and gave his notes therefor and defendant executed a bond for conveyance; that plaintiff took possession and made improvements, and afterwards the parties agreed to a rescission, plaintiff agreeing to surrender possession and cancel the bond, and defendant agreeing to give up the notes and pay for the improvements; and that defendant obtained possession of the land and bond, but failed to pay for the improvements,—a plea denying the execution of the bond is demurrable.—*Rutherford v. Tevis*, 5 Ind. 530.

[b] (Sup. 1857)

In a suit against W. to recover subscription to stock, the complaint averred that C. subscribed for W. and W. ratified it. W. answered that he never subscribed. *Held*, that the answer did not meet the averments, and was no defense.—*Wilson v. Evansville & C. R. Co.*, 9 Ind. 510.

[c] (Sup. 1860)

An answer that the note on which a judgment was founded was without consideration is not responsive to a complaint seeking to set aside an entry of satisfaction of the judgment.—*Bowers v. Bound*, 14 Ind. 218.

[d] (Sup. 1868)

A paragraph of an answer commenced in the following words: "That at the time of said supposed wrongful taking of the property in the first count of plaintiff's complaint mentioned, the defendant," etc. *Held* that, though not as explicit as it should be it was intended to apply to the first paragraph of the complaint.—*Wise v. Eastham*, 30 Ind. 133.

[e] (Sup. 1871)

Where a complaint averred that certain real estate had been sold and conveyed in fee simple to the plaintiff, and the deed recorded, and also certain mill privileges of a race and milldam given, and that the entire property had, subsequent to the recording of the deed, been conveyed by the original grantor to the defendant, an answer alleging an abandonment of the race and dam by the plaintiff was not

sufficient on demurrer.—*Trisler v. Trisler*, 38 Ind. 282.

[f] (Sup. 1881)

An answer is not bad because it fails to answer an assumption expressed in a conclusion of law stated by the pleader, and which is unsupported by specific facts affirmatively alleged in the complaint.—*Brokaw v. Board of Com'rs of Gibson County*, 73 Ind. 543.

[g] (Sup. 1885)

An answer which, while attempting argumentatively to answer the allegations of the complaint, fails to show any connection between the subject-matter of its narrative and the allegations of the complaint, is demurrable.—*Western Union Tel. Co. v. Ferris*, 103 Ind. 91, 2 N. E. 240.

[h] (Sup. 1886)

In an action in H. county, a plea in abatement that defendants are residents of C. county, and are not residents of H. county, is insufficient, in that it does not show that defendants were not residents of H. county at the time the action was begun.—*Moore v. Morris*, 142 Ind. 354, 41 N. E. 796.

[i] (Sup. 1904)

Where in a will contest the complaint merely tendered the issue as to the validity of the will, plaintiffs claiming no rights thereunder, an answer, alleging the forfeiture of plaintiffs' rights under the will by virtue of provisions therein, in case of a contest, was not responsive to the complaint and was demurrable for want of facts.—*Branstrator v. Crow*, 69 N. E. 668, 162 Ind. 362.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. §§ 200, 201.

See, also, 31 Cyc. pp. 157-159.

§ 99. Duplicity in plea or answer.

As defect reached by general demurrer, see post, § 205.

As objection reached by general demurrer, see post, § 207.

Ground for demurrer, see post, §§ 192, 194.

Ground for motion to strike matters from pleading, see post, § 362.

In declaration or complaint, see ante, § 64.

In rejoinder, see post, § 183.

Motion to require separate statement and numbering of causes of action, see post, § 368.

Requisites of double plea, see post, § 173.

[a] (Sup. 1825)

In an action on an obligation providing for payment of usurious interest, a plea setting forth usury, and also a payment of part of the principal, was not bad for duplicity.—*Fugate v. Ferguson*, 1 Blackf. 366.

[b] (Sup. 1830)

Plaintiff sued the administrator of A. on a joint and several bond executed by A. and B., conditioned for the performance of covenants. *Held*, that a plea that A. was surety only, that

plaintiff had agreed with B., without defendant's knowledge, to take judgment by confession against him for \$275, in a suit on the bond then pending, which was less than plaintiff pretended he could recover, and to take judgment against the present defendant for costs of an action then pending against him on the bond, and the judgment was rendered according to the agreement, was not bad for duplicity, but was a sufficient plea in bar.—*Porter v. Brackenridge*, 2 Blackf. 385.

A plea, to be objectionable for duplicity, must contain more than one valid defense to the suit.—*Id.*

[c] (Sup. 1840)

A plea which contains two good defenses to the action is bad, on special demurrer, for duplicity.—*Benner v. Elliott*, 5 Blackf. 451.

[d] (Sup. 1850)

A. agreed to build for B., at specified places, the superstructure of certain bridges, at certain prices. The work was to be completed before August 18, 1846. B. was to build the abutments. The declaration contained an averment of performance of B.'s part. Breach that A. did not, by the time agreed upon, build said superstructures, or any part thereof, etc. A. pleaded in bar that B. did not, before August 1, 1846, nor for nine months thereafter, although often requested so to do, etc., have said abutments put up, etc. Averment that in consequence of B.'s failure A. was prevented from complying with his part of the contract as he desired to do, etc. Demurrer to the plea overruled, and final judgment for A. *Held*, that the plea was not double, and that the demurrer was properly overruled.—*President, etc., of Richmond & B. Turnpike Co. v. Rife*, 2 Ind. 316.

[e] (Sup. 1853)

A plea, to be bad for duplicity, should contain at least two substantive matters of defense, either of which, if separately well pleaded would constitute a good bar to the action.—*Hand v. Taylor*, 4 Ind. 409; *Mitchel v. Whitcomb*, *Id.* 614.

[f] (Sup. 1858)

Duplicity in an answer is a violation both of the rules of pleading at common law and of 2 Rev. St. p. 39, § 56, subd. 3, which provides that defendant may set forth in his answer as many grounds of defense as he shall have, but each shall be distinctly stated in a separate paragraph and numbered, and refer to the cause of action intended to be answered.—*Johnson v. Crawfordsville, F. K. & Ft. W. R. Co.*, 11 Ind. 280.

[g] (Sup. 1862)

An answer is not regarded as double, where one of two grounds of defense is not well pleaded.—*Thompson v. Oskamp*, 19 Ind. 399.

[h] (Sup. 1876)

A paragraph of pleading filed by a defendant cannot be regarded both as a paragraph al-

leging a defense and as a pleading seeking affirmative relief.—*McMannus v. Smith*, 53 Ind. 211.

[i] (Sup. 1879)

Defendant has a right to plead, in one paragraph of answer, a separate defense to each of the claims set up in the complaint, and, in doing so, does not make the paragraph double, inasmuch as but one defense is pleaded to the same claim.—*State ex rel. Nave v. Newlin*, 69 Ind. 108.

[j] A single paragraph of an answer cannot perform the double function of both denying and confessing and avoiding the complaint.—(Sup. 1890) *Coble v. Eltzroth*, 25 N. E. 544, 125 Ind. 429; (1892) *Racer v. State*, 31 N. E. 81, 131 Ind. 393; (1892) *Buckles v. Same*, 31 N. E. 86, 131 Ind. 600; (App. 1893) *Queen Ins. Co. v. Hudnut Co.*, 35 N. E. 397, 8 Ind. App. 22; (1895) *Board of Com'rs of Miami County v. Woodring*, 40 N. E. 31, 12 Ind. App. 173.

[k] (App. 1897)

An answer that confesses and avoids some of the material allegations in the complaint, and in the same paragraph denies "each and every material allegation of the complaint not herein admitted," is not double, but is sufficient pleading.—*Weser v. Welty*, 47 N. E. 639, 18 Ind. App. 664.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 202-205.

See, also, 31 Cyc. pp. 146, 147.

§ 100. Tender of issue by plea or answer, and joinder in issue thereon.

Joining issue as waiver of demurrer, see post, § 212.

On demurrer, see post, § 215.

On replication or reply, see post, § 186.

[a] (Sup. 1829)

In making up issues before proceeding to trial and the swearing of the jury, the similitude may be dispensed with.—*Swan v. Rary*, 2 Blackf. 291.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 206, 207.

See, also, 31 Cyc. pp. 153, 154.

(B) DILATORY PLEAS AND MATTER IN ABATEMENT.

Effect of demurrer to as opening record, see post, § 217.

In actions against executors or administrators, see EXECUTORS AND ADMINISTRATORS, § 446. Joinder of defense in abatement, and defense to the merits, see ante, § 91.

Necessity for verification, see post, § 293.

Order of pleading in abatement and in bar, see ABATEMENT AND REVIVAL, § 82.

Pleading different pleas or defenses together, see ante, § 91.

Responsiveness, see ante, § 98.

Review of decisions involving discretion of court, see APPEAL AND ERROR, § 960.

§ 104. Plea to the jurisdiction.

In action against foreign corporation, see CORPORATIONS, § 665.

Responsiveness, see ante, § 98.

[a] (Sup. 1839)

A plea in abatement of the writ that at and before the date of the writ, which issued in one county and was directed to the sheriff of another, and ever since, the defendant resided in the county in which the writ issued, is sufficient.—*Clarke v. Hite*, 5 Blackf. 167.

[b] (Sup. 1845)

A writ issued in a county against three persons was returned "Not found" as to two of them, and the return suggested of record. The other defendant pleaded in abatement that all the defendants were, when the writ issued, and still were, resident in another county. *Held*, that such plea was bad, since plaintiff, having entered a suggestion of the return of "Not found," could, by Rev. St. 1843, p. 675, proceed against the defendant alone on whom the writ was served.—*State v. Williams*, 7 Blackf. 493.

[c] (Sup. 1878)

In an action against the maker of a promissory note, an answer alleging that he resides in another county than that in which the action is brought, is sufficient as a plea to the jurisdiction of the court.—*Cole v. Merchants' Bank of Watertown*, 60 Ind. 350.

[d] (Sup. 1882)

Want of jurisdiction in an action to recover real estate, wherein venue is properly laid in the title of the complaint, must be shown by answer.—*Wilcox v. Moudy*, 82 Ind. 219.

[e] (App. 1892)

Where U., one of the defendants, who was a nonresident, appeared and answered on the merits, and the other defendants joined in an answer in abatement, on the ground that the cause of action, if any, was in another county, in which they resided, but it did not appear from the complaint, or from the answer in abatement, that U. was not a resident of the county where the action was brought, the answer in abatement was demurrable.—*Brown v. Underhill*, 4 Ind. App. 77, 30 N. E. 430.

[f] (Sup. 1905)

Where a petition for the tiling of a drain does not disclose on its face a want of jurisdiction, such question is properly raised by a plea to the jurisdiction.—*Kemp v. Adams*, 164 Ind. 258, 73 N. E. 590.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 213-217.

See, also, 31 Cyc. pp. 166-168.

§ 106. Plea in abatement.

Abatement of grounds of attachment, see **ATTACHMENT**, §§ 253-258.

Effect of demurrer to, as opening record, see post, § 217.

Form and requisites of demurrer to, see post, § 201.

Grounds for demurrer, see post, § 194.

In ejectment, see **EJECTMENT**, § 70.

Matter in abatement as distinguished from matter in bar, see **ABATEMENT AND REVIVAL**, §§ 80-87.

Necessity for verification, see post, §§ 290, 293.

Objections reached by general demurrer, see post, § 205.

Plea in abatement as method of presenting question of jurisdiction, see **ABATEMENT AND REVIVAL**, § 3.

Waiver of objections to want of verification, see post, § 422.

[a] (Sup. 1835)

In an action on a special contract, a plea in abatement that prior to the commencement of the suit plaintiff sued the defendant in assumpsit before a justice of the peace, that defendant pleaded in bar the same contract on which this action is founded, and averred performance, and that the defendant obtained a judgment in that suit, from which plaintiff took an appeal, which is still pending, is bad.—*Tracy v. Reed*, 4 Blackf. 56.

[b] (Sup. 1844)

A plea in abatement for a variance between the declaration and the writ must recite the writ.—*Nichols v. Smalley*, 7 Blackf. 200.

[c] (Sup. 1860)

An answer setting up the pendency of another suit, which should have been joined, must state facts showing that the two ought to be joined. It is not enough to allege that the notes sued on were made by the same parties on the same day.—*Parish v. Heikes*, 14 Ind. 605.

[d] (Sup. 1861)

An answer alleging the pendency of an appeal in another action between the same parties, which does not identify the pending appeal, by showing in what court it was instituted, etc., and who appealed, is insufficient.—*Miller v. Rigney*, 16 Ind. 327.

When the answer to a complaint avers the pendency of a suit in another court, it must set forth and identify the case averred to be so pending.—*Id.*

[e] (Sup. 1863)

An answer which avers that the defendant is informed and believes the plaintiff has been, and now is, engaged in inciting, aiding, and assisting in the rebellion of the so-called Confederate states against the United States, and the constitution and laws thereof, and has been, and now is, giving aid and comfort to the so-called Confederate states, is defective and demurrable, for not stating more specifically the particular

acts of rebellion which the plaintiff has committed.—*Meni v. Rathbone*, 21 Ind. 454.

[ee] A plea in abatement ought to be certain to every intent and in every particular.—(Sup. 1874) *Ward v. State*, 48 Ind. 289; (1895) *Needham v. Wright*, 39 N. E. 510, 140 Ind. 190; (1902) *State v. Comer*, 62 N. E. 452, 157 Ind. 611.

[f] (Sup. 1880)

In an action against a carrier for injuries, a verified answer averred that at the commencement of the suit, and ever since, defendant had had all of its property, money and assets, in the hands of a receiver by appointment of the United States court, and by order of the court had been forbidden to transact any business; that all of its affairs were being managed and all of its business being conducted by the receiver; that the defendant had no control over its property or its funds, and could not, without violating the order of the court make any contract, create any debt, or pay any; wherefore the court had no jurisdiction over the person of defendant, and prayed that the action might abate. *Held*, that the answer was insufficient to abate the action in the absence of any averment that the plaintiff had not obtained leave of the court in which the receiver was appointed to bring the action.—*Ohio & M. Ry. Co. v. Nickless*, 71 Ind. 271.

[g] (Sup. 1881)

A plea that another suit is pending for the same cause is insufficient on demurrer, in the absence of any averment as to when the other suit was commenced.—*Eiceman v. State ex rel. Leonard*, 75 Ind. 46.

[h] (Sup. 1885)

An answer stating that a prior action between the same parties for the same cause is pending is sufficient to withstand a demurrer.—*Merritt v. Richey*, 100 Ind. 416.

[i] (Sup. 1887)

A plea of prior action pending, in order to abate the action to which it is pleaded, must show that the action pending is between the same parties and for the same cause as that to which the plea is addressed.—*Bryan v. Scholl*, 109 Ind. 367, 10 N. E. 107.

[j] (Sup. 1890)

A plea in abatement on the ground of another action pending is not sufficient where it does not show that another action was pending between the same parties involving the same cause of action at the time the proceeding is commenced.—*American White Bronze Co. v. Clark*, 23 N. E. 855, 123 Ind. 230.

[k] (App. 1893)

A plea in abatement is a proper mode of presenting the question that an action on a note was prematurely brought, when such fact does not appear on the face of the note.—*Scott v. Norris*, 6 Ind. App. 102, 32 N. E. 332, 33 N. E. 227.

[l] (App. 1898)

A plea in abatement, being a dilatory plea, is not regarded favorably by the courts.—*Rush v. Foss Mfg. Co.*, 51 N. E. 143, 20 Ind. App. 515.

A plea in abatement is a dilatory plea, and must be strictly construed, and must state facts necessary to the answer, and anticipate and exclude all supposable matter, which would, if alleged, defeat it.—*Id.*

[m, n] (Sup. 1886)

A plea in abatement is merely a denial of the right to bring the suit.—*Needham v. Wright*, 39 N. E. 510, 140 Ind. 190.

A plea in abatement on the ground of the pendency of another action must show clearly that the action pending is for the identical cause of action, and that it is between the same parties or their privies.—*Id.*

[o] (Sup. 1903)

A plea in abatement for nonjoinder of parties defendant, which fails to show that the persons not joined are living and subject to the process of the court, thus giving a better writ, is bad.—*Boseker v. Chamberlain*, 66 N. E. 448, 160 Ind. 114.

[p] (App. 1909)

A plea in abatement is a dilatory plea, and is construed with great strictness, and it must contain the utmost fullness of statement, as well as the highest attainable accuracy, leaving nothing to be supplied by intendment, nor a supposable special answer unobviated.—*C. Callahan Co. v. Wall Rice Milling Co.*, 89 N. E. 418.

[q] (Sup. 1910)

In a suit in equity to collect taxes on property omitted from taxation and to set aside a fraudulent conveyance of real estate and foreclose the state's lien for taxes thereon, and a receiver, a plea to the jurisdiction, and denying the material averments of the complaint, and alleging that defendants are nonresidents, that none of the property assessed was within the state or owned by the principal defendant, that the purchase and conveyance of the real estate were made for the consideration stated in the deed, and that, when the affidavit was made upon which the publication of notice was ordered, neither of the defendants was a resident or within the jurisdiction of the state, and that one of the defendants named had no property in the county subject to taxation for a year specified, is insufficient as a plea in abatement, where the fact that defendants were nonresidents appeared from the complaint, and jurisdiction was acquired in the way provided by statute in such cases, the sufficiency of which was not challenged; the denial that the property assessed was subject to taxation for a certain year being to the merits rather than in abatement.—*Darnell v. State*, 90 N. E. 769.

[r] (App. 1910)

A plea in abatement is one which goes not to the merits of the action, but merely postpones

it until some requisite disclosed by the plea is complied with.—*Kunkle v. Coleman*, 92 N. E. 61.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 219-227.

See, also, 31 Cyc. pp. 169-184.

§ 107. Answer pleading matter in abatement.

[a] (Sup. 1880)

An answer alleging that the action is not prosecuted in the name of the real party in interest is insufficient for want of facts.—*King v. Barbour*, 70 Ind. 35.

[b] (Sup. 1883)

Where in an action against the sureties an administrator of a decedent and surety sets up an answer that the decedent left surviving him a widow but did not aver that she was living at the time of said action it was insufficient to show that the widow was a necessary party.—*Ferguson v. State ex rel. Hagans*, 90 Ind. 38.

[c] (App. 1891)

An answer in abatement, alleging that other persons are liable jointly with the defendant, which fails to show that such other persons are living and subject to the process of the court, is bad.—*Alexander v. Collins*, 28 N. E. 190, 2 Ind. App. 176.

[d] (App. 1892)

Answers in abatement are not favored in law. They must allege every fact necessary to their sufficiency. No presumptions of law or facts are allowed in their favor. On the contrary, every intendment must be taken against them.—*Brown v. Underhill*, 30 N. E. 430, 4 Ind. App. 77.

[e] (Sup. 1897)

An answer in abatement is not required to state facts sufficient to constitute a defense, but facts sufficient to abate the action.—*Combs v. Union Trust Co.*, 146 Ind. 688, 46 N. E. 16.

[f] (App. 1903)

In an action under Burns' Rev. St. 1901, § 7298a, penalizing any male person who, having become civilly or criminally liable for bastardy or seduction, shall marry the wronged female with intent to escape prosecution, and afterwards maltreat, desert, or fail to provide for her, an answer setting up a divorce obtained by the plaintiff wife after defendant's desertion is not a plea in abatement, as it cannot give the plaintiff a better writ.—*State ex rel. Lannoy v. Lannoy*, 65 N. E. 1052, 30 Ind. App. 335.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 228.

See, also, 31 Cyc. pp. 169, 170.

§ 108. Pleading in abatement matter in bar.

[a] (Sup. 1883)

A plea in abatement which sets out only matters in bar is demurrable.—*Flora v. Cline*, 89 Ind. 208.

[b] (Sup. 1884)

A prior judgment is pleadable only in bar, and not in abatement.—*Harvey v. State ex rel. Town of Monticello*, 94 Ind. 159.

[c] (Sup. 1890)

Answers pleaded as in abatement will be so regarded on motion to dismiss, though really in bar.—*Brink v. Reid*, 122 Ind. 257, 23 N. E. 770.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. § 229.

See, also, 31 Cyc. pp. 169, 170.

§ 109. Pleading in bar matter in abatement.**[a] (Sup. 1824)**

Pendency of another suit is not admissible in evidence under a plea in bar.—*Smock v. Graham*, 1 Blackf. 314.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. § 230.

See, also, 31 Cyc. pp. 169, 170.

§ 111. Decision of issue, and proceedings thereon.**[a] (Sup. 1829)**

The judgment for plaintiff on a demurrer to a plea in abatement is not final, but only a respondent ouster.—*Lambert v. Lagow*, 1 Blackf. 388.

[b] (Sup. 1839)

Judgment sustaining a demurrer to a plea in abatement should be respondent ouster.—*Atkinson v. State Bank*, 5 Blackf. 84; *Clarke v. Hite*, 5 Blackf. 167.

[c] (Sup. 1839)

Where an issue in fact on a plea in abatement is found for the plaintiff, he is entitled to a verdict on the merits.—*Atkinson v. State Bank*, 5 Blackf. 84.

[d] (Sup. 1839)

The plaintiff, on a trial of an issue to the country, on a plea in abatement, should prove his damages, for, without such proof, though he sustain the issue there must be a venire de novo.—*Neal v. Mills*, 5 Blackf. 208.

Where the plaintiff replies nul tiel record to a plea of the pendency of a prior suit, and the issue is found for him, the judgment is that the defendant answer over.—*Id.*

[e] (Sup. 1858)

It is substantially correct to answer in abatement, and, when overruled, to answer over to the merits.—*Wright v. Bundy*, 11 Ind. 398, 409.

[f] (Sup. 1867)

Where a defendant interposes a plea in abatement only, and issue is joined on that plea and found for the plaintiff, the defendant is not entitled to plead anew, setting up a defense to the merits; but the plaintiff's damages should be assessed, and final judgment rendered in his favor.—*Bond v. Wagner*, 28 Ind. 462.

In an action upon an account for goods sold, the defendant pleaded in abatement the

nonjoinder of one who was a joint purchaser with him of the goods sued for. Issue was joined upon this answer, and, after the cause had been submitted to the court, the plaintiff had leave to dismiss as to some items of the account, and leave was refused the defendant to withdraw his answer, and also to plead in bar after the issue in abatement had been found against him. *Held*, that there was no error in these rulings.—*Id.*

[g] (App. 1896)

Where, after a demurrer was sustained to a plea in abatement, the facts upon which the plea in abatement was predicated were heard and a special verdict rendered thereon by the jury, it was tantamount to the overruling of the demurrer to the said plea, and a trial and special verdict and judgment thereon against the party demurring.—*Jenkins v. Fisher*, 42 N. E. 954, 15 Ind. App. 58.

[h] (App. 1901)

Where, after a change of venue had been granted, plaintiff obtained leave to withdraw her complaint, and on the following day refiled the same in a court of concurrent jurisdiction, without paying the costs assessed on the voluntary dismissal of the prior proceedings, it was not error for the court to overrule defendant's plea in abatement of the second action on the ground that it was wrongful and vexatious, plaintiff having filed an affidavit that the second action was not vexatious, the presumption of vexation being overcome by the slightest countervailing evidence.—*Citizens' St. R. Co. v. Shepherd*, 62 N. E. 300, 29 Ind. App. 412.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 234-236.

See, also, 31 Cyc. pp. 187, 188.

(C) TRAVERSES OR DENIALS AND ADMISSIONS.

Admissions in replication or reply, see post, § 177.

Evidence admissible under, see post, § 382.

Grounds for demurrer to denials, see post, § 194.

In equity, see EQUITY, § 186.

Joinder of denial and other defenses, see ante, § 93.

Joinder of denial and pleas in confession and avoidance, see ante, § 90.

Matters to be proved under, see post, §§ 376-378.

Traverses or denials in replication or reply, see post, § 176.

§ 112. Nature and office of traverse or denial.**[a] (Sup. 1846)**

A plea cannot traverse what is not alleged in the declaration.—*State ex rel. Rittenour v. Campbell*, 8 Blackf. 138.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 237.

See, also, 31 Cyc. p. 188.

§ 115. General issue.

Admissions by pleading general issue, see post, § 127.

Evidence admissible under, see post, § 382.

General reply, see post, § 170.

Pleading general denial as affecting right to plead in abatement to jurisdiction, see ABATEMENT AND REVIVAL, § 3.

Pleading matters available under general issue, see post, § 136.

Raising defense of statute of frauds, see FRAUDS, STATUTE OF, § 152.

[a] (Sup. 1838)

In an action of disseisin, a denial of the defendant's possession amounts to a plea of the general issue.—*Rhoden v. Graham*, 4 Blackf. 517.

[b] (Sup. 1846)

Where there is a special plea to three of the four counts in a declaration, a replication to the plea, and a general issue to the whole, the action is not discontinued, as there can be no discontinuance so long as the whole declaration is answered by the general issue.—*Richmond Trading & Mfg. Co. v. Farquar*, 8 Blackf. 80.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 240; 17 CENT.

DIG. Eject. §§ 201-203.

See, also, 31 Cyc. pp. 189-192.

§ 118. Special traverse.

As subject to general demurrer, see post, § 205.

[a] (Sup. 1850)

The inducement to a plea of special traverse must be in substance a sufficient answer to the declaration, though not a direct denial, nor a confession and avoidance.—*State ex rel. Barrell v. Chrisman*, 2 Ind. 126.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 243.

See, also, 31 Cyc. pp. 192, 193.

§ 119. Sufficiency of denials under codes of procedure.

Necessity for reply, see post, § 165.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 244-254, 257, 258.

See, also, 31 Cyc. pp. 193-202.

§ 120. — Form and requisites in general.**[a] (Sup. 1880)**

An answer denying all the allegations of the complaint not expressly admitted, first specially denying some and then generally denying all of such allegations, is sufficient as against a general demurrer.—*Voss v. Prier*, 71 Ind. 128.

[b] (Sup. 1889)

Where the allegations in a paragraph of an answer amount to a denial of the complaint,

the paragraph is a good answer.—*Martin v. Martin*, 20 N. E. 763, 118 Ind. 227.

[c] (App. 1896)

A paragraph in an answer, which is good as an argumentative denial at least, is not demurrable.—*J. F. Seiberling & Co. v. Rodman*, 14 Ind. App. 460, 43 N. E. 38.

[d] (App. 1906)

Where the denial contained in an answer to plaintiff's petition was limited to such allegations as were not admitted and sought to be avoided by affirmative facts, the answer was not objectionable for inconsistency.—*Unger v. Mellinger*, 77 N. E. 814, 37 Ind. App. 639, 117 Am. St. Rep. 348.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 244, 253, 254, 257, 258.

See, also, 31 Cyc. pp. 193, 194.

§ 123. General issue or general denial under codes of procedure.

As affecting right to open and close at trial, see TRIAL, § 25.

Evidence admissible under, see post, § 382.

General reply, see post, § 170.

Pleading matters available under general denial, see post, § 136.

[a] (Sup. 1862)

The general denial under oath is equivalent, in Code pleading, to a verified non est factum.—*Evans v. Southern Turnpike Co.*, 18 Ind. 101.

[b] (Sup. 1866)

In an action by one who, as replevin bail, had paid a judgment in order to have it revived and to have execution in his favor, an answer of the general denial is well pleaded, and it is an error to sustain a demurrer to such answer.—*Blake v. Douglass*, 27 Ind. 416.

[c] (Sup. 1887)

Want of consideration for the execution of a written instrument must generally be specifically pleaded, but, where the consideration is fully averred in the complaint, this rule does not apply, for the general denial puts the plaintiff to proof of the consideration substantially as alleged.—*Nixon v. Beard*, 111 Ind. 137, 12 N. E. 131.

[d] (Sup. 1889)

Where plaintiff alleged that his father held certain realty in trust for him, and died leaving the trust unexecuted, and before his death he executed his will whereby he devised his realty to defendant, a paragraph of an answer pleaded as a separate answer of third persons made parties, averring that the title was in defendant, followed by a disclaimer of any interest in the land, is sufficient, as it amounts to a general denial of the plaintiff's cause of action.—*Martin v. Martin*, 118 Ind. 227, 20 N. E. 763.

Where a plaintiff alleged that his father held certain realty in trust for him, and died leaving the trust unexecuted, and before his death he executed his last will whereby he devised such realty to defendant, a paragraph of an answer pleaded as a separate answer of defendant's husband, averring that he was the husband of defendant, and that she was the owner in fee simple of the land and entitled to its possession, is sufficient, as it amounts to a general denial.—Id.

[e] An answer containing a general denial is not demurrable.—(App. 1894) *Scott v. Tell City Bank*, 10 Ind. App. 94, 37 N. E. 555; (Sup. 1898) *Allen v. Adams*, 50 N. E. 387, 150 Ind. 409; (App. 1907) *Ætna Life Ins. Co. v. Bockting*, 39 Ind. App. 586, 79 N. E. 524.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 255.

See, also, 31 Cyc. p. 195.

§ 124. Specific denials under codes of procedure.

Striking out, see post, § 362.

[a] (Sup. 1860)

Nul tiel corporation puts in issue the existence of the corporation, at least so far as to require proof of user.—*Hubbard v. Chappel*, 14 Ind. 601.

[b] (Sup. 1889)

A paragraph of an answer which did not admit the allegations of the complaint and offer facts in avoidance, but pleaded facts in negation of the main facts stated in the complaint, was a special denial, and good as a plea of that character against a demurrer.—*Hostetter v. Auman*, 20 N. E. 506, 119 Ind. 7.

[c] (Sup. 1892)

The affirmative allegations of an answer are the controlling ones, and those which are equivalent to denials embraced in the general denial are without effect.—*Racer v. State*, 31 N. E. 81, 131 Ind. 393; *Buckles v. Same*, 31 N. E. 86, 131 Ind. 600.

[d] (App. 1895)

In an action on an implied contract for the value of gravel, defendant filed a general denial, and by special answer set up an agreement, made when the gravel was taken, that nothing was to be paid for it. *Held*, that the special answer was in effect a special denial.—*Crum v. Yundt*, 40 N. E. 79, 12 Ind. App. 308.

[e] (Sup. 1896)

A paragraph of answer in the nature of an argumentative denial of material matter in the complaint is sufficient to withstand a demurrer, though the facts therein averred could have been given in evidence under the general denial.—*Boos v. Morgan*, 146 Ind. 111, 43 N. E. 947.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 256.

See, also, 31 Cyc. pp. 197, 198.

§ 125. Traverse or denial of conclusions or immaterial allegations.

[a] (Sup. 1843)

The declaration in a suit by the state on the relation of a school commissioner alleged under a *videlicet* that the relator was appointed such commissioner on a certain day, and the plea was that the relator was not appointed on that day. *Held*, that the plea was bad, as tendering an immaterial issue.—*Wright v. State ex rel. Woolman*, 7 Blackf. 63.

[b] (Sup. 1899)

Since the allegation in a complaint for breach of a marriage contract of an agreement by the parties, when previously married, to obtain a divorce, and afterwards remarry, is immaterial, a paragraph of the answer which traverses such allegation is insufficient, and should not be sustained on demurrer.—*Bowman v. Bowman*, 55 N. E. 422, 153 Ind. 498.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 259, 260.

See, also, 31 Cyc. pp. 202, 203.

§ 126. Negative pregnant.

[a] (Sup. 1841)

In debt on a note for the payment of money, it was pleaded in bar of the action that the note was given in consideration that the payee would assign to the defendant certain certificates for three tracts of land, each tract containing 80 acres; that the payee did not assign the certificates for the tracts of land containing 80 acres each; wherefore, etc. *Held*, that the plea was a negative pregnant, and, therefore, bad on special demurrer.—*Howk v. Pollard*, 6 Blackf. 108.

[b] (Sup. 1861)

A company executed a note for the purchase of real estate, and in a suit on the note answered that plaintiffs had not executed such a deed of conveyance as they had agreed to execute. Demurrer to this answer, as being a negative pregnant, was sustained by reason of default to state the contents or give the copy of the deed, upon which a proposition of law was rested.—*Charleston & J. Turnpike Co. v. Willey*, 16 Ind. 34.

[c] (Sup. 1881)

A pleading alleging that "no valid summons was issued or served" is a mere negative pregnant and implies the service of a writ, invalid only on grounds claimed for such invalidity.—*State v. Davis*, 73 Ind. 359.

[d] (Sup. 1890)

Where an information charged that defendants in disobedience of an injunction, wrongfully committed specific acts, an answer that defendants denied that they did any of the acts "in disobedience of the order of injunction" was fatally defective as a negative pregnant, as it admitted the performance of the acts, but averred that they were not performed in violation of the injunction, which violation was a ques-

tion of law.—*Hawkins v. State*, 26 N. E. 43, 126 Ind. 294.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 261-263.

See, also, 31 Cyc. pp. 203-205.

§ 127. Admissions in general.

As affecting matters to be proved, see post, § 376.

As affecting right to open and close at trial, see TRIAL, § 25.

By demurrer, see post, § 214.

By failure to traverse or deny, see post, § 129.

Conclusiveness of admissions on party making them, see ante, § 36.

Effect as against infant, see INFANTS, § 95.

In declaration or complaint, see ante, § 69.

In replication or reply, see post, § 177.

[a] (Sup. 1860)

An argumentative denial forbids all inference of admissions of the facts alleged by the other side.—*Meredith v. Lackey*, 14 Ind. 529.

[b] (Sup. 1861)

Where a defendant answers a complaint by a general denial, he admits the capacity of the plaintiff to sue.—*Downs v. McCombs*, 16 Ind. 211; *Heaston v. Cincinnati & Ft. W. R. Co.*, 1d. 275, 79 Am. Dec. 430.

[c] (Sup. 1867)

Under Code, § 74, the pleading of an affirmative defense to an action for goods sold and delivered, and for work and labor, will not be deemed, in the absence of allegations of any contract price, to admit the allegations of value.—*Shirts v. Irons*, 28 Ind. 458.

[d] (Sup. 1873)

In one paragraph of an answer, the sureties of a city clerk alleged that, when the clerk received the money on the orders claimed to have been illegally issued by him, the city was indebted to him \$1,000. In a subsequent part of the paragraph they expressly admitted that he received from the city treasurer on orders unlawfully filled up by himself \$382 over and above what was due him from the city, and without any allowance by the city council. *Held*, that this admission was inconsistent with and controlled the averment in the former part of the pleading that the city owed the clerk \$1,000.—*Armington v. State ex rel. City of Greensburg*, 45 Ind. 10.

[e] (Sup. 1889)

A general denial in an action to recover the possession of real property admits that the defendants have possession of the entire property.—*Caspar v. Jamison*, 21 N. E. 743, 120 Ind. 58.

[f] (Sup. 1892)

While a party is not always bound to anticipate a defense, it is often proper and necessary for him to do so, and in such case a plea of confession and avoidance admits the facts

so pleaded.—*Bowlus v. Phenix Ins. Co.*, 32 N. E. 319, 133 Ind. 106, 20 L. R. A. 400.

[g] (App. 1900)

Horner's Rev. St. 1897, § 347 (*Burns' Rev. St. 1894*, § 350), provides that the defendant may set forth in his answer as many grounds of defense as he shall have. *Held*, that where an administrator in an action on a note executed by his intestate set up defenses in confession and avoidance and in denial, in different paragraphs, the admission of the note made in the pleading in confession and avoidance could not be used as evidence in issue joined on the pleading in denial.—*Ray v. Moore*, 56 N. E. 937, 24 Ind. App. 480.

[h] (Sup. 1904)

Where, in an action for the price of coal sold, plaintiff showed by its complaint and bill of particulars that it was entitled to recover \$1,206.97, exclusive of interest, and the answer did not attempt to bar a recovery for less than \$1,264.30, but admitted that defendants had no defense to that amount of the claim sued on, a demurrer thereto was properly sustained.—*Harder v. Indiana Bituminous Coal Co.*, 71 N. E. 138, 163 Ind. 67.

[i] (App. 1907)

An argumentative general denial cannot be construed as admitting the facts denied.—*Etna Life Ins. Co. v. Bocking*, 39 Ind. App. 586, 79 N. E. 524.

[j] (App. 1907)

Admissions made in one paragraph of an answer are conclusive only as to the paragraph in which they are contained.—*Merchants' Nat. Bank v. McClellan*, 40 Ind. App. 1, 80 N. E. 854.

In an action by a distributee for a part of a bank deposit made by intestate, there was no evidence that there had been no administration of intestate's estate. The answer contained a general denial, and in another paragraph pleaded confession and avoidance. *Held*, that the admission by way of confession and avoidance did not relieve the heir of the necessity of proving that there had been no administration of the estate, to entitle him to a verdict.—*Id.*

[k] (Sup. 1908)

In an action by a stockholder on behalf of a corporation to recover the value of pipe sold by the president claimed by defendant to have been owned by him individually, an admission in a special paragraph of the answer that the corporation had purchased the pipe did not overcome the force of a general denial in the answer.—*Tevis v. Hammersmith*, 170 Ind. 286, 84 N. E. 337.

[l] (App. 1910)

Where, in an action against a township for damages to sheep by dogs, defendant admitted that certain sheep of the plaintiff were killed by dogs as averred in the complaint, and that it tendered to plaintiff \$120 for his damages and brought the tender into court for plaintiff's ben-

ed, the tender being a statutory one as provided by Burns' Ann. St. 1908, § 3209, was an admission of the township's liability for damages to plaintiff in some amount.—Wea Tp., Tippecanoe County v. Cloyd, 91 N. E. 959.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 264-268; 17 CENT. DIG. Eject. §§ 201-203.

See, also, 31 Cyc. pp. 206-215.

§ 128. Protestation.

[a] (Sup. 1822)

A protestation is not a denial, in the suit in which it is made, of the allegation protested against.—Clark v. Faulkner, 1 Blackf. 218.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 269.

See, also, 31 Cyc. p. 215.

§ 129. Admissions by failure to traverse or deny.

As affecting matters to be proved, see post, § 377.

By failure to reply, see post, § 182.

In reply, see post, § 177.

Necessity for defense in general, see ante, § 78.

Representative character of plaintiff, see EXECUTORS AND ADMINISTRATORS, § 444.

[a] (Sup. 1848)

In an action against a sheriff for a false return on a writ of replevin, if the defendant do not plead the general issue, nor any special plea denying that the original suit was well founded, it is admitted to have been so.—State ex rel. Chew v. Youmans, 1 Ind. 217.

Debt on sheriff's bond. Breach, that the relator sued out a writ of replevin against A., for a wagon, which writ came to the hands of the sheriff, and was falsely returned that the wagon was not found in his county. There was an averment that the wagon was in the county, etc., and belonged to the relator. Pleas, that the property was not in the county; that the sheriff did not make a false return; and that he used due diligence to serve the writ, etc. *Held*, that the pleas did not deny the averment that the relator owned the wagon, but thereby admitted that the replevin suit was well founded, and that the relator had only to prove that the return was false.—Id.

[b] In pleading, a material fact asserted by one side, and not denied by the other, is admitted.—(Sup. 1855) Hufford v. State ex rel. White, 6 Ind. 365; (1898) State ex rel. Bishop v. Crowe, 50 N. E. 471, 150 Ind. 455.

[c] (Sup. 1856)

Where, in an action on a stock subscription, the complaint alleges the consolidation of the company to which the subscription was made with the plaintiff company, and that being consolidated they became one company under the plaintiff's name, such averment is admitted by a failure to controvert it by the answer.—Sparrow v. Evansville & C. R. Co., 7 Ind. 369.

[d] (Sup. 1855)

Matters well pleaded which are not denied by the answer stand admitted.—Warbritton v. Cameron, 10 Ind. 302.

[e] (Sup. 1859)

An allegation that a man and woman were alone in a room, the man lying on a sofa, admitted by not being denied, does not constitute an admission of intercourse between them.—Garrett v. Garrett, 12 Ind. 407.

[f] (Sup. 1860)

Failure to answer is a quasi admission, though the cause was submitted to the court by consent, and evidence heard to enable the court to render judgment. A hearing under such circumstances is not a trial without an issue, under our Code.—Scott v. Dibble, 14 Ind. 17.

[g] (Sup. 1878)

In an action to recover a trotting premium won by plaintiff's horse, an answer, alleging that plaintiff entered his horse in the race with other horses, that the sole consideration for the premium was money claimed to have been won upon a race by reason of plaintiff's horse having taken second place therein, is bad, in that it admits the complaint by not denying it and avers nothing in avoidance thereof.—Alvord v. Smith, 63 Ind. 58.

[h] (Sup. 1880)

Facts of the complaint not controverted by the answer are virtually admitted to be true.—Cole v. Wright, 70 Ind. 179.

[i] (Sup. 1880)

Matters well pleaded in a complaint not controverted in the answer must, under Code (2 Rev. St. 1876, p. 71) § 74, be taken as true in testing the sufficiency of the answer.—Bowen v. Pollard, 71 Ind. 177; Matter v. Campbell, 71 Ind. 512.

[j] (Sup. 1881)

Under 2 Rev. St. 1876, p. 71, providing that every material allegation of the complaint not specifically controverted by the answer shall be taken as true, where an answer in no manner controverts any of the allegations of the complaint, the court in determining the sufficiency of such answer must construe it in connection with the allegations of the complaint, which for such purpose except as to dates must be taken as true.—Armstrong v. Cavitt, 78 Ind. 476.

[k] (Sup. 1882)

By appearing and pleading a general denial to an action for the recovery of real estate, defendant admits that he was in possession of the land at the commencement of the action.—Holman v. Elliott, 86 Ind. 231.

[l] (Sup. 1883)

Allegations of time and value in pleading are not, as a general rule, material, and so are not confessed by not denying them.—Board of Com'rs of Madison County v. Burford, 93 Ind. 383.

[m] (*Sup.* 1884)

By the express provisions of Rev. St. 1881, § 383, allegations of value or amount of damages are not to be considered as true by failure to controvert them.—*Reynolds v. Baldwin*, 93 Ind. 57.

[n] (*Sup.* 1885)

In a complaint for libel, allegations that plaintiff was employed by a certain company, and was discharged because of the libel, are not allegations of value, and are admitted if not denied in the answer.—*Over v. Schiffing*, 102 Ind. 191, 26 N. E. 91.

[o] (*App.* 1898)

In an action for damages for negligence in presenting a draft for acceptance, an answer which did not deny any of the material allegations of the complaint, except as to damages, and concluded by alleging that defendant was not liable as alleged in the complaint, "but, if at all, only for nominal damages," will be construed as a plea only to the amount of damages recoverable.—*Citizens' Nat. Bank v. Third Nat. Bank*, 49 N. E. 171, 19 Ind. App. 69.

[p] (*Sup.* 1904)

Civ. Code, § 115 (*Burns' Ann. St.* 1901, § 367), provides that, when a pleading is founded on a written instrument, such instrument may be read in evidence without proving its execution, unless such execution is denied under oath and declares that there can be no waiver of the objection that such an answer is not verified by failing to move to strike it out. *Held*, that where each paragraph of the complaint in an action on a life insurance policy charged that defendant executed the policy, and defendant did not deny such execution under oath, defendant was estopped to claim that the policy had never in fact been delivered with intent that it should become operative.—*Penn Mut. Life Ins. Co. v. Norcross*, 72 N. E. 132, 163 Ind. 379.

[q] (*App.* 1909)

Where, in replevin against a purchasing agent by his principal to recover goods on which the agent claimed a lien, the answer alleged facts entitling defendant to a lien, it did not amount to an admission of plaintiff's ownership and right of possession since a plea of property in the defendant is not a plea in confession and avoidance.—*Welker v. Appleman*, 90 N. E. 35.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 270-275; 17 CENT. DIG. Eject. §§ 201-203.

See, also, 31 Cyc. pp. 207-210.

(D) MATTER IN AVOIDANCE.

Admissions by plea of, see ante, § 127.

As affecting right to open and close at trial, see TRIAL, § 25.

In replication or reply, see post, § 178.

Joinder of denial with matter in avoidance, see ante, § 93.

Joinder with denial in answer, see ante, § 90.

Materiality of issues raised, see post, § 371.

Partial defense, see ante, § 80.

Plea of payment, see PAYMENT, § 55.

Reply to new matter in answer, see post, § 166.

Variance between set-off and bill of particulars, see post, § 328.

§ 130. Nature and office of pleading in confession and avoidance.

[a] (*Sup.* 1844)

A plea which confesses the cause of action and avoids it by some new matter does not amount to the general issue.—*Page v. Prentice*, 7 Blackf. 322.

[b] (*Sup.* 1892)

Affirmative relief is generally had on a cross-complaint, and not on answer, the office of an answer by way of confession and avoidance being to set up matter which constitutes a defense to the cause of action stated in the complaint.—*Crow v. Carver*, 32 N. E. 569, 133 Ind. 260.

[c] (*App.* 1910)

A plea in bar is one which alleges matter in avoidance of a cause of action.—*Kunkle v. Coleman*, 92 N. E. 61.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 276, 283.

See, also, 31 Cyc. pp. 215, 216.

§ 131. Form and requisites of plea in general.

[a] (*Sup.* 1881)

Where a deed was placed in the hands of a third person, to be delivered on compliance with a certain condition, and was delivered by him to the grantees in violation of such condition, and the grantees conveyed a part of the land to a purchaser for a valuable consideration, an answer, in an action by the grantor, setting up that he, with full knowledge that the deed mentioned in the complaint had been delivered to the grantees, rented of the grantees such land and accepted it as their tenant for a year, was insufficient, as it neither denied nor avoided the charge of the complaint that the deed was delivered in violation of the condition on which it was placed in such third person's custody.—*Robbins v. Magee*, 76 Ind. 381.

[b] (*Sup.* 1889)

To be good, an answer in confession and avoidance need not confess the cause of action precisely as it is alleged; for even under the strict rules of the common law it was sufficient if the plea gave color to the cause of action stated in the declaration.—*Cooper v. Smith*, 21 N. E. 887, 119 Ind. 313.

[c] (*Sup.* 1892)

An answer cannot be good as a plea in confession and avoidance, unless it overcomes by affirmative allegations the prima facie case which it confesses and seeks to avoid.—*Racer v. State*, 31 N. E. 81, 131 Ind. 393; *Buckles v. Same*, 31 N. E. 86, 131 Ind. 600.

[d] (App. 1906)

An answer in a single paragraph may confess certain allegations of the complaint, and avoid the same by affirmative facts, and deny all others.—*Unger v. Mellinger*, 77 N. E. 814, 37 Ind. App. 639, 117 Am. St. Rep. 348.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 277, 278.

See, also, 31 Cyc. pp. 215, 216.

§ 132. Statement of new matter constituting defense under codes of procedure.

[a] (Sup. 1864)

An answer setting up in defense a failure to perform an agreement to execute an indemnifying bond is bad, when it does not set forth any injury resulting from such failure, but shows that injury never can happen.—*Billan v. Hercklebrath*, 23 Ind. 71.

[b] (Sup. 1834)

To a complaint for conversion of a horse intrusted to defendant to pasture, and not surrendered on demand, defendant pleaded that he was not to be responsible for injury caused by a railroad running through his farm, or loss from insufficient fences. *Held*, that the plea was bad on demurrer in not alleging that the failure to surrender was caused by the railroad or insufficient fences.—*Glenn v. Dailey*, 96 Ind. 472.

[c] (Sup. 1836)

Where, in an action to quiet title, it appears that an unacknowledged contract of sale, executed by plaintiff's grantor to defendant before the conveyance to plaintiff, has been recorded, a plea admitting that the contract was not entitled to record, and averring that defendant was ready to perform the conditions of the contract, but failing to aver that he did perform such conditions, is bad as a plea in confession and avoidance.—*Walter v. Hartwig*, 106 Ind. 123, 6 N. E. 5.

[d] (Sup. 1837)

In a suit on a promissory note, an answer that the sole consideration therefor was the purchase of an eighth interest in certain land; "that, by the terms of said purchase, the defendant was entitled to a deed for said land, and to the possession thereof"; and that the same had been demanded and refused,—is bad on demurrer, for failing to show from whom the land was purchased, or upon whom the demand was made.—*Winstandley v. Rariden*, 110 Ind. 140, 11 N. E. 15.

[e] (Sup. 1893)

In an action by a tenant for damages to his growing crops, and for undermining his house, resulting from the removal of gravel from the land, an allegation in the answer that "all damages to the crops and land" had been assessed and paid to the landowner is sufficiently specific to include damages for injury to the house, in the absence of any allegation in the com-

plaint of a special right in the house.—*Shauver v. Phillips*, 7 Ind. App. 12, 32 N. E. 1131, 34 N. E. 450.

[f] (Sup. 1896)

Under Rev. St. 1894, § 350 (Rev. St. 1881, § 347), providing that an answer shall "clearly refer to the cause of action intended to be answered," a paragraph of an answer in an action to recover for an assault and battery, which pleads justification of an assault therein mentioned, but not alleged to be the same declared on, and which is stated to have taken place on a different date from the date alleged in the complaint, is not responsive to the issue tendered, and is bad on demurrer.—*Pyle v. Peyton*, 146 Ind. 90, 44 N. E. 925.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 279.

See, also, 31 Cyc. pp. 218-221.

§ 133. Giving color.

[a] (Sup. 1839)

The complaint alleged that plaintiff delivered a check to defendant for collection; that defendant collected it, but, instead of returning the proceeds, deposited them in his own name in a bank which was and is totally insolvent. The answer admitted defendant's receipt and collection of the check, and the deposit in his own name, but alleged that the bank was in good repute for solvency; that he undertook the collection gratuitously; and that plaintiff had accepted the certificate of deposit, with knowledge of all the facts, in full satisfaction of defendant's obligation, and had received dividends thereon from the receiver of the bank. *Held*, that the answer gave sufficient color to plaintiff's cause of action, and was good as a confession and avoidance.—*Cooper v. Smith*, 119 Ind. 313, 21 N. E. 887.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 280.

See, also, 31 Cyc. pp. 216, 217.

§ 134. Matter in justification or excuse.

[a] (Sup. 1879)

In an action on an agreement to pay the balance of an account stated in work, if ordered, after a certain date, on which account there are credits, an answer showing that a part of the credits were given for notes purporting to have been executed by good parties, but which notes proved to be forgeries, is good, as showing failure of consideration to the agreement to the extent of the amount of the notes.—*Davis v. Doherty*, 69 Ind. 11.

[b] (Sup. 1894)

An answer which confesses the conduct complained of, and justifies it by a theory sufficient, though different, from that upon which the complaint is based, is sufficient.—*Hawkins v. Stanford*, 37 N. E. 794, 138 Ind. 267.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 281.

See, also, 31 Cyc. pp. 217, 218.

§ 136. Matter available under general issue or general denial.

Grounds for demurrer, see post, § 194.

Motion to strike out, see post, § 352.

Necessity for reply to, see post, § 166.

Striking out, see post, § 364.

[a] (Sup. 1820)

Any ground of defense which admits the facts alleged in the declaration, but avoids the action by matter which the plaintiff would not be bound to prove or dispute in the first instance on the general issue, may be pleaded specially; but any matter of defense which denies what the plaintiff would on the general issue be bound to prove in the first instance in support of his action ought to be given in evidence on the general issue.—*Davis v. Whipple*, 1 Blackf. 506.

[b] (Sup. 1821)

In assumpsit by the assignee against the assignor of a promissory note, a special plea denying the assignment is bad, because it amounts to the general issue.—*Scribner v. Bullitt*, 1 Blackf. 112.

[c] (Sup. 1839)

It is no objection to a special plea, on general demurrer, that it amounts to the general issue.—*Lair v. Abrams*, 5 Blackf. 191.

[d] (Sup. 1853)

A special plea which amounts only to the general issue is bad.—*Payton v. Secur*, 4 Ind. 645.

[e] (Sup. 1864)

In a suit to subject to sale, a contract for the sale and purchase of land held as collateral security for the payment of promissory notes, where the general denial is in a paragraph of the answer alleging that the defendant was not a maker, but merely an indorser of the notes, and did not assign the contract for the sale of the land to the plaintiff, either by delivery or indorsement, is demurrable.—*Vaughn v. Cush- ing*, 23 Ind. 184.

[f] (Sup. 1872)

To a complaint charging that the defendant had obstructed a stream of water, and caused it to flow over plaintiff's adjoining lands, the defendant answered by general denial, and also, in another paragraph, that plaintiff had previously diverted the water course to defendant's injury, and that defendant, for his own protection, had restored it to its natural channel. *Held*, that a demurrer to this paragraph was properly overruled.—*Harding v. Whitney*, 40 Ind. 379.

[g] (Sup. 1874)

Although by statute the defendant, in an action for the recovery of real property, may avail himself of any defense under the general denial, he may nevertheless plead specially.—*Vanduyen v. Hepner*, 45 Ind. 589.

[h] It is not error to sustain a demurrer to a special paragraph of an answer, when the

facts it put in issue are admissible in evidence under the general denial.—(Sup. 1874) *De Haven v. De Haven*, 46 Ind. 296; (1878) *Alvord v. Smith*, 63 Ind. 58; (1882) *Kidwell v. Kidwell*, 84 Ind. 224; (1883) *Flora v. Cline*, 89 Ind. 208; (1891) *Craig v. Frazier*, 127 Ind. 286, 26 N. E. 842; (1893) *Standard Life & Acc. Ins. Co. v. Martin*, 133 Ind. 376, 33 N. E. 105.

[i] (Sup. 1876)

The rejection of a special answer, alleging matters which can be proved under the general denial, also pleaded, is not error.—*City of Aurora v. Colshire*, 55 Ind. 484.

[j] (Sup. 1881)

Where an answer sets up facts which if proven would not leave uncontradicted enough of the complaint to constitute a cause of action, the answer states a defense, though this allegation might have been proven under the general denial, if one had been pleaded.—*Stoddard v. Johnson*, 75 Ind. 20.

[k] (Sup. 1881)

A defendant in suit to recover real estate may give in evidence all defenses under the general denial; but, if he elects, he may plead specially, and when he does so, and his answers are bad, it is error to overrule a demurrer to them.—*Over v. Shannon*, 75 Ind. 352.

[l] (Sup. 1890)

The complaint in an action against the sureties on a bank cashier's bond alleged, in respect of losses due to unauthorized loans, that the "exchange committee" provided for by the by-laws duly existed. The answer defended on the ground that there was no such committee, and that in consequence the duties of the cashier were enlarged beyond what was contemplated when the bond was executed. It also contained a general denial. *Held*, that the allegations of the answer as to the committee amounted to a denial of the complaint, and it was not error to sustain a demurrer to such allegations, as the general denial remained.—*Wallace v. Exchange Bank of Spencer*, 126 Ind. 265, 26 N. E. 175.

[m] (Sup. 1891)

In an action against a school town for breach of a written contract engaging plaintiff as a teacher, where the complaint avers that plaintiff was duly employed by the legally elected and qualified school trustees of the corporation, an answer which alleges that the persons who signed plaintiff's contract were not duly elected and qualified school trustees, but mere usurpers, is demurrable when pleaded after a general denial, since it is only a special denial.—*School Town of Milford v. Powner*, 126 Ind. 528, 26 N. E. 484.

[n] (Sup. 1892)

Where defendant's answer was in two paragraphs, the first being a general denial, and the second a special plea, and every material averment of the plea could have been proven under the general denial, it was not error to sustain

a demurrer to the plea.—*Toledo, St. L. & K. C. R. Co. v. Stephenson*, 131 Ind. 203, 30 N. E. 1062.

[o] (App. 1892)

Plaintiff sued to recover upon a bond executed by defendant to indemnify him against loss by reason of a certain ditch assessment against land he was about to take a mortgage upon. The complaint alleged the foreclosure of the mortgage, the adjudication of the assessment to be a lien paramount to the mortgage, and payment of the assessment by the plaintiff. The defendant's answer consisted of a general denial, and a special plea alleging that the assessment was only an apparent lien, and that long before the foreclosure all of the ditch allotted to the land had been constructed by the then owners, and the land discharged. *Held*, that the matters therein set forth could have been given in evidence under the general denial.—*Sluyter v. Union Cent. Life Ins. Co.*, 3 Ind. App. 312, 29 N. E. 608.

[p] (Sup. 1893)

In an action by an administrator to set aside a conveyance of land made by the intestate in his lifetime, in which the complaint alleges that claims allowed against the estate amount to \$550, and claims pending to \$250 more, and that the personal estate is only \$14, and the first paragraph of the answer is a general denial, a demurrer is properly sustained to the second paragraph, alleging that the intestate owed no debts at the time of his death, since such paragraph amounts only to a general denial.—*Radabaugh v. Silvers*, 135 Ind. 605, 35 N. E. 694.

[q] (App. 1893)

A demurrer lies to the second paragraph of an answer in replevin, pleading property in a third person, that defense being provable under the general denial of the first paragraph.—*Fruits v. Elmore*, 8 Ind. App. 278, 34 N. E. 820.

[r] (App. 1900)

Where defendant in an action for wrongful conversion answered in two paragraphs,—the first a general denial, and the second an allegation that plaintiff's goods were taken from defendant's possession by virtue of legal process issued by a third party,—it was not error to sustain a demurrer to the second paragraph, as the defense therein contained might be proved under the general denial.—*Cleveland, C., C. & St. L. Ry. Co. v. Wright*, 58 N. E. 559, 25 Ind. App. 525.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 284; 5 CENT. DIG. Assumpsit, § 110.

See, also, 31 Cyc. p. 218.

§ 137. Matter available under other special plea.

[a] (Sup. 1879)

Where all the evidence admissible under a certain paragraph of a pleading may be admit-

ted under other paragraphs, it is not error to sustain a demurrer to the former.—*Gabe v. McGinnis*, 68 Ind. 538.

[b] (Sup. 1896)

It is not error to sustain a demurrer to one of several paragraphs in an answer, where all the evidence which could be introduced under the stricken paragraph can be introduced under the paragraph or paragraphs remaining.—*Moore v. Morris*, 142 Ind. 354, 41 N. E. 796.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 285.

See, also, 31 Cyc. p. 218.

(E) SET-OFF, COUNTERCLAIM, AND CROSS-COMPLAINT.

Aider by verdict or judgment, see post, § 435. Amendment to plead new set-off or counterclaim, see post, § 262.

As affecting right to open and close at trial, see TRIAL, § 25.

Bill of particulars of set-off or counterclaim, see post, § 319.

Contest of will by cross-complaint, see WILLS, § 222.

Copy of account alleged as set-off, see post, § 330.

Cross-bill in equity, see EQUITY, §§ 195-202.

Cross-complaint as affected by dismissal of action, see DISMISSAL AND NONSUIT, § 42.

Cross-complaint as affecting amount in controversy, as determining appellate jurisdiction as between particular courts, see COURTS, § 220 (14).

Cross-complaint for cancellation of instruments, see CANCELLATION OF INSTRUMENTS, § 38.

Cross-complaint for reformation of instrument, see REFORMATION OF INSTRUMENTS, § 38.

Cross-complaint in action against husband or wife, see HUSBAND AND WIFE, § 229.

Cross-complaint or counterclaim for specific performance of contract, see SPECIFIC PERFORMANCE, § 115.

Cross-complaint to enforce right of subrogation, see SUBROGATION, § 41.

Cross-complaint to quiet title by purchaser at execution sale, see EXECUTION, § 283.

Demurrer to set-off good in part, see post, § 204.

Distinction between answer and counterclaim, see ante, § 76.

Effect of demurrer to, as opening record, see post, § 217.

Evidence admissible under plea of set-off or counterclaim, see post, § 384.

Evidence of set-off, counterclaim, or recoupment under general denial or plea in bar, see post, § 382.

Filing account where answer by way of set-off is based on account, see ACCOUNT, ACTION ON, § 5.

Grounds for demurrer, see post, § 195.

In actions for breach of covenants, see COVENANTS, § 115.

In actions for dissolution and accounting of partnership, see **PARTNERSHIP**, § 327.
 In actions for divorce, see **DIVORCE**, § 101.
 In actions for partition, see **PARTITION**, § 57.
 In actions for price of goods, see **SALES**, § 354.
 In actions for reformation of instruments, see **REFORMATION OF INSTRUMENTS**, § 37.
 In actions on bonds of executor or administrator, see **EXECUTORS AND ADMINISTRATORS**, § 537 (8).
 In actions to foreclose mortgages, see **MORTGAGES**, § 455.
 In actions to quiet title, see **QUIETING TITLE**, § 39.
 In ejectment, see **EJECTMENT**, §§ 72, 73.
 In justices' courts, see **JUSTICES OF THE PEACE**, § 93.
 In reply, see post, § 169.
 In suit to foreclose mortgage, see **CHATTLE MORTGAGES**, § 277.
 Joinder of causes of action, see **ACTION**, § 45.
 Joinder with other defense, see ante, § 92.
 Necessity for filing written instruments with pleading, see post, § 308.
 Replication with demurrer to, see post, § 188.
 Striking out answer containing set-off, see post, § 352.
 Trial of cause on cross-complaint asking affirmative relief, see **TRIAL**, § 18.
 Waiver of objections, see post, §§ 411, 412.

§ 138. Nature and office of pleading.

Answers and counterclaims by different defendants, see ante, § 84.
 Distinction from pleading in avoidance, see ante, § 130.

[a] (Sup. 1871)

The only real difference between a complaint and a cross-complaint is that the first is filed by the plaintiff, and the second by the defendant. Both contain a statement of the facts, and each demands affirmative relief upon the facts stated. In the making up of the issues and the trial of questions of fact, the court is governed by the same principles of law and rules of practice in the one case as in the other. When a defendant files a cross-complaint and seeks affirmative relief, he becomes the plaintiff, and the plaintiff in the original action becomes the defendant in the cross-complaint.—*Ewing v. Patterson*, 35 Ind. 326.

[b] (App. 1905)

A counterclaim presupposes affirmative relief and may be good on demurrer, whether it be a full defense or not, and it must state facts showing a liability of plaintiff to defendant in respect to transactions set out in the complaint.—*Johnson v. Sherwood*, 34 Ind. App. 490, 73 N. E. 180.

[c] (App. 1907)

A pleading though styled on its face a cross-complaint, being shown by its allegations to be a counterclaim, will be treated as such.—*Reardon v. Higgins*, 39 Ind. App. 363, 79 N. E. 208.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 286.
 See, also, 31 Cyc. pp. 221, 222.

§ 139. Necessity for plea or answer.

[a] (Sup. 1904)

In an action on a life insurance policy for the amount due at the death of the insured, where the company failed to file any counterclaim for unpaid premiums, it is not entitled to a reduction therefor, though the policy provides that the company may retain any unpaid premiums on final payment of the policy.—*Penn Mutual Life Ins. Co. v. Norcross*, 163 Ind. 379, 72 N. E. 132.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 287.
 See, also, 31 Cyc. p. 222.

§ 140. Time for pleading.

[a] (Sup. 1883)

One of two judgment debtors sued his co-debtor and the judgment creditor to enjoin the collection of the judgment. The co-debtor, though served with process, did not appear, and there was a finding for the judgment creditor. *Held*, that a counterclaim filed by such co-debtor in vacation, pending a motion by the plaintiff for a new trial, was filed too late, and was properly stricken out.—*Helm v. First Nat. Bank of Huntington*, 91 Ind. 44.

[b] (Sup. 1886)

After the issues are closed, and the cause set for trial, permission to file a cross-complaint is in the sound discretion of the trial court, and an order refusing permission to do so will not be set aside unless it is shown that that discretion has been abused.—*Bever v. North*, 107 Ind. 544, 8 N. E. 576.

[c] (Sup. 1889)

The practice of permitting a counterclaim to be filed after the evidence is in and findings made by the trial court, while not erroneous, is not to be commended.—*Alleman v. Hawley*, 117 Ind. 532, 20 N. E. 441.

[d] (Sup. 1903)

Where, in an action against a receiver, it was agreed that matters of set-off and counterclaim might be given in evidence under a general denial, it was not error for the court, at the conclusion of the evidence, to direct such receiver to file an additional answer of set-off and counterclaim, founded on the same items and facts.—*Whitcomb v. Stringer*, 66 N. E. 443, 160 Ind. 82.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 288.
 See, also, 31 Cyc. p. 225.

§ 142. Form and requisites of plea or answer in general.

Pleading as both answer and counterclaim, see ante, § 92.

[a] (Sup. 1836)

If a discount exceed the plaintiff's demand, the defendant shall have judgment for the balance in his favor, and for the costs of suit; and it is not necessary for the defendant to pray judgment for the balance of his plea or notice.—*Hurd v. Earl*, 4 Blackf. 184.

[b] (Sup. 1840)

A plea of set-off, containing several distinct matters, is in the nature of a declaration containing several counts.—*Shearman v. Feilows*, 5 Blackf. 459.

[c] (Sup. 1858)

In an action on a note by the indorsee thereof, defendant answered that he was security for the payee on a note given by the payee to one R.; that after he gave the note sued on, and before the same was transferred to plaintiff, it was agreed between said payee and defendant that he (defendant) should pay the note to R., and should have a credit upon the note in suit; that R. recovered judgment against defendant on the note on which he was security, which judgment he was bound to pay, and which amount he prayed as a set-off. *Held*, on demurrer, that the answer was bad, in that it did not allege the agreement which it set up in defense was made before breach of the contract sued on, and that it omitted to allege that defendant had, in accordance with his contract, paid the judgment or any part of it.—*Billingsley v. Stratton*, 11 Ind. 396.

[d] (Sup. 1859)

Where a paragraph of an answer does not purport to plead a set-off, and the facts averred do not show a liability to the defendant, it cannot be treated as a set-off.—*Smith v. Baxter*, 13 Ind. 151.

[e] (Sup. 1861)

A. drew a bill of exchange upon A. & B. (as a firm), in favor of C., who indorsed it to A. & B., and they indorsed it to a bank. To suit thereon, A. and C. answered that C. was only an accommodation indorser for A. & B.; that, when the bill fell due, the bank was indebted to A., for the use of A. & B., in a certain sum, and in a further sum of money deposited by one D. for the use of A. & B. *Held*, that this answer, though a nondescript in pleading, was yet substantially good, as its averments in substance alleged the indebtedness to be to A. & B.—*Larrimore v. Heron*, 16 Ind. 350.

[f] (Sup. 1876)

In an action on a note by its assignee, where the pleading filed by defendant shows that it is intended as a counterclaim against the payee, it cannot at the same time be considered as an answer to plaintiff's cause of action.—*Gabe v. McGinnis*, 55 Ind. 372.

[g] (Sup. 1881)

A pleading which states matters arising out of, and connected with, the plaintiff's cause of action, which might have been the subject

of an action in favor of the defendant, is properly a counterclaim, and will be treated as such, although called a cross-complaint.—*Jones v. Hathaway*, 77 Ind. 14.

[h] (Sup. 1882)

A plea containing proper allegations for a counterclaim may be treated as such, although filed as an answer.—*Porter v. Reid*, 81 Ind. 569.

[i] (Sup. 1889)

Where a pleading concludes with a prayer for affirmative relief, and the court granted affirmative relief, it must be regarded as a counterclaim, though it was styled an answer.—*Wright v. Anderson*, 20 N. E. 247, 117 Ind. 349.

[j] (App. 1893)

It would seem that when the same matter may be pleaded as an answer by way of recoupment, or by way of counterclaim, that the defendant has the right to elect.—*Brower v. Nellis*, 33 N. E. 672, 6 Ind. App. 323.

[k] (App. 1906)

Where, in an action to cancel a note and mortgage on real estate on the ground of an alleged breach of warranty in the deed of the land from defendant to complainant, a paragraph of defendant's pleading sought a reformation of the deed and mortgage, and a foreclosure of the latter, it was to be treated as a counterclaim, notwithstanding that it was designated by defendant as an "answer by way of counterclaim."—*Johnson v. Sherwood*, 73 N. E. 180, 34 Ind. App. 490.

[l] (App. 1907)

Whether defendant's pleading is an answer, set-off, or counterclaim must be determined from the facts stated therein.—*Excelsior Clay Works v. De Camp*, 40 Ind. App. 26, 80 N. E. 981.

[m] (Sup. 1909)

The court will determine the character of a pleading, whether it is an answer or a counterclaim, by the facts which it contains and the character of relief sought, and not by what the pleader calls it.—*Cleveland, C. & St. L. R. Co. v. Rudy*, 89 N. E. 951.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 290, 291, 297, 300.

See, also, 31 Cyc. pp. 226-229.

§ 144. Matter of set-off in general.

[a] (Sup. 1836)

Under the statute, a plea of matters of set-off must be in the form of a plea of payment, setting out in the conclusion the matters of set-off.—*Young v. Harry*, 4 Blackf. 167.

[b] (Sup. 1836)

It is not necessary that a plea of payment and set-off under the statute should show that the amount claimed as a set-off is equal to the plaintiff's demand.—*Hurd v. Earl*, 4 Blackf. 184.

[c] (Sup. 1840)

A plea of set-off which shows that the defendant drew an order on a third person, and gave it to the plaintiff, is bad, without an averment that the plaintiff received the amount.—*Shearman v. Fellows*, 5 Blackf. 459.

[d] (Sup. 1851)

Under Rev. St. p. 709, subsec. 7, providing that, if an action is brought by one for the use of another, defendant may set off any claim against the usee in like manner as if the latter were plaintiff, where the complaint on a promissory note by two payees does not show that it is brought by one for the use of the other, defendant may properly allege such fact in his plea, and then allege a set-off against the usee.—*Forkner v. Dinwiddie*, 3 Ind. 34.

[e] (Sup. 1852)

A special plea of set-off, which professes to answer the whole cause of action, but answers only a part, is bad on general demurrer.—*Conklin v. Waltz*, 3 Ind. 396.

[f] (Sup. 1858)

In a set-off, the claim should be set out with as much certainty as in an action.—*Stockton v. Graves*, 10 Ind. 294.

[g] (Sup. 1863)

The particulars of a demand pleaded in set-off must be set forth.—*Ward v. Bennett*, 20 Ind. 440.

[h] (Sup. 1864)

Suit by M., assignee, on a note. Answer, by way of set-off, that the note was executed by D. to one K., the assignor of M.; that afterwards B., A., and said K. executed a joint note to one C., who assigned the same to said D. before the latter had any notice of the assignment by K. to plaintiff of the instruments sued on; that, when D. acquired title to said note, B. and A. were, and continued to be, insolvent. *Held*, that the answer was demurrable.—*Durbon v. Kelley*, 22 Ind. 183.

[i] (Sup. 1864)

Where the maker of a note in an action upon it by an assignee against him, pleads that, at the time of the indorsement of the note by the payee to the plaintiff, the payee was indebted to him, etc., such averment will sufficiently show that the indebtedness accrued before notice of the assignment of the note.—*Jenkinson v. Bowen*, 22 Ind. 344.

[j] (Sup. 1864)

A plea of set-off in an answer, "for money paid to the plaintiff for the use and forbearance of payment of said sums," is defective in not charging that the money so paid was usurious interest.—*Wilson v. Fleming*, 23 Ind. 119.

[k] (Sup. 1865)

To an action by an assignee upon a promissory note, the defendant pleaded, by way of set-off, a note made by the plaintiff's assignor to a third party, and assigned to the defendant. The answer showed that the note offered as a set-

off was assigned to the defendant after the assignment of the note sued on to the plaintiff. *Held*, that the answer was bad, for the want of an averment that the note offered as a set-off was assigned to the defendant before notice of the assignment of the note sued on to the plaintiff.—*Sayres v. Linkhart*, 25 Ind. 145.

[l] (Sup. 1866)

A paragraph purporting to answer by a set-off an entire complaint for a larger sum is bad on demurrer.—*Blew v. Hoover*, 30 Ind. 450.

[m] (Sup. 1869)

An answer setting up that the defendant agreed to pay for the plaintiff and deliver to him a certain note described; that the defendant was induced so to agree upon the plaintiff's representation that such note did not bear interest until maturity; that the note did, in fact, bear interest from its date, which the plaintiff well knew; that such interest at the maturity of the note amounted to a sum specified, which the defendant paid, together with the principal, which sum so paid with interest he asked to set off,—*held* good on demurrer.—*Brown v. Freed*, 31 Ind. 387.

[n] (Sup. 1869)

Averments in an answer to a complaint upon a note in an action brought in one county that the note was given by defendant to plaintiff for money loaned; that, to secure the payment, defendant executed to plaintiff a deed absolute on its face, but intended as a mortgage for certain lands in another county; and that plaintiff held the lands, and refused to reconvey on payment of the note,—set forth a valid counterclaim.—*Vail v. Jones*, 31 Ind. 467.

[o] (Sup. 1872)

An answer offering to set-off a note must be accompanied by a note or a copy thereof or must show reason why this is not done.—*Hamrick v. Craven*, 39 Ind. 241.

[p] (Sup. 1872)

The sufficiency of a pleading setting up a counterclaim or set-off is not to be tested by the technical rules of the common law. An answer of set-off which assumes to answer the whole complaint, but only answers a part, is not bad. A set-off is not strictly a defense.—*Curran v. Curran*, 40 Ind. 473.

[q] (Sup. 1872)

Where one of several makers of a promissory note files a set-off in his favor, he should allege that he is principal, and that the other makers are only sureties; and, in the absence of such allegations, it is not error to refuse to allow the set-off.—*Dodge v. Dunham*, 41 Ind. 186.

[qq] (Sup. 1873)

In one paragraph of an answer, the sureties of a city clerk alleged that, when the clerk received the money on the orders claimed to have been illegally issued by him, the city was indebted to him one thousand dollars. In a subsequent part of the paragraph they express-

ly admitted that he received from the city treasurer on orders unlawfully filled up by himself \$332 over and above what was due him from the city, and without any allowance by the city council. *Held*, that the paragraph was not good as an answer of set-off.—*Armington v. State ex rel. City of Greensburgh*, 45 Ind. 10.

[r] (Sup. 1873)

In an action on a note, where defendant pleaded by way of set-off that plaintiff was indebted to him in the amount of docket fees due defendant as district attorney for prosecuting plaintiff for a misdemeanor, it was not necessary to allege that the judgments or costs taxed were in full force and unreversed.—*Law v. Vierling*, 45 Ind. 25.

An answer of set-off will not be had because it purports to answer the whole of the complaint, and only answers a part thereof.—*Id.*

[rr] (Sup. 1873)

An answer of set-off is not demurrable for assuming to answer the entire complaint, although the set-off is shown to be for a sum less than the plaintiff's demand. The answer is good to the extent of the set-off.—*Mullendore v. Scott*, 45 Ind. 113.

[rrr] (Sup. 1874)

To a complaint by a husband and wife, on a check payable to A. & Co., wherein it was alleged that the wife was in business with other parties, under the firm name of A. & Co., but that the check was her individual property, in which the other members of the firm had no interest, and that it was drawn payable to A. & Co. by mistake, *held*, that an answer in the form of a cross-bill, alleging that the check was given for certain notes bought of A. & Co., and represented by the plaintiffs to be the property of A. & Co., which notes were indorsed to the defendant in the name of A. & Co., and claiming to set off the amount of a note made by A. & Co., and held by the defendant, was good.—*Griffin v. Kemp*, 46 Ind. 172.

[s] (Sup. 1874)

To an action for foreclosure and judgment by an administrator, on a mortgage and note executed to his intestate, the defendant answered that he was a bishop of the Roman Catholic Church, and, according to the canons of said church, the real estate of each congregation of his diocese was deeded to him to hold in trust for such congregation. The mortgage was on real estate purchased by one of his congregations, and it and the note were given by him for money lent by the intestate to such congregation, with the agreement and understanding between the mortgagee and the defendant that said congregation, and not the defendant, was to repay said loan. The answer further alleged, that the plaintiff's intestate, before and at and after the execution of the note and mortgage was the priest of said congregation, and that as such he collected from the members thereof \$1,300 to pay the debts of the congregation, in-

cluding the debt sued on, and for other purposes, no part of which he had paid to the congregation, or to the defendant as its trustee, which sum the defendant offered to set off against the plaintiff's demand. *Held*, that as a set-off the answer was defective for failing to state how much of the \$1,300 was applicable to the debt in suit, or how much of it was required for the other debts and "other purposes."—*Benoit v. Schneider*, 47 Ind. 13.

[t] (Sup. 1877)

To a complaint by the sole devisee of the estate of a testator, against an attorney at law, to recover, in part, for moneys alleged to have been collected by the latter upon choses in action so devised to the plaintiff, and, in part, for an alleged personal indebtedness of the defendant to the plaintiff, the defendant pleaded, by way of set-off, an alleged indebtedness of the estate of such testator to the defendant, for professional services rendered by him in the settlement thereof, but did not allege either that such matter of set-off had been filed as a claim against such estate or that such estate had been finally settled. *Held*, on demurrer that such answer is insufficient.—*Tracewell v. Peacock*, 55 Ind. 572.

[tt] (Sup. 1877)

In an action against a township trustee for a breach of his bond in applying moneys of one fund to the payment of debts against another, an answer averring indebtedness of the township to the principal defendant for money had and received for his use, and for money paid by him for the township's use, accompanied by no specification of the application thereof, was too general for a set-off, and insufficient.—*Robinson v. State ex rel. Martin*, 60 Ind. 23.

[ttt] (Sup. 1880)

An answer by way of set-off cannot be objected to on the ground that it states only a partial defense.—*Kennedy v. Richardson*, 70 Ind. 524.

[u] (Sup. 1882)

In an answer by way of set-off, defendant pleaded payment on a judgment formerly held against him, and that plaintiff had agreed, if he would allow the judgment to be revived free from the payment, he would appropriate the sum to any other indebtedness of defendant. *Held*, that the answer was bad in failing to allege that the judgment had been revived.—*Huston v. Vail*, 84 Ind. 262.

[uu] (Sup. 1882)

A counterclaim, treated at the trial as an answer in bar, will be so treated by the Supreme Court on appeal, and *held* bad, on demurrer for want of facts sufficient to answer the whole complaint, if it purports to answer the complaint.—*Hancock v. Fleming*, 85 Ind. 571.

[uuu] (Sup. 1882)

In an action against a city, an answer alleging as a set-off that plaintiff is indebted to it

for taxes in a certain sum without stating by whom or for what purpose the taxes were levied, nor on what property they were assessed, nor when assessed, is insufficient.—*City of Connersville v. Connersville Hydraulic Co.*, 86 Ind. 235.

[v] (Sup. 1882)

In an action against the holder of a certificate of sale for the nonpayment of taxes, *held*, that the answer or counterclaim was not bad because not answering the whole complaint; its purpose being to state facts as the basis of affirmative relief in favor of defendant.—*Reed v. Earhart*, 88 Ind. 159.

[vv] (Sup. 1883)

An answer by way of set-off is bad on demurrer where it does not show that defendant held the claim offered to be set off at the commencement of the action.—*Gregory v. Gregory*, 89 Ind. 345.

[vvv] (Sup. 1886)

In a suit upon a promissory note an answer which alleges that the note was given for the interest of the plaintiff, as heir, in certain real estate, and that, the estate of the decedent being insufficient to pay debts, the defendant had been compelled to pay the proportion thereof for which plaintiff was liable, in order to protect his title, but which does not allege that defendant had any deed for such real estate, nor that plaintiff had requested such payment, or promised to repay or credit it on the note, is bad on demurrer.—*Blacker v. Dunbar*, 108 Ind. 217, 9 N. E. 104.

[w] (App. 1891)

A plea of set-off for money paid out at plaintiffs' request, which does not allege directly or by inference that the demand is due and unpaid, is demurrable.—*Johnson v. Tyler*, 1 Ind. App. 387, 27 N. E. 643.

[ww] A plea of set-off must be substantially the same as a complaint, and is to be tested by the same rules and methods.—(App. 1892) *Howlett v. Dilts*, 30 N. E. 313, 4 Ind. App. 23; (1893) *Brower v. Nellis*, 33 N. E. 672, 6 Ind. App. 323.

[x] (App. 1893)

In an action on a judgment the complaint alleged that the judgment was entered against defendants and one B., who had since died, but defendants' pleading of a breach of warranty as a counterclaim contained no averment as to the death of B. *Held*, that such pleading was bad, as a set-off, it not appearing that the cause of action alleged as a defense was in defendants alone.—*Brower v. Nellis*, 6 Ind. App. 323, 33 N. E. 672.

[xx] (App. 1893)

In an action upon an assigned claim, a plea of set-off of a debt due from the assignor, which does not allege that said debt accrued before the assignment, is demurrable.—*Francis v. Leak*, 6 Ind. App. 411, 33 N. E. 807.

[y] (Sup. 1894)

Where, in an action by the indorsee of notes, defendant claimed the right to have the notes rescinded for fraud, it was proper to file a cross complaint, and to bring in the original payee, in order to have the entire controversy adjudicated.—*Shirk v. Mitchell*, 137 Ind. 185, 36 N. E. 850.

[yy] (App. 1895)

Where, in an action to recover for the building of a sidewalk under Act Feb. 14, 1859, authorizing the trustees of any town to require property owners to construct sidewalks, and, on their refusal to do so, to construct the same at the expense of the owner, defendant pleads a set-off to the value of a portion of the walk built by him, the plea is bad as an answer to the entire demand.—*Shrum v. Town of Salem*, 13 Ind. App. 115, 39 N. E. 1050.

[yyy] (Sup. 1903)

In an action against a receiver of a loan association, a set-off alleging that intervener collected and received a large sum of money belonging to the association, which sum he has failed and refused to account for and pay over to the association or its receiver, is not objectionable for want of an allegation of demand.—*Whitcomb v. Stringer*, 66 N. E. 443, 160 Ind. 82.

[z] (App. 1907)

A defendant pleading a set-off must show a cause of action in his favor.—*Lupton v. Taylor*, 39 Ind. App. 412, 78 N. E. 680, 79 N. E. 523.

[zz] (App. 1907)

Where the answer, in an action on a note, set up by way of set-off a claim for money obtained by plaintiff, the widow of defendant's deceased partner, on a note due the partnership, an allegation that she refused to account to defendant for his share of the money collected thereon was a sufficient allegation of demand.—*Schnell v. Schnell*, 39 Ind. App. 556, 80 N. E. 432.

In an action on a note, an allegation in the answer setting up a set-off, which averred that a certain note was executed to a firm consisting of defendant and plaintiff's deceased husband, that plaintiff obtained possession of the note and collected the money due thereon, but which failed to state from whom, and in what manner she came into possession of the note, was insufficient on demurrer, since it would be inferred that she came into possession of the note lawfully.—*Id.*

The joinder of three claims for set-off in one paragraph of an answer is not ground for demurrer, where the facts alleged therein constitute a valid set-off as to one of the claims.—*Id.*

[zzz] (App. 1910)

A set-off is not a defense, but is regarded as a cross-action, and must therefore state facts sufficient to stand alone.—*Penn-American Plate*

Glass Co. v. Harshaw, Fuller & Goodwin Co., 90 N. E. 1047.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 293.

See, also, 31 Cyc. pp. 221, 222, 226.

§ 146. Counterclaim in answer.

[a] (Sup. 1873)

Where a written contract is set out in a complaint, and is the foundation of the action, the defendant, in setting up a counterclaim against the plaintiff upon the same contract, and seeking a judgment thereon in his own favor, must set out in his own pleading the original or a copy of the contract.—Campbell v. Routt, 42 Ind. 410.

A counterclaim, like any other pleading, should be good by itself without aid from other pleadings in the cause or exhibits contained therein, where such exhibits are in no manner adopted and made a part of such counterclaim.—Id.

[b] (Sup. 1876)

Where it appears from the facts alleged in an answer that it contains a statement of new matter arising out of or connected with the cause of action, which might be the subject of an action in favor of the defendant, this need not also be directly averred to constitute a counterclaim.—Gilpin v. Wilson, 53 Ind. 443.

[c] (Sup. 1878)

A counterclaim based on an alleged breach of covenant in a deed, which fails to set out either the deed or a copy thereof, is insufficient on demurrer.—Patton v. Camplin, 63 Ind. 512.

[d] (Sup. 1879)

A paragraph of an answer which sets up a counterclaim, and expressly confines itself "to the matters and things set forth in the third paragraph of plaintiff's complaint," is sufficient as against an objection that it is pleaded to the whole complaint and answers only a part, though it offers to set off what may be proved under it to the whole claim in the complaint.—Sidener v. Davis, 60 Ind. 336.

[e] (Sup. 1881)

A pleading stating the consideration of the contract sued on, and alleging a counterclaim to the same, shows that the matter of the counterclaim is connected with, and grows out of, the cause of action.—Crowder v. Reed, 80 Ind. 1.

[f] (Sup. 1883)

In an action on a note given for a stock of goods and the good will of a business, a counterclaim alleging that the purchase of such property was induced by fraudulent representations on the part of the plaintiffs as to the amount of annual sales, and that the defendants had obtained a lease for the storeroom previously occupied by the plaintiffs, but failing to allege that they had purchased or procured such

lease from the plaintiffs, or that the plaintiffs had any such right or interest in the storeroom, or that the defendant's annual sales had not been equal to or greater than the amount represented by the plaintiffs, was bad on demurrer.—Rawson v. Pratt, 91 Ind. 9.

[g] (Sup. 1883)

In an action by the heirs of a wife to restrain the husband's administrator from selling land held in the husband's name in trust for the wife, a counterclaim alleging that the administrator had paid off a mortgage on the land when it was purchased, to protect the title, is not sufficient, unless the mortgage or a copy thereof accompanies the pleading, as the administrator can enforce the lien only by foreclosing the mortgage.—Goldsberry v. Gentry, 92 Ind. 193.

[h] (Sup. 1885)

When the facts averred in an answer present a counterclaim, the fact that it was not formally pleaded as such can make no difference.—Mills v. Rosenbaum, 2 N. E. 313, 103 Ind. 152.

[i] (App. 1893)

A counterclaim must be complete within itself, and a demurrer thereto is properly sustained where it is unintelligible except by reference to the complaint.—Wabash Valley Protective Union of Crawfordsville v. James, 8 Ind. App. 449, 35 N. E. 919.

[j] (App. 1894)

A counterclaim is in the nature of a complaint, and, in order to withstand a demurrer, must contain facts sufficient to entitle the defendant to affirmative relief against the plaintiff.—Blaney v. Postal, 34 N. E. 849, 10 Ind. App. 131.

[k] (App. 1895)

In an action by a lessor for rent and breach of covenants, an answer alleging that defendant and one to whom he sublet with plaintiff's consent, and in consideration of an increase in the rent, were disturbed in their possession by repeated and insolent demands by plaintiff for a surrender of the premises, and by threats of ejectment, and by the bringing of an action for possession, whereby defendant was prevented from conducting a school for which he had leased the premises, and seeking damages therefor, was good as a counterclaim without an allegation that damages for such conduct were due and unpaid.—Jennings v. Bond, 14 Ind. App. 282, 42 N. E. 957.

[l] (App. 1896)

A single pleading cannot constitute both an answer and a counterclaim. Where it sets out new matter, and asks affirmative relief, it will be considered as a counterclaim, and not an answer.—Huber Mfg. Co. v. Busey, 16 Ind. App. 410, 43 N. E. 967.

[m] A counterclaim must contain every allegation needed in a complaint founded on the

same cause of action.—(Sup. 1898) *Indiana Mut. Building & Loan Ass'n No. 2 v. Crawley*, 51 N. E. 466, 151 Ind. 413; (1905) *Stoner v. Swift*, 74 N. E. 248, 164 Ind. 652.

[n] (Sup. 1900)

A counterclaim alleging a failure on plaintiffs' part to comply with their contract within the time limited therein, and claiming the sum stipulated as liquidated damages for such delay, is ineffectual for any purpose where it fails to allege that defendant performed the conditions of the contract on its part to be performed, or to show a legal excuse for nonperformance.—*Bird v. St. John's Episcopal Church of Elkhart*, 56 N. E. 129, 154 Ind. 138.

[o] (App. 1910)

Burns' Ann. St. 1908, § 355, provides that any matter arising out of or connected with a cause of action which might be the subject of an action in favor of defendant, or which tends to reduce plaintiff's claim or demand for damages, may be pleaded as a counterclaim, and section 356 declares that, if defendant omits to set up a counterclaim arising out of the contract or transaction set forth in the complaint, he cannot afterward sue thereon except at his own cost. *Held*, that such sections should be construed together, and that an answer pleading a counterclaim was demurrable where it did not show that defendant's claim accrued on the same contract, or that it arose out of the same transaction, on which plaintiff's suit was based.—*Penn-American Plate Glass Co. v. Harshaw, Fuller & Goodwin Co.*, 90 N. E. 1047.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 294-296.

See, also, 31 Cyc. p. 226.

§ 147. Cross-complaint in general.

Aided by verdict or judgment, see post, § 435.

Amendment, see post, § 267.

Filing written instruments with cross-complaint, see post, § 308.

Motion to strike out, see post, §§ 352, 354, 360.

Objections to cross-complaint reached by general demurrer, see post, § 205.

To enforce right of subrogation, see SUBROGATION, § 41.

Waiver of failure to answer cross-complaint, see post, § 412.

[a] (Sup. 1873)

A cross-complaint can only relate to the matters in question in the original complaint.—*Hunter v. McLaughlin*, 43 Ind. 38.

[b] (Sup. 1875)

An answer seeking affirmative relief should be in the form of a cross-complaint, and, where affirmative relief is sought against the plaintiff and the co-defendants, they should be made parties to the cross-complaint.—*Winslow v. Winslow*, 52 Ind. 8.

[c] (Sup. 1878)

In an action on a note by the administrators of the payee, the payee's widow, who was

not a party to the original action, was, on application by her, made a party plaintiff in the action and filed a pleading in which she demanded to be declared the owner of the note as against the original plaintiffs, and asked judgment against the defendants for the amount thereof. The original plaintiffs filed a general denial to the widow's pleading and also a special answer admitting that the consideration of the note was once the widow's property, but that it had become their decedent's separate estate by the acceptance of a certain deed by her for real estate purchased therewith. The answer of the defendants named in the original complaint was in the nature of a bill of interpleader and in general denial to the widow's pleading. *Held*, that as the widow was not made a party to the original complaint, either by the action of the plaintiffs therein or by order of the court below, but by order of the court was made a party plaintiff in the action the pleading she filed was not a cross-complaint, but an original complaint in her own behalf.—*Lyman v. Buckner*, 60 Ind. 402.

[d] (Sup. 1881)

Where, assuming that on the facts stated, a defendant would have a right to recover against defendants to the cross-complaints, the controversy would be one clearly at law, and in no way connected with, or dependent on, the matter alleged in the complaint, and the facts do not constitute a cause of action by way of counterclaim or cross-complaint, there is no available error to the defendant in dismissing the same.—*Sterne v. First Nat. Bank of Vincennes*, 79 Ind. 560; *Same v. Vincennes Nat. Bank*, Id. 598.

[e] (Sup. 1882)

Each paragraph of a cross-complaint must be complete in itself, and cannot be aided by reference merely to other paragraphs.—*Axtel v. Chase*, 83 Ind. 546.

[f] (Sup. 1889)

The same general rules govern a cross-complaint that govern a complaint.—*Johnson v. Pontious*, 20 N. E. 792, 118 Ind. 270.

[g] (Sup. 1894)

It is questionable whether an action by cross-complaint to establish a lien is germane to a suit to enjoin the enforcement of a supposed legal lien by execution.—*Wood v. Hughes*, 37 N. E. 588, 138 Ind. 179.

[h] (App. 1894)

A cross-complaint must be good as to all the cross-complainants, or it will be good as to none.—*Ohio Thresher Engine Co. v. Hensel*, 36 N. E. 716, 9 Ind. App. 328.

[i] (App. 1894)

Though the Code is silent on the subject of cross-complaints, the chancery practice of determining the rights of the parties on each side of the cause is recognized by the decisions, and in such cases the rules of pleading and practices of chancery courts, as modified by the

spirit of the Code govern.—*Heaton v. Lynch*, 38 N. E. 224, 11 Ind. App. 408.

[l] (Sup. 1897)

A cross-complaint must be sufficient within itself, without aid from any other pleadings in the case.—*Schmidt v. Zahndt*, 47 N. E. 335, 148 Ind. 447.

[k] (Sup. 1906)

The cross-complainant and cross-defendant are in legal effect the plaintiff and defendant in a separate action.—*State ex rel. Longfellow v. Wimer*, 166 Ind. 530, 77 N. E. 1078.

[l] (Sup. 1909)

A cross-complaint must be germane to the subject-matter of the original, and relief sought must be connected with matters involved in the principal action, or in some way depend on the contract or transaction on which it was based.—*Hunter v. First Nat. Bank*, 172 Ind. 62, 87 N. E. 734.

FOR CASES FROM OTHER STATES,

See 31 Cyc. pp. 226-230.

§ 148. Cross-complaint against plaintiff.

[a] (Sup. 1869)

To a complaint to set aside a conveyance by plaintiff to defendant for fraud, an answer by way of cross-complaint alleged that the defendant was owner in fee simple and entitled to said land; that the purchase was in good faith and for a valuable consideration of plaintiff, who was still in possession; and that plaintiff falsely claimed that defendant had acquired title by unfair means, and prayed for a decree quieting defendant's title. *Held*, that the cause of action set up in the answer was within the definition of a counterclaim in the Code, and a proper subject for a cross-bill.—*Grimes v. Duzan*, 32 Ind. 361.

[b] (Sup. 1890)

In a suit for the cancellation of a note and mortgage, and the recovery of personal property, a cross-complaint, seeking to settle title to real estate to which no claim is made, and the title to which cannot be affected by any judgment which can be rightfully rendered, is improper.—*Washburn v. Roberts*, 72 Ind. 213.

[c] (Sup. 1881)

If a pleading is, in all essential features, a cross-complaint, arguments addressed to its sufficiency as an answer raise no question upon it as a cross-complaint.—*Stockton v. Stockton*, 73 Ind. 510.

[d] (Sup. 1885)

In an action to recover possession of land, where both the action and the cross-action seek possession of the same land, the cross-complaint is not demurrable as charging trespass sounding in tort, merely because defendant charges plaintiff, as plaintiff does defendant, with wrongful acts.—*Cartwright v. Yaw*, 100 Ind. 119.

[e] (Sup. 1886)

A cross-complaint, like a complaint, must, in itself, state all the requisite facts to entitle the defendant to affirmative relief, and defects in it cannot be cured by the averments of any of the other pleadings in the action.—*Conger v. Miller*, 104 Ind. 592, 4 N. E. 300.

[f] (Sup. 1891)

In a suit to recover land, defendants filed a cross-complaint, which was entitled, "W. v. F. and P.," and which proceeded substantially as follows: "The above-named defendants, F. and P., for cross-complaint against the plaintiff W., * * * say that they are the equitable owners * * * of the following described real estate. * * * Cross-complainants further aver that he derived his title as follows, to wit: He (defendant) purchased said real estate from H."; and then, after setting out the chain of title down to H., it concluded: "Cross-complainants aver that they are the owners of said real estate, and that said W. is claiming some title thereto," etc. *Held* that, in the allegation "defendant purchased from H.," the term "defendant" will be taken to refer to defendants in the main suit, and not defendant in the cross-suit; and hence this specific allegation is not repugnant to the general allegation of title in cross-complainants.—*Warbritton v. Demorett*, 129 Ind. 346, 27 N. E. 730, 28 N. E. 613.

[g] (Sup. 1897)

A cross-complaint must state facts sufficient to entitle the pleader to some affirmative relief, and it cannot be aided by the allegations of other pleadings in the action.—*Leach v. Rains*, 48 N. E. 858, 149 Ind. 152.

[h] (App. 1900)

A cross-complaint filed in a suit on a note to recover attorney's fees incurred by the cross-complainants in preparing to defend the original suit, without making such attorneys parties to the cross-complaint, was bad on demurrer, since the matters set up in it were not germane to the original action, and a judgment in favor of the cross-complainants would not constitute a bar to an action by the attorneys against the cross defendants.—*Buscher v. Volz*, 58 N. E. 269, 25 Ind. App. 400.

[i] (Sup. 1901)

Under Burns' Rev. St. 1894, § 353, defining a counterclaim to be any matter arising out of or connected with the cause of action which might be the subject of an action in favor of the defendant, or which would tend to reduce the plaintiff's claim for damages, a cross-complaint is insufficient as a counterclaim which contains no averments, or otherwise shows, that the transaction alleged therein was connected with or arose out of the same cause of action on which the plaintiff bases his complaint.—*Harris v. Randolph County Bank*, 60 N. E. 1025, 157 Ind. 120.

Burns' Rev. St. 1894, § 351 (Horner's Rev. St. 1897, § 348), provides that a set-off shall be allowed only in actions for money demands on

contract. A cross-complaint in an action on a note against the original makers alleged that plaintiff wrongfully took possession of certain notes belonging to a certain bank, of which cross-complainant was receiver, which assigned them to plaintiff, and the latter wrongfully converted them to its own use. A second paragraph alleged that plaintiff is indebted to such bank for money had and received. *Held*, that the cross-complaint did not allege matters by way of set-off.—Id.

[j] (Sup. 1903)

A paragraph of a joint cross-complaint, which fails to state a cause of action in favor of both cross-complainants, is bad on demurrer.—*Deane v. Indiana Macadam & Construction Co.*, 68 N. E. 686, 161 Ind. 371.

[k] (App. 1906)

In an action against the purchaser of goods for breach of contract, in which a cross-complaint asking for reformation of the contract is filed, it is not necessary for the cross-complaint to negative the receipt of an acceptance of the order for the goods, where the complaint does not allege that an acceptance of the order was sent to and received by defendant.—*Nichols & Shepard Co. v. Berning*, 37 Ind. App. 109, 76 N. E. 776.

[l] (App. 1907)

In an action on a written contract, an answer counting on the same contract is controlled by the construction placed on the contract set out in the complaint; and, where the allegations of the answer are in conflict with the terms of the written contract, the writing must control.—*Stamets v. Plano Mfg. Co.*, 40 Ind. App. 620, 82 N. E. 122, 923.

[m] (Sup. 1909)

In suit on a note, a surety alleged that there had been deposited with the holder as collateral corporate stock, which the maker had received as the price of its plant and property on its sale to the corporation issuing it; that said pledged stock constituted all of the maker's assets except the proceeds of a sale of certain lots and some rental money now in hands of a trustee; that certain persons had subscribed for and on payment of less than par value had received, stock in the corporation, the maker of the note, prior to execution of the note in suit—and prayed for a receiver to take possession and control of all the maker's assets, to require an accounting of the trustee, and to enforce collection of the balance due on subscription for such shares of stock. *Held*, that the allegations of the cross-complaint were not germane to the principal action.—*Hunter v. First Nat. Bank*, 172 Ind. 62, 87 N. E. 734.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 209.

See, also, 31 Cyc. pp. 221, 222.

§ 149. Cross-complaint against codefendant or third parties.

[a] (Sup. 1869)

In a suit by a widow to quiet title to her interest as widow in certain land, the complaint alleged that she had conveyed the land to defendant by joining in a deed with her children, by which it was intended to convey to such defendant the interests of the children in the land as heirs at law of her husband, not intending thereby to convey her interest, and that the land was afterwards conveyed with warranty by defendant to a third person. Defendant's cross-complaint alleged that, by mistake, the latter conveyance described and conveyed a greater interest in said land than that lately owned by such children, which was the interest intended by the parties to the deed to be conveyed, and prayed that said deed from the defendant to his codefendant be reformed. *Held* that, under the Code, the matter set forth in the cross-complaint and the subject of the principal suit could be litigated together, and that the cross-complaint was good on demurrer, assigning insufficiency of the facts alleged.—*Dice v. Morris*, 32 Ind. 283.

[b] (Sup. 1874)

Where a defendant partner filed an answer alleging that he had no knowledge of a claim by the partnership against his codefendant, but averring that if it existed he was entitled to one-half thereof, and praying that judgment for his half might not be rendered in plaintiff's favor, *held* error to render judgment in his favor against his codefendant for one-half the sum found due to the partnership. To entitle himself to such judgment, he must have filed a cross-complaint asking affirmative relief.—*Hill v. Marsh*, 46 Ind. 218.

[c] (Sup. 1882)

In an action on a note, both of the makers of which signed it as sureties for a third person, and afterwards entered into an agreement between themselves the effect of which was to constitute one of them principal and the other surety, the latter was entitled to maintain a complaint against his codefendant under Code, §§ 674, 675, to have the question of suretyship determined.—*McTaggart v. Dolan*, 86 Ind. 314.

[d] (Sup. 1884)

In an action by the assignee of a promissory note not payable to order or bearer in a bank in the state brought against the immediate and remote assignors, the immediate assignor filed a cross-complaint against the remote assignor. The cross-complaint did not claim that the immediate assignor had sustained any damages by reason of any breach of warranty contained in the assignment executed by the remote assignor. *Held*, that the remote assignor's demurrer to the cross-complaint for the alleged insufficiency of facts therein to constitute a cause of action should have been sustained.—*Mathes v. Shank*, 94 Ind. 501.

[e] (**SUP.** 1894)

Where, in an action by the indorsee of notes, defendant claimed the right to have the notes rescinded for fraud, it was proper to file a cross-complaint, and to bring in the original payee, in order to have the entire controversy adjudicated.—*Shirk v. Mitchell*, 137 Ind. 185, 36 N. E. 850.

[f] (**APP.** 1909)

A cross-complaint must show a complete cause of action against the cross-defendants, and to show such action the cross-complaint must by averment show an adverse claim of defendants which is unfounded.—*Abner T. Bowen v. W. O. Eaton & Co.*, 89 N. E. 961.

Where plaintiff in his complaint and a defendant in his cross-complaint asserted a claim to a fund, and a codefendant answered the complaint and cross-complaint by a general denial and asserted a claim to the same fund and averred facts sufficient to entitle him to receive it, unless plaintiff or defendant showed a superior right, the cross-complaint of the codefendant was sufficient to entitle him to some relief.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 301.

See, also, 31 Cyc. p. 223.

(F) AFFIDAVIT OF DEFENSE OR OF MERITS.

Authorizing order of court for filing of pleas after rule day, see ante, § 85.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. §§ 302-320.

See, also, 31 Cyc. pp. 231-240.

IV. REPLICATION OR REPLY AND SUBSEQUENT PLEADINGS.

Adoption of allegations of other pleading, see ante, § 15.

Aider by verdict or judgment, see post, § 436.

Amendment, see post, § 269.

As affecting right to open and close at trial, see TRIAL, § 25.

Character of pleading as reply or demurrer, see post, § 201.

Defective reply as ground for judgment on pleadings, see post, § 347.

Defects in complaint cured by reply, see post, § 402.

Demurrer to reply good in part, see post, § 204.

Effect of demurrer to, as opening record, see post, § 217.

Grounds for demurrer, see post, § 196.

In avoidance of defense of release, see RELEASE, §§ 49-52.

In avoidance of defense of statute of limitations, see LIMITATION OF ACTIONS, §§ 186-192.

In equity, see EQUITY, §§ 212, 213.

Replication or reply with demurrer, see post, § 188.

Reply bad in part, see ante, § 38.

Reply to plea or answer of estoppel in pais, see ESTOPPEL, § 113.

Reply to plea or answer of payment, see PAYMENT, § 61.

Reply to plea or answer setting up statute of frauds, see FRAUDS, STATUTE OF, § 155.

Reply to plea or answer setting up statute of limitations, see LIMITATION OF ACTIONS, § 185.

To amended pleading, see post, § 265.

To plea in abatement, see ante, § 111.

Waiver of objections, see post, §§ 409, 412.

Withdrawal, see post, § 339.

In particular actions or proceedings.**See—**

Against sureties. **PRINCIPAL AND SURETY**, § 156.

ASSAULT AND BATTERY, § 24.

ASSUMPSIT, ACTION OF, § 21.

BILLS AND NOTES, § 486.

Bonds. **BONDS**, § 126.

For arrest or discharge therefrom. **EXECUTION**, § 453.

Of public officers—

OFFICERS, § 141.

SHERIFFS AND CONSTABLES, § 168.

TAXATION, § 570.

Breach of contracts. **CONTRACTS**, § 345.

By or against corporation. **CORPORATIONS**, § 513.

Partners after dissolution of partnership. **PARTNERSHIP**, § 296.

Surviving partners or representatives of deceased partners. **PARTNERSHIP**, § 258.

Claims against decedents' estates. **EXECUTORS AND ADMINISTRATORS**, § 251.

Compensation of broker. **BROKERS**, § 82.

Confirmation or trial of. **TAXATION**, § 809.

Contract of suretyship. **PRINCIPAL AND SURETY**, § 156.

DIVORCE, § 102.

EJECTMENT, § 74.

Election contests. **ELECTIONS**, § 286.

Enforcement of mechanic's lien. **MECHANICS' LIENS**, § 274.

Of right of exemption. **EXEMPTIONS**, § 147.

Establishment of claim to property garnished. **GARNISHMENT**, § 216.

Failure to deliver or misdelivery of goods shipped. **CARRIERS**, § 94.

Foreclosure of mortgage. **MORTGAGES**, § 456.

Foreign judgment. **JUDGMENT**, § 939.

Injuries from fires caused by operation of railroads. **RAILROADS**, § 478.

To persons on or near street railroad tracks. **STREET RAILROADS**, § 110.

Insurance policy. **INSURANCE**, §§ 641, 815.

INTERPLEADER, § 26.

LIBEL AND SLANDER, § 96.

MANDAMUS, § 166.

Opening or setting aside partnership accounting. **PARTNERSHIP**, § 348.

PARTITION, § 58.

Penalty for failure or refusal to furnish telephonic services. **TELEGRAPHS AND TELEPHONES, § 78.**

Price of land sold. **VENDOR AND PURCHASER, § 314.**

Recovery of price paid for goods. **SALES, § 354.**

REFORMATION OF INSTRUMENTS, § 38.

REPLEVIN, § 66.

Sale of land to enforce assessment for public improvements. **MUNICIPAL CORPORATIONS, § 567.**

Setting aside settlement of accounts of executor or administrator. **EXECUTORS AND ADMINISTRATORS, § 509 (6).**

SUBSCRIPTIONS, § 21.

TRESPASS, § 42.

WORK AND LABOR, § 23.

§ 164. Necessity for pleading in reply.

In justice's court, see **JUSTICES OF THE PEACE, § 90.**

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 321-330; 33 CENT. DIG. Mal. Pros. § 104.

See, also, 31 Cyc. p. 241.

§ 165. — In general.

[a] (**Sup. 1849**)

It is error to go to trial, leaving one of the pleas in the case unanswered.—*Seivers v. McCall*, 1 Ind. 393, *Smith*, 257.

[b] Where no replication was filed to a plea, and there was, therefore, no issue either of fact or law, a trial was erroneous.—(**Sup. 1854**) *Swope v. Ardery*, 5 Ind. 213; (**1857**) *Reeves v. Clark*, 8 Ind. 409.

[c] (**Sup. 1854**)

In an action by the administrator of M. M. against the administrator of J. M., the complaint alleged that J. M. had fraudulently induced M. M. to marry him, whereby he became possessed of a large amount of real and personal property of M. M.; that J. M. had a wife living, which was unknown to M. M. The answer alleged that M. M. had not at her death any rights, credits, etc., due said J. M.'s estate. *Held*, that the answer was merely an informal denial of the right of action, which did not require a replication.—*Wiggins v. Holman*, 5 Ind. 502.

[d] (**Sup. 1857**)

County commissioners refused to pay the county recorder's claim for indexing deeds, and the recorder appealed. The commissioners filed an answer, to which the recorder made no reply. *Held*, that no reply was necessary, and that a failure to reply was not an admission that the facts stated in the answer were true.—*Board of Com'rs of La Grange County v. Kromer*, 8 Ind. 446.

[e] (**Sup. 1858**)

An answer in an action on a stock subscription that the stock was subscribed by one who pretended to act as, but was not, the agent of defendant, is an argumentative denial of the alleged subscription which was shown by the complaint to be in writing, and, as the answer was not sworn to, it could only operate as a general denial, and hence a reply was not required.—*Denny v. Indiana & I. C. Ry. Co.*, 11 Ind. 292.

[f] (**Sup. 1862**)

Where all the evidence was admissible under the issue formed by the complaint and general denial, other pleadings were unnecessary.—*Leedy v. Clapp*, 18 Ind. 188.

[g] An answer which states no defense needs no reply.—(**Sup. 1866**) *Debord v. La Hue*, 28 Ind. 212; (**1868**) *Bragg v. State ex rel. Davis*, 30 Ind. 427.

[h] (**Sup. 1867**)

An offer to confess judgment, filed with an answer in a cause, though numbered as a paragraph of the answer, makes no part of the answer, and does not require a reply.—*Barnes v. Bates*, 28 Ind. 15.

[i] (**Sup. 1868**)

A plaintiff is only required to reply to such parts of the answer as are well pleaded.—*Numbers v. Bowser*, 29 Ind. 491.

[j] (**Sup. 1879**)

Where all the evidence which can be offered under a reply is properly admissible under the general denial filed in the case, it is not error to sustain a demurrer thereto.—*Foust v. Gregg*, 68 Ind. 399.

[k] (**Sup. 1881**)

Special argumentative denials in an answer require no reply.—*Uhl v. Harvey*, 78 Ind. 26.

[l] (**Sup. 1889**)

Where a pleading styled a "disclaimer" was nothing more than an answer confessing the cause of action, it did not require a reply, and the refusal to allow a reply was not prejudicial error.—*Walker v. Steele*, 22 N. E. 142, 23 N. E. 271, 121 Ind. 436.

[m] (**Sup. 1892**)

A plea of non est factum closes the issues, and does not require a reply.—*Brickley v. Edwards*, 30 N. E. 708, 131 Ind. 3.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 321; 33 CENT. DIG. Mal. Pros. § 104.

See, also, 31 Cyc. pp. 241-243.

§ 166. — New matter in answer.

[a] (**Sup. 1847**)

In an action of slander, the pleas were not guilty and the statute of limitations. There was no replication to the special plea. The verdict and judgment were for the plaintiff. *Held* that,

the special plea being unanswered, the trial was not legal.—*Huston v. McPherson*, 8 Blackf. 562.

[b] (Sup. 1858)

To a claim on a receipt, an answer that the money was to be retained as an advancement from the tenant for life (a widow) to the remainderman amounts to a material allegation of new matter, admitted, if not replied to, and therefore there is no issue without a reply.—*Norman v. Norman*, 11 Ind. 288.

[c] (Sup. 1860)

Where all the evidence that could have been given under the answer of want of consideration was admissible under the general denial, the judgment will not be reversed for a failure to reply to such answer.—*Butler v. Edgerton*, 15 Ind. 15.

[d] A reply need not be made to new matter in the plea or answer which amounts only to a traverse or denial.—(Sup. 1866) *Ferris v. Johnson*, 27 Ind. 247; (1881) *Webb v. Corbin*, 78 Ind. 403.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 321½–328;
33 CENT. DIG. Mal. Pros. § 104.
See, also, 31 Cyc. pp. 244, 245.

§ 169. Matter to be pleaded in reply in general.

Defense of estoppel, see ESTOPPEL, § 114.

[a] (Sup. 1840)

If a plea in confession and avoidance conclude with a special traverse, which does not go to the point of the action, the plaintiff may reply to the matter in avoidance without noticing the special traverse.—*Benner v. Elliott*, 5 Blackf. 451.

[b] (Sup. 1856)

Where a former recovery is pleaded to an entire complaint, if a part of the demand was not included within the former recovery, the fact should be set up by reply.—*Brandon v. Judah*, 7 Ind. 545.

[c] (Sup. 1860)

Under the Code, plaintiff may, in his reply, in addition to the general traverse, set up new matter in avoidance of the answer.—*Snodgrass v. Hunt*, 15 Ind. 274.

[d] (Sup. 1878)

When a judgment by confession before a justice of the peace is set up in an answer, the plaintiff may set up in reply his refusal to consent to the judgment.—*Kennard v. Carter*, 64 Ind. 31.

[e] (Sup. 1893)

Affirmative relief cannot be granted to a plaintiff for matters pleaded in a reply by way of counterclaim.—*Small v. Kennedy*, 137 Ind. 296, 33 N. E. 674.

[f] (App. 1901)

A reply of set-off may be made to an answer of set-off.—*Orr v. Leathers*, 61 N. E. 941, 27 Ind. App. 572.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 331.
See, also, 31 Cyc. pp. 249, 250.

§ 172. Time for filing or service.

[a] (Sup. 1849)

After trial and judgment it is too late to make up the issue on an unanswered plea.—*Seivers v. McCall*, 1 Ind. 393, Smith, 257.

[b] (Sup. 1860)

A plaintiff cannot be permitted, after the trial, to file a replication, particularly where it is not shown that a reply had been filed before the trial, or that it was supposed there had been.—*Lawrence v. Huffer*, 15 Ind. 367.

[c] (Sup. 1862)

The court may, in its sound discretion, allow the plaintiff to reply to the answer after the initiatory steps in the trial have been taken.—*Gilbert's Ex'r v. Plant*, 18 Ind. 308.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 334–338; 27 CENT. DIG. Inj. § 269.
See, also, 31 Cyc. pp. 247, 248.

§ 173. Form and requisites of replication in general.

Waiver of objections on ground of duplicity, see post, § 412.

[a] (Sup. 1818)

Where, in an action of covenant, the defendant pleaded covenants performed, a replication which was a general negative was informal and wrong for concluding with a verification.—*Dougherty v. Wilson*, 1 Blackf. 478.

[b] (Sup. 1841)

If one of several replications to a plea of payment and set-off be good, it is sufficient to sustain the action.—*Hurd v. Earl*, 6 Blackf. 39.

[c] (Sup. 1841)

In debt on a bond, it appeared on oyer, to be conditioned for the collection of taxes. Performance was pleaded, and the replication assigned breaches. The replication was specially demurred to for being double and argumentative, and for not showing a sufficient assessment roll and precept. *Held*, that the assignment of several breaches did not render the replication double.—*Vance v. State ex rel. Goodlander*, 6 Blackf. 80.

[d] (Sup. 1853)

If a plea be double, and plaintiff replies thereto, instead of demurring for the duplicity, he must answer both parts of the plea.—*Barrett v. Ruitt*, 3 Ind. 571.

[e] Plaintiff may tender as many issues in reply as he pleases, if they are not inconsistent with the complaint, nor frivolous, etc.—(Sup. 1856) *Zehnor v. Beard*, 8 Ind. 96; (1857) *City of Lamasco v. Kessler*, Id. 474; (1857) *Terre*

Haute & R. R. Co. v. McCormack, Id. note; (1860) *Snodgrass v. Hunt*, 15 Ind. 274.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. §§ 339, 340, 385.
See, also, 31 Cyc. pp. 248-250.

§ 174. Form and requisites of reply under codes of procedure.

Adoption of allegations in other pleading, see ante, § 15.
Character of pleading as reply or demurrer, see post, § 201.

[a] A reply must be good as to the entire answer to which it is addressed; otherwise, it will be open to demurrer.—(Sup. 1874) *Kernodle v. Caldwell*, 46 Ind. 153; (1887) *Silvers v. Canary*, 109 Ind. 267, 9 N. E. 904.

[b] Every reply must respond to the entire pleading or part thereof to which it purports to be the answer.—(Sup. 1874) *Musselman v. Cravens*, 47 Ind. 1; *Towell v. Pence*, Id. 304; (1880) *Kinsey v. State ex rel. Shirk*, 71 Ind. 32; (1881) *Pouder v. Tate*, 76 Ind. 1; (1882) *Markland Min. & Mfg. Co. v. Kimmel*, 87 Ind. 560.

[c] A reply pleaded to an entire answer, but containing no response to one paragraph thereof, is bad on demurrer.—(Sup. 1881) *American Ins. Co. v. Leonard*, 80 Ind. 272; (1886) *Fordice v. Scribner*, 108 Ind. 85, 9 N. E. 122; (1887) *Bottles v. Miller*, 112 Ind. 584, 14 N. E. 728.

[d] (Sup. 1882)

Where a reply avers nothing in denial or avoidance of matter set up in the answer, it is bad on demurrer.—*Chrisman v. Chenoweth*, 81 Ind. 401.

[e] (Sup. 1883)

A reply which, if the truth of its allegations be admitted, does not defeat the allegations of the answer to which it is directed, is demurrable.—*Ilaas v. Shaw*, 91 Ind. 384, 46 Am. Rep. 607.

[f] (Sup. 1884)

Mere omission to notice a preliminary uncontroverted statement in the answer where the reply is otherwise good and fully meets and replies to all the material facts stated in the answer, will not vitiate the reply.—*Kinsey v. State ex rel. Shirk*, 98 Ind. 351.

[g] (Sup. 1889)

Plaintiff's reply was headed by a preliminary statement, designating it as a reply to the second and third paragraphs of defendant's answer, after which followed two properly numbered paragraphs,—the first a general denial, the second a plea of payment of the items alleged as a set-off in the third paragraph of the answer. *Held*, that a demurrer to the reply, on the ground that it purported to be a reply to the second and third paragraphs of the answer, but that it pleaded facts constituting a reply to the third paragraph only, without denying, confessing, or avoiding the matter set out in the sec-

ond, was properly overruled.—*Hill v. Hill*, 121 Ind. 255, 23 N. E. 87.

[h] (Sup. 1893)

Where a complaint alleges that defendant is threatening to enter on plaintiff's property, and asks that he be enjoined, and defendant files a cross complaint claiming title, an answer thereto is not bad which disclaims title in plaintiff to all land claimed by defendant, and lying south of "the line formerly and until recently occupied by the fence that stood three feet south of, and parallel with, the south wall of" plaintiff's church building, and denies title in defendant to all land north of such line.—*Richwine v. Presbyterian Church of Noblesville*, 135 Ind. 80, 34 N. E. 737.

[i] (App. 1900)

Defendants pleaded a set-off and a counterclaim, and alleged a promise by plaintiff to execute to one of the defendants a chattel mortgage on specified personal property to secure the payment of his note indorsed by such defendant. To the set-off and counterclaim plaintiff replied that he was a resident householder, and that all of his property was less in value than \$600. *Held*, that the fact that the pleadings did not show that the property claimed in the reply as exempt was the property to be mortgaged did not render the reply subject to demurrer.—*Whiteley Malleable Castings Co. v. Bevington*, 58 N. E. 268, 25 Ind. App. 391.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. § 342.
See, also, 31 Cyc. pp. 250-253.

§ 175. New assignment of cause of action.

[a] (Sup. 1839)

Trespass for breaking the plaintiff's close and cutting his timber thereon. Pleas: (1) Not guilty. (2) That a state road was established running through said close, and that the defendant, as a commissioner of the road, entered on the close and cut down and removed the trees growing in the road, etc. New assignment that the suit was not only for the trespasses mentioned in the plea, but also for other trespasses out of the road. Plea to the new assignment not guilty. *Held*, that the plaintiff by new assigning, without denying the special plea, admitted the existence and validity of the state road, and the defendant's authority as set forth in the plea, and confined the issue to such trespasses as were alleged in the new assignment.—*McNutt v. Arnott*, 5 Blackf. 95.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. §§ 341, 397.
See, also, 31 Cyc. pp. 254, 255.

§ 176. Traverses or denials.

Grounds for demurrer, see post, § 196.

[a] (Sup. 1827)

Plaintiff brought covenant on an obligation for the payment of money, to which defendant

pleaded payment and a release, which release plaintiff had since destroyed. Plaintiff replied, denying that he had destroyed the release. *Held*, that plaintiff, not having specially demurred to the plea for duplicity, as he might have done, was bound to answer the plea as a whole, and that the replication therefore was insufficient for a failure to deny payment.—*Beno v. Hollowell*, 2 Blackf. 38.

[b] (Sup. 1851)

One of several material facts averred in a plea may properly be traversed by the replication.—*White Water Val. Canal Co. v. Henderson*, 3 Ind. 3.

[c] (Sup. 1858)

2 Rev. St. p. 42, §§ 66, 67 declare that "all defenses, except the mere denial of the facts alleged by the plaintiff, shall be specially pleaded," and that, "when the answer contains new matter, the plaintiff may reply thereto, denying each allegation, etc., and he may allege any new matter constituting a defense to the answer and not inconsistent with the complaint." *Held*, in view of the foregoing, that the use of the traverse and the denial in the reply were precisely similar to its use in the answer, and that, in effect, it simply put in issue the truth of the matters alleged.—*Kimberling v. Hall*, 10 Ind. 407.

[d] (Sup. 1859)

A general reply, denying each and every allegation in all the paragraphs of an answer, is good.—*Cleveland v. Worrell*, 13 Ind. 545.

[e] (Sup. 1859)

A denial of one defense is not a denial of other distinct defenses.—*Stebbens v. Lenfesty*, 14 Ind. 4.

[f] (Sup. 1860)

A reply setting up facts inconsistent with the answer amounts to a direct denial of it.—*Meredith v. Lackey*, 14 Ind. 529.

[g] (Sup. 1861)

Where, in a suit for the alleged conversion of certain bonds by the defendant, the answer set up a claim for services rendered by the defendant as an attorney and before the legislature, a replication that the defendant unlawfully converted the bonds to his own use was *held* good as an argumentative denial of the matters set up in the answer.—*Judah v. Trustees of Vincennes University*, 16 Ind. 56.

[h] (Sup. 1863)

Semble, that, where several defendants in the same action sever in their answers, the plaintiff may reply effectively to them all by one general denial.—*Torr v. Torr*, 20 Ind. 118.

[i] (Sup. 1864)

Where the answer, in a suit on a bill of exchange, sets up payment, part in money and the residue in bills of exchange, which, it is averred, were received by plaintiff in payment, a replication which alleges that at the time of the delivery of such bills defendant fraudu-

lently misrepresented to plaintiff that the drawers and drawees were solvent and able to pay the same and would pay them at maturity, and that the sums of money therein named were secured by mortgage, and that, relying on these representations, plaintiff received such bills of exchange to be applied when paid to the extinguishment of the balance due on the bill sued on, does not contain a departure in pleading, but only amounts to an argumentative denial of the answer.—*Frisbee v. Lindley*, 23 Ind. 511.

[j] (Sup. 1871)

An answer alleged payment and a set-off, and a reply was filed by plaintiff in these words: "The plaintiff denies each and every allegation therein contained." A trial being had, the jury found for plaintiff. *Held*, on a motion for judgment for defendant, on the ground of the insufficiency of the reply, that the paper filed did not amount to a reply.—*Train v. Gridley*, 36 Ind. 241.

[k] (Sup. 1872)

Where there are separate paragraphs of an answer filed by different defendants, a reply in these words: "The plaintiff, for reply to defendant's answer, says that he denies each and every allegation to the answer"—may be taken to be a reply to each paragraph of the answer.—*Ferguson v. Wagner*, 41 Ind. 450.

[l] (Sup. 1881)

Where paragraphs of a reply to a cross-complaint constituted mere argumentative denials, and a general denial was also filed, no error was committed in sustaining a demurrer to such special paragraphs.—*Arnold v. Smith*, 80 Ind. 417.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 343, 345-353.

See, also, 31 Cyc. pp. 250, 253.

§ 177. Admissions.

Admission of submission to arbitration, see ARBITRATION AND AWARD, § 86.

Affected by necessity for reply, see ante, § 165.

By demurrer, see post, § 214.

By failure to reply, see post, § 182.

In declaration or complaint, see ante, § 69.

Judgment on admissions, see post, § 349.

[a] (Sup. 1855)

Where a replication fails to take issue on a material plea, and it remains unanswered, it will be taken as admitted, for the omission by either party to traverse any material fact alleged by his adversary is, in effect, an admission of it.—*McClure v. Pursell*, 6 Ind. 330.

A material averment in an answer which is not noticed by the reply will be regarded as admitted.—*Id*.

[b] (Sup. 1855)

A material averment in an answer, which is not noticed by the reply, is regarded as admitted.—*Barker v. Hobbs*, 6 Ind. 385.

[c] (Sup. 1860)

Though the averments of the answer may not be directly controverted in the reply, yet if the reply sets up facts in avoidance of, or inconsistent with, the answer, the answer cannot be taken as admitted.—*Meredith v. Lackey*, 16 Ind. 1.

[d] (Sup. 1886)

Where a party, in his reply to an answer, states that he "admits the contract therein alleged," he thereby admits the consideration as alleged; and such consideration being sufficient, the further averment in the reply that the contract was without consideration does not make it good as against a demurrer.—*Blacker v. Dunbar*, 108 Ind. 217, 9 N. E. 104.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 354, 355.

See, also, 31 Cyc. pp. 263, 266.

§ 178. Confession and avoidance.

[a] (Sup. 1858)

2 Rev. St. p. 42, §§ 66, 67, declares that "all defenses, except the mere denial of the facts alleged by the plaintiff, shall be specially pleaded," and that "when the answer contains new matter, the plaintiff may reply thereto, denying each allegation, etc., and he may allege any new matter constituting a defense to the answer and not inconsistent with the complaint." *Held* that, in view of the foregoing, new matter must be specially pleaded in the reply as in the answer, and that otherwise it could not be proved on the trial.—*Kimberling v. Hall*, 10 Ind. 407.

[b] (Sup. 1862)

A reply not setting up facts sufficient to avoid the answer, or presenting such a state of facts as shows plaintiff not to be entitled to recover, is bad.—*Wilson v. Madison, etc., R. Co.*, 18 Ind. 226.

[c] (Sup. 1867)

Defendant pleaded, as a set-off, a note alleged to have been assigned to him. *Held*, that paragraphs of the reply setting up that at the time of the assignment it was agreed by the parties to it that the property in the note should not pass to defendant, and that he was not, at the time of filing his answer, the owner of the note, were bad on demurrer; but that a paragraph stating facts sufficient to show that the assignor of the note, and not defendant, was the real party in interest, notwithstanding the assignment, was good.—*Lewis v. Sheaman*, 28 Ind. 427.

[d] (Sup. 1872)

In an action on a note secured by a mortgage on a portable sawmill, the answer alleged that the note was given in consideration of the sale of the mill, which sale was made on a written agreement, executed by plaintiff to defendant, warranting it to be in good and complete running order, that there was a breach of such warranty, etc. There was no copy of the written contract filed with the an-

swer. To this there was a reply that the written contract was simply preliminary to an examination of the mill by defendant, and that such examination had been made, and the note thereupon executed, and the written contract surrendered up. A demurrer to this reply was overruled. *Held*, that the reply was good, and that if bad the demurrer should have been sustained to the answer for the failure to file therewith a copy of the written agreement.—*Drook v. Irvine*, 41 Ind. 430.

[e] (Sup. 1877)

To an answer in an action for use and occupation, alleging the previous assignment of the cause of action by the plaintiff for the benefit of his creditors, a reply was filed alleging that before the suit the assignee had reassigned such cause of action to plaintiff. *Held*, that the reply should have set out the reassignment, or an excuse for not doing so, but that the reply was sufficient to the answer; the latter being itself insufficient.—*Ross v. Boswell*, 60 Ind. 235.

[f] (Sup. 1885)

There being a general denial to a counterclaim for money paid for plaintiff, it is not reversible error to sustain a demurrer to a special reply that the money expended by defendant belonged to plaintiff.—*Mason v. Mason*, 102 Ind. 38, 26 N. E. 124.

[g] (Sup. 1889)

The complaint alleged that plaintiff delivered a check to defendant for collection; that defendant collected it, but, instead of returning the proceeds, deposited them in his own name, in a bank which was and is totally insolvent. The answer admitted defendant's receipt and collection of the check, and the deposit in his own name, but alleged that the bank was in good repute for solvency; that he undertook the collection gratuitously; and that plaintiff had accepted the certificate of deposit, with knowledge of all the facts, in full satisfaction of defendant's obligation, and had received dividends thereon from the receiver of the bank. The reply admitted the receipt of the certificate of deposit with knowledge of the bank's insolvency, but alleged that plaintiff subsequently returned it to defendant, and has not seen it since; also, admitted that plaintiff received certain dividends from the receiver. *Held*, that the reply was insufficient.—*Cooper v. Smith*, 119 Ind. 313, 21 N. E. 887.

[h] (Sup. 1889)

Defendant, by way of set-off, pleaded an indebtedness for board and lodging, and for washing, mending, and making plaintiff's clothes, and for boarding, feeding, and stabling plaintiff's horse. Plaintiff replied, setting up a contract by which defendant was to furnish board and lodging and care for plaintiff's clothes in consideration of services to be performed by plaintiff, and alleging that he had fully performed his part of the contract, but failing to aver a contract for keeping the horse.

Held, that the court erred in overruling a demurrer to the reply.—*Hill v. Hill*, 121 Ind. 255, 23 N. E. 87.

[i] (App. 1891)

In an action on a note given for boot in a horse trade, defendant counterclaimed for breach of warranty of the horse traded him. Plaintiff, in his reply, pleaded a counterclaim for breach of warranty of the mare traded to him. *Held*, that the reply was within the terms of Code Civ. Proc. § 357, which provides that when the answer contains new matter the reply may set up any new matter which avoids it and supports the complaint.—*Starke v. Dicks*, 2 Ind. App. 125, 28 N. E. 214.

[j] (App. 1893)

Where the answer alleges that a certain sum was received by plaintiff in settlement for goods sold, a reply alleging that said sum was not accepted in full, but in part payment only, of which fact defendants had due notice, is not demurrable, though a general denial would have sufficed.—*Pottlitzer v. Wesson*, 8 Ind. App. 472, 35 N. E. 1030.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 350, 357.

See, also, 31 Cyc. pp. 253, 254.

§ 180. Departure from declaration or complaint.

Aider by verdict or judgment, see post, §§ 433, 436.

Argumentative denial in general, see ante, § 176. Departure of rejoinder from plea, see post, § 183.

From complaint in action to set aside settlement of administrator's accounts, see EXECUTORS AND ADMINISTRATORS, § 509 (3).

Ground for demurrer, see post, §§ 192, 196.

Prayer for reformation of instrument in reply as departure, see REFORMATION OF INSTRUMENTS, § 38.

Waiver, see post, § 412.

[a] (Sup. 1839)

On a declaration in the usual form in a suit by the assignee against the maker of a promissory note, the pleas were want of consideration, etc. The replication was that the note was made in the state of Ohio, etc.; setting out a statute of that state, which showed the pleas to be inadmissible. *Held*, that the replication was a departure.—*Yeatman v. Cullen*, 5 Blackf. 240.

[b] (Sup. 1840)

If the replication desert the ground in point of law on which the declaration rested the cause, it is a departure.—*Wells v. Teall*, 5 Blackf. 306.

[c] The inconsistency of the reply and complaint is the same defect as that known in the old system as a departure in pleading.—(Sup. 1850) *Zehnor v. Beard*, 8 Ind. 96; (1857) *City of Lamasco v. Kessler*, Id. 474; (1857) *Terre Haute & R. R. Co. v. McCormack*, Id., note.

[d] (Sup. 1857)

In an action upon a promissory note which stated that it was given for the purchase of certain lands described as the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of a certain section, the defendant, in his answer, alleged that the sole consideration for which the note was given was the sale of the lands to which the payee had no title whatever. The plaintiff replied, admitting that the note was given for the lands described, but averring that he had title. Subsequently plaintiff was allowed to amend his reply by alleging that the description of the land in the note was, through mistake or fraud of the defendant, erroneous, and that the consideration of the note was the sale of the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of the designated section. *Held*, that such reply, as amended, is defective, as a departure in pleading.—*Shank v. Fleming*, 9 Ind. 189.

[e] (Sup. 1860)

Suit by assignees against the makers of a promissory note made in Ohio, and payable at a bank in that state. The defendants pleaded a set-off, to which the plaintiffs replied, setting out a statute of Ohio which brought the note within the law merchant. *Held*, that the reply was a departure.—*Will v. Whitney*, 15 Ind. 194.

[f] (Sup. 1860)

In a suit to foreclose a mortgage on real estate, defendant answered that plaintiff had realized out of the sale of personal property mortgaged an amount greater than the entire mortgage debt. The reply alleged that the proceeds of the personal property had, at the request of defendant, been appropriated to the payment of other debts. *Held*, that the reply was responsive to the defense, and was not a departure.—*Martin v. Davis*, 15 Ind. 478.

[g] (Sup. 1861)

Suit was brought against the sureties on an administrator's bond for the sale of real estate. Answer that the administrator had paid and accounted, etc. Reply that afterwards there had been a further accounting in the court of common pleas, and that the administrator had been found in arrears, etc. *Held*, that the reply was a departure, inasmuch as it failed to show that the amount stated to have been found in arrear was part of the proceeds of the sale of the real estate.—*Burtch v. State ex rel. Richardville*, 17 Ind. 506.

[h] (Sup. 1864)

Where the answer, in a suit on a bill of exchange, sets up payment, part in money and the residue in bills of exchange, which, it is averred, were received by plaintiff in payment, a replication which alleges that at the time of the delivery of such bills defendant fraudulently misrepresented to plaintiff that the drawers and drawees were solvent and able to pay the same and would pay them at maturity, and that the sums of money therein named were secured by mortgage, and that, relying on these representations, plaintiff received such

bills of exchange to be applied when paid to the extinguishment of the balance due on the bill sued on, does not contain a departure in pleading, but only amounts to an argumentative denial of the answer.—*Frisbee v. Lindley*, 23 Ind. 511.

[l] (Sup. 1865)

To a complaint charging the acceptance of goods purchased to have been procured by the fraudulent representations of the seller, without examination by the buyer, the defendant answered denying the fraud and alleging that the buyer had examined the goods and had full knowledge of their quality. The reply admitted an examination of the goods by the plaintiff and a knowledge of certain facts indicating the defect complained of, but averred that he relied on defendant's representations, and that the defendant had subsequently promised to pay the damages claimed. *Held*, that the reply was a departure.—*McAroy v. Wright*, 25 Ind. 22.

[j] (Sup. 1868)

Suit on promissory note. Answer, alleging payment of a certain amount of illegal interest and seeking to reduce the recovery that much. Reply, that such payment was made under a subsequent written contract to pay that rate. *Held*, that the reply was not a departure.—*Sparks v. Clapper*, 30 Ind. 204.

[k] (Sup. 1871)

A reply of a new promise to an answer of the statute of limitations is not a departure.—*Van Dorn v. Bodley*, 38 Ind. 402.

[l] (Sup. 1874)

When the guardian of an insane person sues upon a promissory note, and alleges in the complaint that the note was indorsed to the plaintiff, a reply showing that the note was indorsed to the deceased ancestor of his ward, and that his ward's only claim to the note grows out of a division made by the heirs of the notes held by the deceased, is a departure.—*Bearss v. Montgomery*, 46 Ind. 544.

[m] (Sup. 1874)

Where a complaint is upon a promissory note made by the defendant, and the defendant answers that the note was given for the plaintiff's interest in partnership goods held by the plaintiff and the defendant, and that the defendant has since paid partnership debts, for which he asks a set-off against the notes, it is not a departure for the plaintiff to reply that the defendant agreed, in writing, as a part of the consideration for the goods, to pay the debts of the firm.—*Shirts v. Irons*, 47 Ind. 445.

A reply which sets up matter which is not inconsistent with the complaint, but which tends to support and justify it, is not a departure.—*Id.*

[n] (Sup. 1874)

A departure in pleading is when a party quits or departs from the case or defense which

he has first made, and has recourse to another.—*Kimberlin v. Carter*, 49 Ind. 111.

Where to a complaint upon a promissory note an answer is filed setting up a failure of consideration, a reply that there had been differences in reference to the consideration, but that they had been compromised and settled, by the defendant agreeing to pay, and the plaintiff to receive, a certain sum, less than the face of the note, is not a departure.—*Id.*

[o] (Sup. 1876)

Where, in an action for money paid and expended by plaintiff for defendant at his special instance and request, a bill of particulars constituting an account for a certain amount of corn purchased at a certain price is filed with the complaint, a reply claiming for money paid by plaintiff to satisfy a purchaser for a contemplated nonperformance of a contract for the delivery of corn by defendant to such purchaser was not a departure.—*Godman v. Meixsel*, 53 Ind. 11.

[oo] (Sup. 1881)

Where a complaint declares on a written contract, a reply asking a reformation thereof is a departure and demurrable, in the absence of any averment therein of a mutual mistake in its execution, or that the parties did not mutually understand or intend the instrument as executed.—*Wood v. Deutchman*, 75 Ind. 148.

[p] (Sup. 1881)

A reply seeking to hold liable a part of the defendants who answer in justification under a writ of possession, and also seeking to recover damages against such defendants for issuing the writ, without showing that they had any connection with its issuance or with the alleged trespass, is a departure from a complaint averring facts constituting a trespass by defendant in removing plaintiff's goods from his dwelling house.—*Steele v. Davis*, 75 Ind. 191.

[pp] (Sup. 1881)

The complaint alleged ownership of a certain lot and building, and that defendant was about to wrongfully remove the latter; to which defendant answered that he had leased the lot with right to build and remove. Plaintiff replied that under a judgment against him and defendant on a lien for indebtedness of the latter, the property had been sold, and that he had bought it. *Held*, that the reply was a departure.—*Cuppy v. O'Shaughnessy*, 78 Ind. 245.

[q] (Sup. 1881)

In an action for breach of contract to convey land, plaintiff alleged that defendant did not and could not convey the title at the time stipulated, and that plaintiff elected to rescind and the answer alleged a tender. *Held*, that a reply alleging that after commencement of suit defendant sold the property to another was a departure.—*Teal v. Langsdale*, 78 Ind. 339.

[qq] (Sup. 1882)

In a complaint to reform a deed, A. claimed title under B., under whom defendant also

claimed by a prior conveyance, which in reply A. admitted, but alleged that the conveyance was voluntary to defraud the creditors of X., who had for that purpose conveyed to B. *Held*, that the reply showed a departure.—*Etter v. Anderson*, 84 Ind. 333.

[r] (Sup. 1882)

A replication which fortifies the complaint or which does not quit the original cause of action, but avoids the answer, is not bad for departure.—*Etna Life Ins. Co. v. Nexsen*, 84 Ind. 347, 43 Am. Rep. 91.

In an action by an agent of a life insurance company for a wrongful discharge, the answer alleged that plaintiff had agreed to pay over money as soon as he collected it, but had failed to do so. *Held*, that a reply stating that plaintiff had been directed to transmit a monthly report to the company and retain his collections until drawn upon, and that he still had in his hands money belonging to the company subject to and awaiting the draft, was not a departure.—*Id.*

[rr] (Sup. 1882)

In a suit to foreclose a mortgage, defendant answered that a part of the money claimed to be due was for usurious interest, to which plaintiff replied that, in consideration of extension of time, defendant had agreed to pay 10 per cent. interest. *Held*, that the reply did not show a departure.—*Hunter v. Rice*, 87 Ind. 312.

[s] (Sup. 1887)

To a complaint for satisfaction of a judgment, alleging that the judgment had been paid by the sale and delivery of certain personal property, accepted in satisfaction thereof by the defendant, who had wrongfully refused to cancel the judgment of record, the latter answered a former adjudication, alleging, among other things, that it had been adjudged in such former action that such property was, at the time it was alleged to have been taken in satisfaction, already the property of the defendant, by virtue of a chattel mortgage executed to him by the plaintiff. The plaintiff replied admitting the judgment, but alleging that it was rendered upon an express agreement that the defendant should be adjudged the owner of such property; and in consideration thereof, and the surrender to him of such property, he agreed to cancel and satisfy the judgment mentioned in the complaint. *Held* no departure.—*Palmer v. Hayes*, 112 Ind. 289, 13 N. E. 882.

[ss] (Sup. 1888)

In an action on notes, defendant answered specially that the notes were obtained by fraud and without consideration. Plaintiff's reply alleged a new promise founded on consideration of an extension of time. *Held*, that a demurrer was properly overruled, as the new matter supported the cause of action stated in the complaint, and avoided the new matter in the answer, as required by Rev. St. 1881, § 357.—

Brown v. First Nat. Bank, 115 Ind. 572, 18 N. E. 56.

[t] (Sup. 1889)

In an action upon a certificate issued by a mutual benefit association, the complaint alleged that assessments had been paid according to an agreement between the assured and the association that they might be paid at any time within 60 days after notice, although the certificate provided that they should be paid within 10 days. The answer denied such agreement, and alleged that the assessments had not been paid according to the terms of the certificate. The reply averred that the defendant had waived the conditions of the certificate by permitting the certificate to stand uncanceled, and by receiving payment within 60 days after notice. *Held* not a departure.—*Sweetser v. Odd Fellows' Mut. Aid Ass'n*, 117 Ind. 97, 19 N. E. 722.

[tt] (Sup. 1890)

In an action on a note and to foreclose a mortgage securing the same, where one of the defendants answered, setting up her coverture at the time of the execution of the note and mortgage and that she executed the same as surety, a reply that for a valuable consideration paid to her by one of her codefendants after the execution of the note and mortgage she promised and agreed with the plaintiff and with her codefendant to pay and satisfy the note and mortgage in suit was a departure.—*Chaplin v. Baker*, 24 N. E. 233, 124 Ind. 385.

[u] (App. 1891)

In an action on a note given for boot in a horse trade defendant counterclaimed for breach of warranty of the horse traded him. Plaintiff, in his reply, pleaded a counterclaim for breach of warranty of the mare traded to him. *Held*, that the reply was not a departure.—*Starke v. Dicks*, 2 Ind. App. 125, 28 N. E. 214.

[uu] (App. 1892)

In an action for the conversion of goods, the complaint alleged a contract of bailment between plaintiff and defendant, and the latter's failure to return the property. The answer admitted that the goods were left in defendant's possession, and alleged that plaintiff owned them only in the special capacity of administrator of a certain estate, and that when he was superseded as such defendant purchased them from his successor. *Held*, that there was no departure in a reply admitting that the goods were nominally held by plaintiff as such administrator when they were placed in defendant's hands, alleging that other parties were the real owners, and that through them plaintiff had since become the owner.—*McFadden v. Schroeder*, 4 Ind. App. 305, 29 N. E. 491, 30 N. E. 711.

[v] (Sup. 1893)

A departure in pleading takes place when in any pleading the party deserts the ground

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that he took in his last antecedent pleading, and resorts to another.—*Louisville, N. A. & C. Ry. Co. v. Herr*, 35 N. E. 556, 135 Ind. 591.

[vv] (Sup. 1893)

Where, in an action to foreclose a mortgage, the defendants plead as a counterclaim deceit and breach of warranty by the plaintiff in selling them the property in payment for which the mortgage debt was incurred, the plaintiff may set up in reply deceit on the part of the defendants in regard to the land exchanged for said property, by virtue of Rev. St. 1881, § 357, which declares that, "when any paragraph of the answer contains new matter, the plaintiff may reply to it by general denial, and may also, in separate paragraphs, reply any new matter which supports the complaint and avoids the matter in such paragraph of answer."—*Small v. Kennedy*, 137 Ind. 299, 33 N. E. 674.

[vvv] (App. 1894)

Where, in an action on a policy insuring a horse, the condition of the horse as to being afflicted with disease at the time insurance was affected was first brought into the controversy by the answer, and plaintiff replied as to the condition of the horse at that time, a contention that plaintiff violated the doctrine that a cause must proceed on a definite theory and that the reply departed from such theory was of no merit.—*Indiana Farmers' Live Stock Ins. Co. v. Byrkett*, 36 N. E. 779, 9 Ind. App. 443.

[w] (App. 1896)

In an action on a fire policy, defendant alleged that it never executed the policy, and that its agent who issued it had no authority to do so, because it was a prohibited risk, and outside of his territory. *Held*, that a reply setting up a ratification did not constitute a departure.—*German Fire Ins. Co. v. Columbia Encaustic Tile Co.*, 15 Ind. App. 623, 43 N. E. 41.

[ww] (App. 1897)

Where an answer alleges payment by check it is not a departure from a complaint setting up an original indebtedness to reply, acknowledging the receipt of the check, but alleging that it proved to be worthless.—*Cox v. Hayes*, 47 N. E. 844, 18 Ind. App. 220.

[x] (App. 1900)

That the items set out in a bill of particulars filed with a reply describe different articles from those mentioned in the bill of particulars filed with the complaint does not constitute a departure.—*Orr v. Leathers*, 61 N. E. 941, 27 Ind. App. 572.

[xx] (Sup. 1901)

Plaintiffs sued defendants, who were husband and wife, on notes executed by them, and to foreclose a mortgage. The wife answered that the notes were given for a debt owing by her husband, and that the real estate mortgaged was her separate property. Plaintiffs replied by general denial, and alleged that the husband owned the land in fee simple when the debt was contracted, but, to defraud his

creditors, he deeded the land to her for a very inadequate consideration. *Held* proper to sustain the wife's demurrers to the replies, since, as they contained the substance of a complaint to set aside the conveyance as fraudulent, they were a departure from the complaint.—*Shaw v. Jones*, 59 N. E. 166, 156 Ind. 60.

[y] (App. 1901)

It is the function of a reply to aid and strengthen the complaint in its essential allegations, but not to amend its defects or to depart from the cause of action therein set forth.—*Midland Steel Co. v. Citizens' Nat. Bank*, 59 N. E. 211, 26 Ind. App. 71.

Where a note was sued on by a bona fide holder for value as commercial paper, and the answer showed a defense good as against the indorsee, in that the note was not commercial paper, being payable in Pennsylvania, and the reply relied on a statute of Pennsylvania and decisions of that state making such a note commercial paper, not subject in the hands of a bona fide holder to the defense pleaded, a demurrer to the reply, on the ground that it was a departure, was erroneously overruled.—*Id.*

[yy] (App. 1903)

In an action on a fire policy, the insurer alleged in his answer that the policy sued on stipulated that it should be void if the interest of the insured were otherwise than unconditional and sole ownership, and that at the time of the issuance of the policy the insured had made a conveyance thereof to a third person. The answer also averred that the insured represented that she was the owner of the property insured, that the insurer relied on such representations, and that plaintiff had previously conveyed the property to a third person. The insured replied, alleging that the deed to the third person was without consideration, that it was made without his knowledge or consent, that it was never delivered, that the insured retained possession of it, except during the time it was being recorded, and that insured retained possession of the property and exercised absolute dominion over it. *Held*, that the reply was not a departure from the complaint in the action, which averred title in the insured to the property covered by the policy.—*Franklin Ins. Co. v. Feist*, 68 N. E. 188, 31 Ind. App. 390.

[z] (App. 1904)

Where the same facts pleaded in plaintiff's reply were provable under her answer to defendant's cross-complaint, the fact that the allegations of the reply were not germane to the claim made by plaintiff in her complaint was immaterial.—*Carter v. Carter*, 72 N. E. 187, 35 Ind. App. 73.

Where plaintiff declares in the first paragraph of a complaint on a mutual policy payable to her, and defendant answers that insured took out a new policy afterward making him the beneficiary, and also files a cross-complaint, and she answers the cross-complaint and replies to his answer by setting out an antenu-

tial contract providing that, in consideration of marriage, insured made her the beneficiary, and that defendant's policy was issued in violation of the insurer's by-laws, and without consideration, and that insured, at the time of procuring defendant's policy, was of unsound mind, it was not departure.—*Id.*

[m] (App. 1909)

Where a complaint charged that a contract was made directly with defendant, it is not a departure in the reply to charge that it was made with her agent.—*Colt v. Lawrenceburg Lumber Co.*, 88 N. E. 720.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 358-384; 7

CENT. DIG. Bills & N. § 1571.

See, also, 31 Cyc. pp. 255, 261.

§ 181. Unnecessary reply.

[a] (Sup. 1870)

In a suit on a contract for the delivery by the defendant of a certain number of saw logs to be sawed by the plaintiff at a stipulated price per hundred feet, the breach alleged being the failure of the defendant to deliver a portion of the logs, the answer alleged that the defendant delivered a certain number of logs, which the plaintiff sawed in such an unworkmanlike manner that the lumber was worthless, and, the plaintiff refusing to saw properly, the defendant refused to deliver more logs. The reply was a general denial. On the trial, after the defendant had offered evidence tending to sustain said answer by proving that the lumber was bad, the plaintiff offered evidence tending to show that the logs delivered were such that good lumber could not be made from them, which evidence was rejected until an additional reply alleging the fact had been filed 'by leave, over the defendant's objection, when, a demurrer to the additional reply having been overruled, said evidence was admitted and the trial proceeded; the jury not having been resworn, and the defendant objecting. *Held*, that the evidence should have been admitted when first offered under the reply in denial, that the additional reply did not change the issue, and there was no necessity for reswearing the jury that the demurrer to the additional reply might properly have been sustained, or the paragraph to which it was filed might have been stricken out on motion, or leave to file it should not have been given, yet that no wrong resulted from these proceedings.—*Dunn v. Johnson*, 33 Ind. 54, 5 Am. Rep. 177.

[b] (Sup. 1877)

The fact that some of the paragraphs of an answer require and admit of no reply does not render insufficient a reply made generally to the whole of the answer.—*Vaughn v. Ferrail*, 57 Ind. 182.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 386.

See, also, 31 Cyc. pp. 246, 247.

§ 182. Failure to reply.

Admissions by failure to deny, see ante, § 177.

Failure to file rejoinder, see post, § 183.

Ground for judgment on pleadings, see post, § 343.

[a] (Sup. 1840)

In trespass quare clausum fregit for several trespasses, the defendant justified on account of a highway over the close in which, etc., and the plaintiff new assigned for trespasses extra viam, without traversing the plea. *Held*, that the existence of the highway was admitted.—*White v. Conover*, 5 Blackf. 462.

[b] (Sup. 1856)

If an answer allege affirmative matter and the same is not replied to, the absence of reply is an admission of the matter alleged.—*Bird v. Lanian*, 7 Ind. 615.

[c] (Sup. 1856)

The Code (2 Rev. St. p. 44) provides that every material allegation of the complaint not specifically controverted by the answer, and every material allegation in the answer not controverted by the reply, shall, for the purposes of the action, be taken as true; so where, in a suit for dower, the defendant replied that the husband of the complainant had devised to his wife other lands in lieu and bar of dower, and she had elected to take under the will, etc., and the widow, the complainant, made no reply, judgment was rendered for the complainant.—*McCarty v. Roberts*, 8 Ind. 150.

Action for dower by a widow against the purchaser of real estate of her deceased husband. Answer, denying the allegations in the complaint, and alleging that the husband had made his will whereby he devised land to the plaintiff in lieu and bar of dower; that the will had been duly proved more than one year before the commencement of the suit; that, though its contents were fully known to the widow at the date of probate, she did not within one year thereafter elect to have her dower, but, on the contrary, elected to take under the will. No reply. *Held*, that the failure to reply was of itself an admission of the facts alleged in the answer, and that further effort to have them confessed was therefore needless; for otherwise there would have been no issue formed by the pleadings, and a trial cannot be had without an issue.—*Id.*

A material allegation of new matter in the answer, under the Code of 1852, providing that every material allegation of new matter in the answer not controverted by the reply shall be taken as true, means some fact which the plaintiff is not bound to prove in the first instance to establish his cause of action, and which goes in avoidance or discharge of the cause of action alleged in the complaint.—*Id.*

[d] (Sup. 1858)

The existence of a judgment alleged in an answer and not replied to must be taken as proved.—*Thompson v. Cooper*, 10 Ind. 526.

[e] (Sup. 1868)

One good paragraph of an answer, alleging new matter, unreplyed to, entitles the defendant to judgment.—*Perkins v. Bragg*, 29 Ind. 507.

[f] (Sup. 1833)

The plaintiff's failure to reply to paragraph of the answer amounted to an admission that the affirmative defense thereby set up was true, where plaintiff, if he was entitled to a trial, did not ask for it or object to the rendering of judgment without one or except to the rendition of judgment, and, if there was error in rendering judgment without a trial, he cannot complain.—*Breidert v. Krueger*, 92 Ind. 142.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. §§ 387, 388.

See, also, 31 Cyc. pp. 266, 267.

§ 183. Rejoinder.

Grounds for demurrer to, see post, § 196.

Waiver of objections to replication by filing rejoinder, see post, § 412.

[a] (Sup. 1838)

In debt on a note the plea was no consideration. The replication set out a consideration, and the rejoinder showed a partial failure of consideration. *Held*, that the rejoinder was a departure.—*Kilgore v. Powers*, 5 Blackf. 22.

[b] (Sup. 1845)

A rejoinder professing to be to the whole of a replication, but only attempting to answer an immaterial part, was *held* to be bad.—*Conard v. Dowling*, 7 Blackf. 481.

[c] (Sup. 1846)

In debt on a constable's bond the breaches assigned in the replication were, (1) that the constable had neglected and refused to return a certain *fi. fa.*; and (2) that after the levy of such execution, the constable had abandoned the levy, and had not returned the execution. The rejoinder to the first breach stated that no such execution had issued, etc., to the constable, nor had he neglected or refused to return the same. The rejoinder to the second breach was that no such execution had issued, etc., to the constable. *Held*, that the first rejoinder was double, but that the second was unobjectionable.—*Boatright v. State ex rel. Brown*, 8 Blackf. 8.

[d] (Sup. 1846)

In debt by the state on the relation of A. on a constable's bond, the replication assigned as a breach the recovery of a judgment by the relator for \$88.90, the issue of a *fi. fa.* thereon, the constable's levy of the execution on the debtor's goods of the value of \$150, and his failure to sell, etc. The rejoinder stated that after the levy, and before return day, the debtor executed a delivery bond with sufficient sureties, that the goods were not delivered, and that the constable returned the delivery bond and the execution before return day. It

stated further that afterwards another execution issued on the judgment which was levied on the debtor's goods of the value of \$200, by means whereof the judgment was satisfied. *Held*, that the rejoinder was not double; the latter part of it, which related to the second execution, being mere surplusage.—*State v. Jones*, 8 Blackf. 270.

[e] (Sup. 1854)

If a replication alleged facts material to a proper decision of the cause, and there is no rejoinder to the replication, there is no issue in the case, and a trial without an issue is erroneous.—*Rutherford v. Tevis*, 5 Ind. 530.

[f] (Sup. 1872)

When a counterclaim is pleaded, the reply thereto ends the pleading. If there is any new matter which might have been pleaded to the reply under the former practice, it may now be given in evidence without further pleading.—*Welch v. Bennett*, 39 Ind. 136.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 389-396;
17 CENT. DIG. Eject. § 200; 42 CENT.
DIG. Replev. § 245.

See, also, 31 Cyc. pp. 267-269.

§ 184. Surrejoinder.

[a] (Sup. 1843)

Where a rejoinder is bad for duplicity, and plaintiffs do not demur to it specially for that reason, their surrejoinder is bad if it does not answer both parts thereof.—*Neff v. Powell*, 6 Blackf. 420.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 398.

See, also, 31 Cyc. p. 269.

§ 186. Tender of issue, and joinder in issue.

On demurrer, see post, § 215.

[a] (Sup. 1850)

A special traverse can be answered only by joining issue on it.—*State ex rel. Barrell, v. Chrisman*, 2 Ind. 126.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 399.

See, also, 31 Cyc. pp. 262, 263.

V. DEMURRER OR EXCEPTION.

Acquiescence in order overruling demurrer as affecting right to review order, see APPEAL AND ERROR, § 154.

Appearance and interposition of demurrer as submitting to jurisdiction, see APPEARANCE, § 19.

Costs on demurrer, see COSTS, § 49.

Cure of error in ruling by verdict or judgment, see post, § 433.

Decisions reviewable, see APPEAL AND ERROR, §§ 70, 78, 102.

Demurrer as raising question of jurisdiction, see ABATEMENT AND REVIVAL, § 3.

Effect of sustaining demurrer on amount in controversy, as affecting appellate jurisdiction of courts, see **COURTS**, § 220 (14).

Failure to demur or answer as admission of fact stated in complaint, see **PLEADING**, § 78.

Ground for new trial, see **NEW TRIAL**, § 18.

In equity, see **EQUITY**, §§ 214, 218–223, 228, 231, 232, 242–247, 250, 259.

Judgment on demurrer or exceptions as bar to another action, see **JUDGMENT**, § 572.

Judgment on demurrer or exceptions, conclusiveness, see **JUDGMENT**, § 656.

Judgment on demurrer to plea in abatement, see ante, § 111.

Judicial notice as to, see **EVIDENCE**, § 43.

Mode of raising objection of defect of parties in general, see **PARTIES**, § 75.

Mode of raising objection of misjoinder of parties defendant, see **PARTIES**, § 92.

Mode of raising objection of misjoinder of parties plaintiff, see **PARTIES**, § 88.

Mode of raising objection of nonjoinder of party defendant, see **PARTIES**, § 84.

Mode of raising objection of nonjoinder of party plaintiff, see **PARTIES**, § 80.

Mode of raising objection of want of capacity or interest to sue, see **PARTIES**, § 76.

Mode of raising objection to misnomer or misdescription of parties, see **PARTIES**, § 94.

Operation and effect as appearance, see **APPEARANCE**, §§ 7–10.

Presumptions on appeal or writ of error, see **APPEAL AND ERROR**, § 917.

Raising defense of estoppel in pais, see **ESTOPPEL**, § 108.

Raising defense of res judicata, see **JUDGMENT**, § 948.

Raising defense of statute of frauds, see **FRAUDS, STATUTE OF**, § 150.

Raising defense of statute of limitations, see **LIMITATION OF ACTIONS**, § 180.

Record for purpose of review, see **APPEAL AND ERROR**, §§ 500, 501, 518.

Remedy by demurrer or motion to make more definite and certain, see post, § 367.

Remedy by demurrer or motion to strike matter from pleading, see post, § 362.

Review of decisions, see **APPEAL AND ERROR**, §§ 254, 285, 549, 680, 725, 900, 1040.

Right to dismiss action after demurrer, see **DISMISSAL AND NONSUIT**, § 48.

Setting aside judgment on demurrer, see **JUDGMENT**, § 341.

To amended pleading, see post, §§ 254, 266.

To general denial, see ante, § 123.

To plea in abatement in criminal prosecution, see **CRIMINAL LAW**, § 281.

To plea of former jeopardy, see **CRIMINAL LAW**, § 293.

To plea or answer of estoppel in pais, see **ESTOPPEL**, § 113.

To plea or answer setting up statute of limitations, see **LIMITATION OF ACTIONS**, § 185.

To supplemental pleading, see post, § 284.

Waiver of objection by failure to demur, see post, § 410.

In particular actions or proceedings.

See—

Appointment of receiver. **RECEIVERS**, § 32.

Bonds of administrators. **EXECUTORS AND ADMINISTRATORS**, § 537 (8).

By or against executors and administrators. **EXECUTORS AND ADMINISTRATORS**, § 447.

Compelling payment of claim against decedent's estate. **EXECUTORS AND ADMINISTRATORS**, § 283.

Payment of judgment for killing stock. **RAILROADS**, § 450.

Compensation under contract for construction of public improvements. **MUNICIPAL CORPORATIONS**, § 374.

Condemnation proceedings. **EMINENT DOMAIN**, § 193.

Construction of will. **WILLS**, § 702.

Contesting or setting aside will or probate. **WILLS**, §§ 277, 284.

EJECTMENT, § 75.

Election contests. **ELECTIONS**, § 287.

Enforcement of legacy charged on land. **WILLS**, § 826.

Of enforcement of mechanics' liens. **MECHANICS' LIENS**, § 275.

Equitable relief against judgment. **JUDGMENT**, § 460.

Foreclosure of mortgages. **MORTGAGES**, § 457.

HABEAS CORPUS, § 84.

INDICTMENT AND INFORMATION, §§ 145–149.

INJUNCTION, § 120.

Injuries from negligence or default in transmission or delivery of telegraph or telephone message. **TELEGRAPHS AND TELEPHONES**, § 65.

Insurance policies. **INSURANCE**, § 642.

Judgment. **JUDGMENT**, § 914.

LIBEL AND SLANDER, § 97.

MANDAMUS, §§ 163, 165.

MOTIONS, § 33.

Negligence in presenting draft for acceptance. **BANKS AND BANKING**, § 175.

New trial. **NEW TRIAL**, § 109.

After term. **NEW TRIAL**, § 167.

PARTITION, § 59.

QUIETING TITLE, § 41.

QUO WARRANTO, § 52.

REFORMATION OF INSTRUMENTS, § 39.

Removal of executor. **EXECUTORS AND ADMINISTRATORS**, § 35.

REPLEVIN, § 67.

Review of judgment. **JUDGMENT**, § 335.

Sale of decedent's property. **EXECUTORS AND ADMINISTRATORS**, § 338.

§ 188. Plea, answer, or reply with demurrer.

[a] (Sup. 1820)

A defendant cannot demur and plead to the same count at the same time.—*Hair v. Weaver*, 1 Blackf. 77.

[b] (Sup. 1820)

Although a defendant is at liberty to demur to one count in the declaration and plead to another (for each count is a distinct decla-

ration), and may set up as many matters of law in one case, or of fact in the other, as he may deem necessary for his defense, yet to plead and demur both to one and the same count is inconsistent, repugnant and wholly inadmissible; hence a plea of payment in debt on a bill, after demurrer joined, should be rejected by the court.—*Haire v. Weaver*, 1 Blackf. 502.

[c] (Sup. 1826)

The plaintiff cannot demur and reply to the same plea.—*Riley v. Harkness*, 2 Blackf. 34.

[d] (Sup. 1840)

Where the matter of a count is divisible, the defendant may demur generally to a part and take issue as to the residue.—*Wyant v. Smith*, 5 Blackf. 203.

[e] (Sup. 1840)

A plea of set-off, containing several distinct matters, being in the nature of a declaration containing several counts, the plaintiff may reply to a part and demur to the residue.—*Shearman v. Fellows*, 5 Blackf. 459.

[f] (Sup. 1860)

If the same paragraph contains an answer and demurrer, the answer overrules the demurrer.—*Hosier v. Eliason*, 14 Ind. 523.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 404–407.

See, also, 31 Cyc. p. 271.

§ 189. Nature and office of demurrer and pleadings demurrable.

[a] (Sup. 1882)

The sufficiency of a motion cannot be tested by demurrer.—*Sidener v. Coons*, 83 Ind. 183.

[b] (App. 1906)

Where the equities of plaintiff's case are very strong, the court will determine the rights of the parties only on a full hearing on the merits, and not on demurrer.—*Pierce v. Vansell*, 74 N. E. 554, 35 Ind. App. 525.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 400.

See, also, 31 Cyc. pp. 269–271.

§ 192. Grounds for demurrer in general.

[a] (Sup. 1822)

An obligation was described in the declaration as given for the payment of \$137, and the one read on oyer was for that sum, to be paid in bank notes. *Held*, on general demurrer, that the variance was fatal.—*Osborne v. Fulton*, 1 Blackf. 233.

[aa] (Sup. 1823)

After several continuances of a cause commenced by a feme sole, but previously to any other plea, defendant pleaded in abatement that plaintiff, pending the writ, etc., had married, and that her husband was still living, which plea was verified by affidavit and the day on which the coverture was averred to have taken place was subsequent to the last continuance of

the case an objection to the plea for uncertainty for not expressly alleging the coverture to have taken place puis darrein continuance, if good, should be made on demurrer.—*Templeton v. Clary*, 1 Blackf. 288.

[aaa] (Sup. 1828)

If two replications be filed to one plea, the defendant may demur specially for the duplicity.—*King v. Anthony*, 2 Blackf. 131.

[b] (Sup. 1841)

An argumentative plea is bad on special demurrer.—*Hurst v. Purvis*, 5 Blackf. 557.

[bb] (Sup. 1843)

A rejoinder may be demurred to for duplicity.—*Neff v. Powell*, 6 Blackf. 420.

[bbb] (Sup. 1853)

Duplicity in a plea can be reached by demurrer.—*Barrett v. Ruit*, 3 Ind. 571.

[bbbb] (Sup. 1856)

A demurrer for causes, and in terms, not authorized by the practice act, cannot be sustained.—*Jarvis v. Strong*, 8 Ind. 284.

[c] A demurrer, to be sufficient, must assign a statutory ground.—(Sup. 1856) *Riley v. Murray*, 8 Ind. 354; (1905) *White v. Sun Pub. Co.*, 164 Ind. 426, 73 N. E. 890.

[cc] Duplicity in an answer is not a ground of demurrer.—(Sup. 1858) *Johnson v. Crawfordsville, F. K. & Ft. W. R. Co.*, 11 Ind. 280; (1882) *Carter v. Ford Plate Glass Co.*, 85 Ind. 180.

[ccc] (Sup. 1859)

Repugnancy of allegations is not a cause of demurrer.—*Forst v. Ellston*, 13 Ind. 482.

[d] Argumentativeness in a pleading is not ground for demurrer.—(Sup. 1860) *French v. Howard*, 14 Ind. 455; (1864) *Judah v. Trustees of Vincennes University*, 23 Ind. 272; (1882) *Hisey v. Troutman*, 84 Ind. 115; (1882) *State ex rel. Benckert v. Wylie*, 86 Ind. 396; (1884) *Barkley v. Mahon*, 95 Ind. 101; (1885) *Dickson v. Lambert*, 98 Ind. 487; (1885) *Clauser v. Jones*, 100 Ind. 123; (App. 1895) *Jennings v. Bond*, 14 Ind. App. 282, 42 N. E. 957; (1896) *Brower v. Ream*, 15 Ind. App. 51, 42 N. E. 824.

[dd] (Sup. 1860)

An argumentative answer is not demurrable.—*Williams v. Port*, 14 Ind. 569.

[e] (Sup. 1860)

There was a reply in denial to an answer setting up a written release of the debt by plaintiff, and defendant demurred on the ground that the reply was not verified by affidavit. *Held*, that the reply was not subject to demurrer for the reason assigned.—*Wells v. Dickey*, 15 Ind. 361.

[ee] (Sup. 1861)

Objections to a reply, on the ground of duplicity or redundancy, cannot be taken by

demurrer.—*Judah v. Trustees of Vincennes University*, 16 Ind. 56.

[see] (Sup. 1861)

Where a petition in an action for partition indefinitely describes the land sought to be partitioned, objection cannot be taken by demurrer, as the uncertainty in the description cannot be regarded as an omission of a fact necessary to be stated in order to constitute a cause of action.—*Godfrey v. Godfrey*, 17 Ind. 6, 79 Am. Dec. 448.

[f] That a pleading is uncertain is not a ground of demurrer unless the pleading does not state a cause of action.—(Sup. 1862) *Snowden v. Wilas*, 19 Ind. 10, 81 Am. Dec. 370; (1882) *City of Connersville v. Connersville Hydraulic Co.*, 86 Ind. 235; (1884) *Brown v. Darrah*, 95 Ind. 86.

[ff] (Sup. 1863)

The only defects in pleadings which can be objected to by demurrer are those indicated in section 50 of the Code; and demurrers filed for causes or defects not therein indicated should be overruled.—*City of Aurora v. Cobb*, 21 Ind. 492.

[g] (Sup. 1864)

A demurrer cannot be taken to a pleading because of its surplusage.—*Judah v. Trustees of Vincennes University*, 23 Ind. 272.

An attorney, in answer to an action against him, claimed a sum of money paid for plaintiff to procure the passage of an act of the legislature, and alleged that the expenditure was made in good faith, was necessary, and was authorized by his principal. The reply alleged that the expenditure was unlawful and corrupt, and was used and squandered to corrupt the legislature and to exert on it a secret, undue, and personal influence by lobbying; that the same was not necessary; that the act was honestly passed, and was not secured by corrupt means. *Held*, that the reply was not demurrable, as it is an argumentative denial of the allegation that the expenditures were made in good faith and were necessary.—*Id.*

[gg] (Sup. 1865)

A demurrer to a complaint will not be sustained when the defect upon which the demurrer is based is not evident on the face of the pleading.—*Jones v. Bradford*, 25 Ind. 305.

[h] The objection that a pleading is too indefinite or uncertain cannot be reached by demurrer.—(Sup. 1865) *Fultz v. Wycoff*, 25 Ind. 321; (1873) *Lewis v. Edwards*, 44 Ind. 333; (1874) *Ohio & M. Ry. Co. v. McClure*, 47 Ind. 317; (1877) *Brookville & C. Turnpike Co. v. Pumphrey*, 59 Ind. 78, 26 Am. Rep. 76; (1877) *Schee v. McQuilken*, 59 Ind. 269; (1877) *City of Evansville v. Thayer*, Id. 324; (1877) *Pennsylvania Co. v. Sedwick*, Id. 336; (1878) *Fleming v. Easter*, 60 Ind. 399; (1878) *Inglis v. State ex rel. Hughes*, 61 Ind. 212; (1878) *Boyce v. Brady*, Id. 432; (1878) *Hampson v. Fall*, 64 Ind. 382; (1878) *Jameson v. Board of Com'rs of Bartholo-*

mew County, Id. 524; (1879) *Davis v. State ex rel. Long*, 68 Ind. 104; (1879) *Gabe v. McGinnis*, Id. 538; (1879) *Milroy v. Quinn*, 69 Ind. 403, 35 Am. Rep. 227; (1880) *Walterhouse v. Garrard*, 70 Ind. 400; (1880) *Kennedy v. Richardson*, Id. 524; (1880) *Sharp v. Radebaugh*, Id. 547; (1880) *Buchanan v. Logansport, C. & S. W. Ry. Co.*, 71 Ind. 265; (1881) *Snyder v. Baber*, 74 Ind. 47; (1881) *State ex rel. Shuckman v. Neff*, Id. 146; (1881) *Town of Auburn v. Eldridge*, 77 Ind. 126; (1881) *Crowder v. Reed*, 80 Ind. 1; (1881) *Mitchell v. Stinson*, Id. 324; (1881) *Boyce v. Fitzpatrick*, Id. 526; (1882) *Grand Rapids & I. R. Co. v. Jones*, 81 Ind. 523; (1882) *Boesker v. Pickett*, Id. 554; (1882) *Wright v. Williams*, 83 Ind. 421; (1883) *Continental Life Ins. Co. v. Houser*, 89 Ind. 258; (1883) *Leaman v. Sample*, 91 Ind. 236; (1883) *Herron v. Herron*, Id. 278; (1884) *Galway v. State ex rel. Ballow*, 93 Ind. 161; (1884) *McComas v. Haas*, Id. 276; (1884) *Louisville, N. A. & C. Ry. Co. v. Harrigan*, 94 Ind. 245; (1884) *City of Evansville v. Worthington*, 97 Ind. 282; (1884) *Louisville, N. A. & C. Ry. Co. v. Shanklin*, 98 Ind. 573; (1885) *Cleveland, C., C. & I. Ry. Co. v. Wynant*, 100 Ind. 160; (1885) *Petry v. Ambroscher*, Id. 510; (1885) *Thomson v. Madison Building & Aid Ass'n*, 103 Ind. 279, 2 N. E. 735; (1886) *Sannes v. Ross*, 5 N. E. 699, 105 Ind. 558; (1886) *Town of Rushville v. Adams*, 8 N. E. 292, 107 Ind. 475, 57 Am. Rep. 124; (1887) *Pittsburgh, C. & St. L. Ry. Co. v. Hixon*, 11 N. E. 285, 110 Ind. 225; (1888) *Thomas v. Merry*, 15 N. E. 244, 113 Ind. 83; (1888) *Ohio & M. Ry. Co. v. Walker*, 113 Ind. 196, 15 N. E. 234, 3 Am. St. Rep. 638; (1888) *Betts v. Quick*, 16 N. E. 172, 114 Ind. 105; (1888) *Board of Com'rs of Ripley County v. Hill*, 16 N. E. 156, 115 Ind. 316; (1889) *Ratliff v. Stretch*, 117 Ind. 526, 20 N. E. 438; (1891) *Sheeks v. Erwin*, 130 Ind. 31, 29 N. E. 11; (App. 1892) *Sluyter v. Union Central Life Ins. Co.*, 3 Ind. App. 312, 29 N. E. 608; (1892) *Adamson v. Shaner*, 29 N. E. 944, 3 Ind. App. 448; (Sup. 1893) *Evansville & R. R. Co. v. Maddux*, 134 Ind. 571, 33 N. E. 345, 34 N. E. 511; (1893) *Garard v. Garard*, 135 Ind. 15, 34 N. E. 442, 809; (App. 1893) *Town of Nappanee v. Ruckman*, 34 N. E. 609, 7 Ind. App. 361; (1893) *American Wire Nail Co. v. Connelly*, 8 Ind. App. 398, 35 N. E. 721; (1893) *Hindman v. Timme*, 8 Ind. App. 416, 35 N. E. 1046; (Sup. 1894) *Starkey v. Starkey*, 136 Ind. 349, 36 N. E. 287; (App. 1894) *City of Bloomington v. Rogers*, 36 N. E. 439, 9 Ind. App. 230; (Sup. 1898) *Clow v. Brown*, 48 N. E. 1034, 49 N. E. 1057, 150 Ind. 185; (1898) *Rogers v. Baltimore & O. S. W. Ry. Co.*, 49 N. E. 453, 150 Ind. 397; (App. 1899) *City of Mt. Vernon v. Hoehn*, 53 N. E. 654, 22 Ind. App. 282; (1903) *Mulky v. Karsell*, 68 N. E. 680, 31 Ind. App. 595.

[hh] If a bill of particulars is not sufficiently definite, the objection should be taken, not by demurrer, but by motion to require it to be made more definite.—(Sup. 1866) *Board of*

Com'rs of Bartholomew County v. Ford, 27 Ind. 17; (1879) Proctor v. Cole, 66 Ind. 576.

[hhh] (Sup. 1867)

Under the Code of Procedure, requiring the defendant to plead either by demurrer or by answer, objections to the complaint, including matters in abatement as well as in bar, not apparent on its face, can be taken only by answer.—Thompson v. Greenwood, 28 Ind. 327.

[i] (Sup. 1871)

Duplicity in a pleading cannot be presented by a demurrer.—Denman v. McMahon, 37 Ind. 241.

[ii] (Sup. 1872)

If there is an embarrassing uncertainty in a pleading as to the time when an act was done, the remedy is not by demurrer.—Hazzard v. Heacock, 39 Ind. 172; Same v. Southwick, Id., 178.

[iii] That a pleading is uncertain or indefinite is not a ground of demurrer.—(Sup. 1872) Hart v. Crawford, 41 Ind. 197; (1881) Knox v. Wible, 73 Ind. 233; (1884) Weik v. Pugh, 92 Ind. 382; (1884) Williamson v. Yingling, 93 Ind. 42.

[j] (Sup. 1873)

A pleading is never subject to a demurrer for want of sufficient facts if it contains facts sufficient to constitute a cause of action for any sum, however small or defense to any portion of the cause of action, where it is not pleaded in bar of the entire action.—Lewis v. Edwards, 44 Ind. 333.

[jj] (Sup. 1873)

Redundant averments, unnecessary exhibits and useless verbiage in a pleading, are not reached by a demurrer.—King v. Enterprise Ins. Co., 45 Ind. 43.

[jjj] (Sup. 1874)

A departure in pleading may be objected to by a demurrer.—Bearss v. Montgomery, 46 Ind. 544.

[k] (Sup. 1874)

It is not error to sustain a demurrer to an argumentative pleading, though the better practice is to strike it out on motion.—O'Harra v. Stone, 48 Ind. 417.

[kk] (Sup. 1875)

An objection that a pleading is not signed by counsel cannot be made on demurrer.—Hinkle v. Margerum, 50 Ind. 240.

[kkk] (Sup. 1876)

An answer of non est factum which is defective only in its verification is not demurrable.—Newby v. Rogers, 54 Ind. 193.

[l] (Sup. 1876)

Where the matters alleged in a paragraph of a pleading could have been given in evidence under the remaining paragraph, as to such paragraph, the better practice in the court below was by a motion to strike it out, rather

than by a demurrer thereto.—Cool v. Cool, 54 Ind. 225.

[ll] (Sup. 1877)

Where, in an action on a note, defendant answers, alleging that such instrument is the last of a series of usurious renewals of a usurious note, and that the real principal, and lawful interest thereon, have been overpaid, and asking to recoup the excess, an objection that the dates of such renewals, and of the payments thereon, are not alleged, should not be made by demurrer.—Holcraft v. Mellott, 57 Ind. 539.

[lll] (Sup. 1877)

Surplusage in a pleading does not render the pleading demurrable.—City of Evansville v. Thayer, 59 Ind. 324.

[m] Uncertainty in a pleading which states sufficient facts is not reached by demurrer.—(Sup. 1878) Sibbitt v. Stryker, 62 Ind. 41; (1878) City of Goshen v. Kern, 63 Ind. 408, 30 Am. Rep. 234; (1879) Dale v. Thomas, 67 Ind. 570; (1879) Terrell v. State ex rel. Root, 68 Ind. 155; (1879) Hyatt v. Mattingly, 68 Ind. 271; (1880) Trayser Piano Co. v. Kirschner, 73 Ind. 183.

[mmm] Objection to a pleading because it is blank as to material dates should not be made by demurrer.—(Sup. 1879) Baugh v. Boles, 66 Ind. 376; (1879) Dean v. Miller, Id. 440; (1881) Lentz v. Martin, 75 Ind. 228.

[mmm] (Sup. 1879)

An objection that an answer to a cross-complaint amounts only to an argumentative denial of the allegations which it purports to answer cannot be reached by a demurrer.—Mayer v. Grottendick, 68 Ind. 1.

[mmmm] (Sup. 1880)

A reply which amounts to more than an argumentative denial is not demurrable.—Jordan v. D'Heur, 71 Ind. 199.

[n] (Sup. 1881)

An objection that the complaint in conversion does not specify the acts constituting conversion cannot be taken advantage of by demurrer.—City of Greencastle v. Martin, 74 Ind. 449, 39 Am. Rep. 93.

[nn] (Sup. 1881)

A statement in a pleading inconsistent with the legal effect of a writing set out and made a part thereof is no cause for demurrer.—McDonough v. Kane, 75 Ind. 181.

[nnn] The leaving of blank dates in a pleading is not ground for demurrer.—(Sup. 1881) Cox v. Hunter, 79 Ind. 590; (1885) Ludlow v. Marion Tp. Gravel Road Co., 101 Ind. 176; (App. 1902) Smelser v. Pugh, 64 N. E. 943, 29 Ind. App. 614.

[o] (Sup. 1881)

Unless a pleading is so insufficient as to state no cause of action or defense, a demurrer will not lie.—Crowder v. Reed, 80 Ind. 1.

[oo] (Sup. 1881)

An objection that a complaint was not sufficiently specific cannot be raised by demurrer, unless it be so uncertain as not to state a substantially good cause of action.—Williamson v. Yingling, 80 Ind. 379.

[ooo] (Sup. 1882)

An argumentative pleading will not be held bad on demurrer.—Vance v. Schroyer, 82 Ind. 114.

[p] (Sup. 1882)

Where a pleading is incomprehensible because blanks are left where dates should have been inserted, it is demurrable.—First Nat. Bank of Knightstown v. Deitch, 83 Ind. 131.

[pp] Want of verification of a pleading cannot be raised by a demurrer.—(Sup. 1882) Swihart v. Shaffer, 87 Ind. 208; (1886) Vail v. Rinehart, 105 Ind. 6, 4 N. E. 218; (1892) Champ v. Kendrick, 30 N. E. 787, 130 Ind. 549.

[ppp] (Sup. 1882)

In an action against a railroad company for negligently setting fire to plaintiff's property, the failure to allege in the complaint the particular defects in defendant's engine, or the distance of plaintiff's land from defendant's right of way, or any particular acts of negligence, does not render the complaint demurrable.—Louisville, N. A. & C. Ry. Co. v. Krimming, 87 Ind. 351.

[q] (Sup. 1884)

An imperfect statement of facts in a complaint does not render it demurrable.—Johnston Harvester Co. v. Bartley, 94 Ind. 131.

[qq] (Sup. 1884)

Uncertainty in an allegation of time does not render the complaint demurrable.—Louisville, N. A. & C. Ry. Co. v. Shanklin, 94 Ind. 297.

[qqq] (Sup. 1884)

Misnomer is not reached by demurrer.—Morningstar v. Wiles, 96 Ind. 458.

[r] (Sup. 1884)

An objection that a complaint for negligence was too general cannot be taken by a demurrer for want of facts.—City of Evansville v. Worthington, 97 Ind. 282.

[rr] (Sup. 1884)

A complaint is not demurrable merely because of a clerical error in stating the date of facts alleged therein, upon which plaintiff rests his cause of action.—Orr v. Miller, 98 Ind. 436.

[rrr] (Sup. 1885)

Where a special demurrer is not permissible, argumentativeness is not matter for demurrer.—Ford v. Griffin, 100 Ind. 85.

[s] (Sup. 1885)

In an action to restrain the obstruction of an alleged natural water course, defendant answered that there was no obstruction of a natural water course, and that the only obstruc-

tion was that of an artificial outlet of a pond which outlet was constructed under a license granted without consideration and afterwards revoked. *Held*, that such answer denied argumentatively the cause of action stated in the complaint, and was not subject to demurrer.—Clauser v. Jones, 100 Ind. 123.

[ss] (Sup. 1887)

Under section 376 of the Code (Rev. St. 1881), pleadings are to be construed liberally; and a pleading will not be held bad on demurrer for mere uncertainty or indefiniteness in its allegations, which might be corrected on motion to make more definite or certain; and when a complaint in an action against a railroad company for permitting fire to escape to plaintiff's land contains allegations as to negligence of the railroad company in permitting the fire to escape, and plaintiff's freedom from contributory negligence, sufficient in substance, although indefinite, the complaint will be held good on demurrer.—Pittsburgh, C. & St. L. Ry. Co. v. Hixon, 110 Ind. 225, 11 N. E. 285.

[t] (Sup. 1887)

Although an answer in abatement, not supported by affidavit, and pleaded with, instead of before, an answer in bar, as required by the Code (Rev. St. 1881, § 365), might well be stricken out, on motion, neither of these grounds will authorize the sustaining of a demurrer for want of sufficient facts.—State ex rel. Ruhlman v. Ruhlman, 111 Ind. 17, 11 N. E. 793.

[tt] (Sup. 1889)

The objection that the complaint in a suit for damages for personal injuries alleges that plaintiff was "compelled" by his employer's agent to couple the cars, without giving the facts constituting the compulsion, cannot be made by demurrer.—Brazil Block Coal Co. v. Gaffney, 119 Ind. 455, 21 N. E. 1102, 12 Am. St. Rep. 422, 4 L. R. A. 850.

[ttt] (Sup. 1889)

Where the complaint is vague and uncertain in its allegations, such defect cannot be reached by a demurrer.—Cleveland, C., C. & I. R. Co. v. Wynant, 20 N. E. 730, 119 Ind. 539.

[tttt] (Sup. 1889)

It is only where the pleading is so indefinite and uncertain as to entirely fail to state a cause of action that a demurrer will lie.—Williams v. Board of Com'rs of Lawrence County, 23 N. E. 76, 121 Ind. 239.

[u] (Sup. 1889)

In an action for malpractice, a complaint is not demurrable for failure of plaintiff to set forth in what particular defendant was negligent in the performance of his duties as physician and surgeon.—De Hart v. Etnire, 121 Ind. 242, 23 N. E. 77.

[uu] (App. 1891)

A count in a declaration for money had and received is not demurrable for want of a

bill of particulars.—*McCoy v. Oldham*, 1 Ind. App. 372, 27 N. E. 647, 50 Am. St. Rep. 208.

[uuu] (Sup. 1892)

A demurrer to a complaint will not be sustained on the ground that merely nominal damages are recoverable, unless the court can see from the complaint that there can be no other recovery.—*Hoosier Stone Co. v. Louisville, N. A. & C. Ry. Co.*, 131 Ind. 575, 31 N. E. 365.

[v] (App. 1892)

The remedy for argumentativeness in a pleading is not by demurrer.—*McFadden v. Schroeder*, 29 N. E. 491, 30 N. E. 711, 4 Ind. App. 305.

[vv] (Sup. 1893)

Where in an action against a railway company for injuries sustained by a brakeman while on a train, it was material to defendant to have a specific statement as to the particular place in the train the brakeman occupied when the injury occurred, the practical remedy was not by demurrer for want of sufficient facts.—*Pennsylvania Co. v. Sears*, 34 N. E. 13, 36 N. E. 353, 136 Ind. 460.

[vvv] (App. 1893)

An objection that the second paragraph of a complaint is unsupported by an affidavit is not a ground for demurrer.—*Knight v. Knight*, 6 Ind. App. 268, 33 N. E. 456.

[vvvv] (Sup. 1897)

It is not error to overrule a demurrer to an argumentative general denial.—*Childers v. First Nat. Bank*, 46 N. E. 825, 147 Ind. 430.

[vvvvv] (App. 1897)

An answer amounting to a general denial, though argumentative, is good against demurrer.—*Kirshbaum v. Hanover Fire Ins. Co.*, 45 N. E. 1113, 16 Ind. App. 606.

[w] (App. 1897)

A clerical error in using the word "plaintiff" for "defendant" in the complaint, where there was no doubt as to the word intended to be used, is no ground for demurrer.—*Fry v. Colborn*, 46 N. E. 351, 17 Ind. App. 96.

[ww] (Sup. 1898)

The fact that a pleading is not certain and specific in some respects does not render it bad on demurrer.—*Frain v. Burgett*, 50 N. E. 873, 52 N. E. 395, 152 Ind. 55.

[www] A denial is not demurrable because argumentative.—(Sup. 1899) *Hiatt v. Town of Darlington*, 53 N. E. 825, 152 Ind. 570; (App. 1901) *Flanagan v. Reitemier*, 59 N. E. 389, 26 Ind. App. 243; (Sup. 1905) *Adams v. Pittsburgh, C. & St. L. Ry. Co.*, 74 N. E. 901, 165 Ind. 648.

[x] (App. 1900)

In an action against defendant city for wages as a patrolman, the defense that there was no such office to fill at the time plaintiff claims his appointment cannot be raised by demurrer, but must be raised by answer.—*City of*

Huntington v. Boyd, 57 N. E. 939, 25 Ind. App. 250.

[xx] (Sup. 1901)

An argumentative denial of material facts in a complaint, though subject to be stricken out on motion, puts such facts in issue, and is not subject to demurrer.—*Oren v. Board of Com'rs of St. Joseph County*, 60 N. E. 1019, 157 Ind. 158.

[xxx] (Sup. 1901)

An objection to a complaint by a receiver of a bank against the directors thereof for damages resulting from their gross negligence, in that the charges of negligence are too general, can be pointed out by a demurrer for want of facts.—*Coddington v. Canaday*, 61 N. E. 507, 157 Ind. 243.

[y] (App. 1906)

Where a pleading fairly, though awkwardly, states the material facts, it will be sustained as against a demurrer.—*South Bend Chilled Plow Co. v. Cissne*, 74 N. E. 282, 35 Ind. App. 373.

[yy] (Sup. 1906)

Where a pleading is not sufficiently specific, the remedy is not by demurrer.—*Baltimore & O. S. W. R. Co. v. Slaughter*, 167 Ind. 330, 79 N. E. 186, 7 L. R. A. (N. S.) 597, 119 Am. St. Rep. 503.

[yyy] (App. 1906)

An objection to a cross-complaint, seeking reformation of a contract sued on, that it failed to clearly and definitely point out the mistake objected to, cannot be taken advantage of by demurrer.—*Nichols & Shepard Co. v. Berning*, 76 N. E. 776, 37 Ind. App. 109.

[z] (App. 1906)

A complaint, when questioned by demurrer, must allege the necessary facts directly; mere inferences or probabilities based on conjectures being insufficient.—*National Fire Proofing Co. v. Roper*, 38 Ind. App. 600, 77 N. E. 370.

[zz] (App. 1906)

Where the alternative averments of a complaint do not vitiate it, the remedy is not by demurrer.—*Indianapolis & N. W. Traction Co. v. Henderson*, 39 Ind. App. 324, 79 N. E. 539.

[zzz] (App. 1907)

It is not error to overrule a demurrer to a paragraph in an answer which is an argumentative denial.—*Teague v. City of Bloomington*, 40 Ind. App. 68, 81 N. E. 103.

[zzzz] (App. 1909)

Mere confusion of statement in the averments of a complaint is not a ground of demurrer.—*Pittsburgh, C. & St. L. Ry. Co. v. Rogers*, 87 N. E. 28.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. §§ 408-427.

See, also, 31 Cyc. pp. 276-286.

§ 193. Grounds for demurrer to declaration, complaint, petition, or statement.

Objections reached by general demurrer, see post, § 205.

Sufficiency of statement of cause of action in general, see ante, § 48.

[a] (Sup. 1842)

A misjoinder of counts may be taken advantage of by demurrer.—*Bodley v. Roop*, 6 Blackf. 158.

[aa] (Sup. 1860)

The improper joining in one statement of different causes of action, which may be joined in the same complaint, is not ground of demurrer.—*Schlusser v. Fox*, 14 Ind. 365.

[aaa] A defect in the prayer for relief is not ground for demurrer.—(Sup. 1861) *Bennett v. Preston*, 17 Ind. 291; (1877) *Baker v. Armstrong*, 57 Ind. 189.

[b] (Sup. 1861)

A demurrer, on the ground that the complaint does not state facts sufficient, etc. (Code, § 50, subd. 5), will be overruled, if on the facts stated the plaintiff is entitled to any relief whatever, although not that demanded.—*Bennett v. Preston*, 17 Ind. 291.

[bb] (Sup. 1861)

Under the Code, the joining of a father's right of action for loss of service with the claim of the child for the personal injury to himself would be duplicity, which cannot be taken advantage of by demurrer.—*Rogers v. Smith*, 17 Ind. 323, 79 Am. Dec. 483.

[bbb] Demurrer will not lie to a complaint because of its duplicity.—(Sup. 1862) *Rielay v. Whitcher*, 18 Ind. 458; (1883) *State ex rel. Sidener v. White*, 88 Ind. 587.

[c] (Sup. 1864)

A defect in a pleading founded on a written instrument arising from failure to file with it the original instrument, or a copy thereof, as required by the express provisions of 2 Gav. & H. St. p. 104, § 78, may be reached by demurrer.—*Peoria Marine & Fire Ins. Co. v. Walser*, 22 Ind. 73.

[cc] (Sup. 1864)

An objection for misjoinder of causes of action can be raised only by demurrer.—*Fritz v. Fritz*, 23 Ind. 388.

[ccc] (Sup. 1864)

An objection to a pleading, that it does not contain a copy or the original of a written instrument on which it is based, may be taken by demurrer.—*Williamson v. Foreman*, 23 Ind. 540, 85 Am. Dec. 475.

[cccc] (Sup. 1865)

The omission to file a copy of a written instrument upon which a complaint is founded can be taken advantage of by demurrer.—*Seawright v. Coffman*, 24 Ind. 414.

[d] (Sup. 1866)

The misjoinder of causes of action referred to in section 50 of the Code, as a cause of demurrer, is where two or more causes of action between the same parties, but belonging to different classes, are united, in violation of section 70 of the Code.—*Lane v. State ex rel. Harmon's Adm'r*, 27 Ind. 108.

[dd] A prayer for judgment is only a matter of form, and the want of it, where a cause of action is stated, cannot be reached by demurrer.—(Sup. 1867) *Lowry v. Dutton*, 28 Ind. 473; (App. 1904) *Vanatta v. Waterhouse*, 71 N. E. 159, 33 Ind. App. 516.

[ddd] The provision of the Code authorizing a demurrer for the cause of want of legal capacity to sue has reference to some legal disability of the plaintiff, such as infancy, idiocy, or coverture, and not to the fact that the complaint on its face fails to show a right of action in the plaintiff.—(Sup. 1869) *Debolt v. Carter*, 31 Ind. 355; (1885) *Pence v. Aughe*, 101 Ind. 317; (1880) *Board of Com'rs of Tipton County v. Kimberlin*, 108 Ind. 449, 9 N. E. 407.

[e] (Sup. 1869)

Where two causes of action are improperly joined, such misjoinder cannot be urged as cause for reversal, as the only way to raise such objection is by demurrer.—*Burrows v. Holderman*, 31 Ind. 412.

[ee] Where a complaint shows that the plaintiff is entitled to some relief, though not to the extent demanded, a demurrer should not be sustained.—(Sup. 1869) *Horton v. Thom*, 32 Ind. 151; (1874) *Owens v. Lewis*, 46 Ind. 488, 15 Am. Rep. 295; (1875) *Rogers v. Lafayette Agricultural Works*, 52 Ind. 296; (1876) *Ponnell v. Allen*, 53 Ind. 130; (1881) *Mark v. Murphy*, 76 Ind. 534; (1882) *Morrison v. Bank of Commerce*, 81 Ind. 335; (1882) *Campbell v. Martin*, 87 Ind. 577; (1883) *Anderson v. Ackerman*, 88 Ind. 481; (1883) *Hon v. State ex rel. Hottel*, 89 Ind. 249; (1883) *Thomas v. Irwin*, 90 Ind. 557; (1883) *Lucas v. Hendrix*, 92 Ind. 54; (1883) *Baker v. Allen*, Id. 101; (1884) *Williamson v. Yingling*, 93 Ind. 42; (1886) *Culbertson v. Munson*, 104 Ind. 451, 4 N. E. 57; (1886) *Bloomfield R. Co. v. Van Slike*, 8 N. E. 269, 107 Ind. 480; (1886) *Rice v. Boyer*, 9 N. E. 420, 108 Ind. 472, 58 Am. Rep. 53; (1887) *Rogers v. Union Cent. Life Ins. Co.*, 111 Ind. 343, 12 N. E. 495, 60 Am. Rep. 701; (1889) *Peden v. Mail*, 20 N. E. 493, 118 Ind. 556; (1890) *Erwin v. Acker*, 25 N. E. 888, 126 Ind. 133; (1891) *McLead v. Applegate*, 127 Ind. 349, 20 N. E. 830; (1892) *Union Cent. Life Ins. Co. v. Schidler*, 130 Ind. 214, 29 N. E. 1071, 15 L. R. A. 89; (1892) *Linder v. Smith*, 30 N. E. 1073, 131 Ind. 147; (1892) *Korrady v. Lake Shore & M. S. Ry. Co.*, 131 Ind. 261, 29 N. E. 1069; (1892) *Shepardson v. Gillette*, 31 N. E. 788, 133 Ind. 125; (1895) *United States Saving Fund & Investment Co. v. Harris*, 40 N. E. 1072, 41 N. E.

451, 142 Ind. 226; (App. 1895) *Keller v. Reynolds*, 40 N. E. 76, 280, 12 Ind. App. 383; (Sup. 1897) *Xenia Real Estate Co. v. Macy*, 47 N. E. 147, 147 Ind. 568.

[eee] (Sup. 1870)

Where a complaint states, in the body of it, a good cause of action, specifying its nature, not upon a general account of several items, but upon one item alone, which is set out, it cannot, under the Code, be objected to on demurrer, on the ground that no bill of particulars is made a part of it.—*Brooklyn Gravel Road Co. v. Slaughter*, 33 Ind. 185.

[f] (Sup. 1870)

In a suit on a note, which appears on its face to have been executed on Sunday, no question as to its invalidity by reason of its execution on that day can be raised by demurrer.—*Heavenridge v. Mondy*, 34 Ind. 28.

[ff] (Sup. 1871)

Where a complaint is based on an alleged settlement, a balance struck, and a promise to pay the balance, and the exhibits filed with the complaint contradict the allegations, and conclusively show that there has been no settlement and no promise to pay, the complaint will be bad on demurrer.—*Gilmore v. Board of Com'rs of Putnam County*, 35 Ind. 344.

[fff] (Sup. 1873)

That the plaintiff is not entitled to the relief specially prayed for is no ground of demurrer to the complaint. The prayer is only matter of form, and, when a cause of action is stated, cannot be reached by demurrer.—*Goodall v. Mopley*, 45 Ind. 355.

[g] (Sup. 1874)

The sufficiency of breaches assigned in a suit on a guardian's bond may be tested by a motion to strike out, or by a separate demurrer to each breach.—*Colburn v. State ex rel. Arnold*, 47 Ind. 310.

[gg] (Sup. 1875)

That the specific, appropriate relief sought, as the amount for which judgment is demanded, is not stated in the conclusion of a complaint, is not a ground of demurrer under the Code (2 Gav. & H. St. p. 77, § 50).—*Acker v. McCullough*, 50 Ind. 447.

[ggg] (Sup. 1877)

The complaint in an action by a turnpike company on a subscription to its stock did not show that the road was to pass through more than one county, and alleged that a copy of its articles of association had been filed in the office of the recorder of that county, as required by statute. *Held*, that the objection that no copy of such articles was filed with other counties through which the road passed should be raised by answer, and not by demurrer.—*Miller v. Wild Cat Gravel Road Co.*, 57 Ind. 241.

[h] (Sup. 1877)

In an action on an injunction bond conditioned only that the injunction should be wrongful, if additional breaches be assigned than the only assignable breach, viz., that the injunction was wrongful, the remedy is not by demurrer to such breaches.—*Boden v. Dill*, 58 Ind. 273.

[hh] A general allegation of negligence is sufficient when challenged by demurrer.—(Sup. 1879) *Barnett v. Leonard*, 66 Ind. 422; (1883) *Jones v. White*, 90 Ind. 255; (1890) *Ohio & M. Ry. Co. v. McCartney*, 23 N. E. 258, 121 Ind. 385; (1891) *Deller v. Hofferberth*, 26 N. E. 889, 127 Ind. 414; (1891) *Mississinewa Min. Co. v. Patton*, 28 N. E. 1113, 129 Ind. 472, 28 Am. St. Rep. 203; (App. 1895) *Citizens' St. Ry. Co. v. Lowe*, 39 N. E. 165, 12 Ind. App. 47; (1895) *Pittsburgh, C., C. & St. L. Ry. Co. v. Welch*, 40 N. E. 650, 12 Ind. App. 433; (Sup. 1897) *Louisville, N. A. & C. R. Co. v. Lynch*, 44 N. E. 997, 46 N. E. 471, 147 Ind. 165, 34 L. R. A. 293; (App. 1899) *Chicago & E. R. Co. v. Kreig*, 53 N. E. 1033, 22 Ind. App. 393; (1900) *Duffy v. Gleason*, 58 N. E. 729, 26 Ind. App. 180; (Sup. 1903) *Citizens' St. R. Co. v. Jolly*, 67 N. E. 935, 161 Ind. 80; (1907) *Pittsburgh, C., C. & St. L. Ry. Co. v. Simons*, 168 Ind. 333, 79 N. E. 911.

[hhh] (Sup. 1879)

Where a complaint on a note sets out the note, which itself constitutes a cause of action without the indorsement thereon, failure to allege that the indorsement was in writing if such allegation is necessary, will not subject the complaint to a demurrer.—*Marion & Monroe Gravel R. Co. v. Kessinger*, 66 Ind. 549.

[hhhh] (Sup. 1879)

A pleading setting up a chain of title to lands from which an equitable title may be inferred is not bad on demurrer.—*Earle v. Peterson*, 67 Ind. 503.

[i] (Sup. 1880)

Certain defendants who are required by the complaint to answer and state their claim to the property in controversy cannot demur to the complaint on the ground that it states no cause of action against the other defendants.—*Woollen v. Wishmier*, 70 Ind. 108.

[ii] (Sup. 1880)

A complaint good for nominal damages is not obnoxious to demurrer.—*State ex rel. Alford v. Blanch*, 70 Ind. 204.

[iii] (Sup. 1880)

Where a complaint by a father of a minor who was killed while in the employ of a defendant charged that the employment was against the will of the plaintiff, it was not demurrable, though it contained an improper claim for damages.—*Grand Rapids & I. R. Co. v. Showers*, 71 Ind. 451.

[j] (Sup. 1880)

An allegation in the complaint that a certain person not a party to the action was a

party defendant did not render the complaint defective on a demurrer thereto for want of facts.—*Williams v. Potter*, 72 Ind. 354.

[j] (Sup. 1881)

If want of jurisdiction be apparent on the face of a complaint, the complaint will be bad upon demurrer. Prac. Act, § 50. Want of jurisdiction not apparent on the face of the complaint may be shown by answer.—*State v. Ennis*, 74 Ind. 17.

[jj] (Sup. 1881)

Where a complaint states a cause of action for the recovery of land, an objection to its sufficiency to authorize the award of incidental relief such as the correction of a deed, asked thereby, should not be taken by demurrer for failure to state a cause of action.—*Smith v. Kyler*, 74 Ind. 575.

[k] (Sup. 1881)

Where a complaint improperly unites several causes of action, the proper remedy of the defendant is not by demurrer to such complaint for misjoinder.—*Baddeley v. Patterson*, 78 Ind. 157.

[kk] (Sup. 1881)

Where there was no personal liability and the entire right of action depended on the validity of a lien, which affirmatively appeared to be invalid, the proper practice was to demur.—*McGrew v. McCarty*, 78 Ind. 406.

[kkk] (Sup. 1881)

Objections to the prayer for relief cannot be reached by demurrer to the complaint for want of sufficient facts.—*Nowlin v. Whipple*, 79 Ind. 481.

[ll] (Sup. 1882)

Where a complaint or counterclaim shows that the pleader is entitled to some relief, it is sufficient on demurrer.—*Crecelius v. Mann*, 84 Ind. 147.

[lll] (Sup. 1882)

A complaint to which defendant answers is not bad on demurrer because it contains a prayer for a personal judgment, when the only relief permissible under the facts is the enforcement of a lien on lands, under Rev. St. 1881, § 385, authorizing "any relief consistent with the case made by the complaint and embraced within the issue."—*Copeland v. Copeland*, 89 Ind. 29.

[lll] (Sup. 1883)

Where it is not apparent on the face of the complaint that the court did not have jurisdiction of the person of the defendant or of the subject-matter of the action, a demurrer on the grounds of want of jurisdiction of the subject-matter and the person is not well taken.—*Continental Life Ins. Co. v. Volger*, 89 Ind. 572, 46 Am. Rep. 185.

[m] (Sup. 1883)

If a complaint was good for any purpose, it is sufficient to withstand a demurrer.—*Morley v. Ball*, 90 Ind. 450.

[mm] (Sup. 1883)

The omission to file copies of written instruments which are the cause of action is a good ground for a demurrer for insufficiency, and the mere statement that such copies are filed is not enough.—*Citizens' State Bank of Newcastle v. Adams*, 91 Ind. 280.

[mmm] Where a complaint states facts constituting a cause of action, and also states facts constituting a defense, it is bad on demurrer.—(Sup. 1884) *Behrley v. Behrley*, 93 Ind. 255; (1902) *Roberts v. Indianapolis St. Ry. Co.*, 64 N. E. 217, 158 Ind. 634; (App. 1902) *Knauss v. Lake Erie & W. R. Co.*, 64 N. E. 95, 29 Ind. App. 216.

[n] (Sup. 1885)

A complaint, the prayer and general scope of which shows that it was designed to obtain one character of relief, as to which it is demurrable, cannot be sustained for the purpose of granting a different kind of relief.—*City of Logansport v. Uhl*, 99 Ind. 531, 49 Am. Rep. 109.

[nn] (Sup. 1885)

If it does not appear from the complaint that the action was prematurely brought, a demurrer will not lie for that reason.—*Trentman v. Fletcher*, 100 Ind. 105.

[nnn] (Sup. 1886)

Where a complaint, charging negligence, fails to specify in what the negligence consists, the proper way to reach the infirmity is not by demurrer.—*Cincinnati, I., St. L. & C. Ry. Co. v. Gaines*, 104 Ind. 526, 4 N. E. 34, 5 N. E. 746, 54 Am. Rep. 334.

[nnnn] (Sup. 1886)

Where a complaint states a cause of action, exclusive of an averment as to an element of damages not recoverable in such a case, such additional averment does not make it bad on demurrer for want of sufficient facts.—*Byard v. Harkrider*, 108 Ind. 376, 9 N. E. 294.

[o] (Sup. 1888)

Where, after rejecting an uncertain allegation in a paragraph of a complaint, the paragraph states facts sufficient, the paragraph is not bad on demurrer because of uncertainty in its allegations.—*Board of Com'rs of Ripley County v. Hill*, 16 N. E. 156, 113 Ind. 316.

[oo] (Sup. 1889)

In an action by an infant for personal injuries, the point that the complaint was defective for alleging that the infant had been compelled to endanger himself without pleading the facts was not reached by demurrer.—*Brazil Block Coal Co. v. Gaffney*, 21 N. E. 1102, 119 Ind. 455, 4 L. R. A. 850, 12 Am. St. Rep. 422.

[p] (Sup. 1890)

A complaint alleged that plaintiff exchanged land with defendant for 43 shares of the stock of a corporation of which defendant was president; that defendant fraudulently repre-

sented that the financial condition of the corporation was good, and that the stock was of par value; that, for the purpose of preventing plaintiff from ascertaining the value of the stock, defendant requested him to make no inquiries, because he [defendant] did not wish the other stockholders to know that he was about to sell his stock; that the corporation was at the time insolvent, and the stock worthless, all of which defendant well knew; and that, relying on defendant's representations, plaintiff exchanged his land for the stock. *Held* that, though the complaint might not entitle plaintiff to a vendor's lien, it stated a cause of action for false representations, and hence, as it entitled plaintiff to some relief, it was good on demurrer.—*Nysewander v. Lowman*, 124 Ind. 584, 24 N. E. 355.

[pp] (App. 1891)

Where the sureties on two bonds given by a defaulting county treasurer agreed to divide the loss equally, and some of them paid the debt, and sued the others jointly for contribution, the question whether the liability is joint, or joint and several, or several only, must be raised by demurrer for misjoinder of causes of action, and cannot be raised by a motion for a new trial and on assignment of error made jointly by all the defendants.—*Carnahan v. Chenoweth*, 1 Ind. App. 178, 27 N. E. 332.

[ppp] (Sup. 1892)

Under Rev. St. 1881, § 302, requiring the original or a copy of any written instrument sued on to be filed with the pleading, a complaint which falsely recites that a copy has been filed is demurrable.—*Blackwell v. Pendergast*, 132 Ind. 550, 32 N. E. 319.

[pppp] (App. 1893)

A complaint in which several plaintiffs join, which fails to disclose a joint cause of action in favor of all such plaintiffs, is bad on demurrer for the want of sufficient facts.—*Swales v. Grubbs*, 33 N. E. 1124, 6 Ind. App. 477.

[q] (App. 1893)

A contract made on Sunday, which is not a work of charity or necessity, being voidable, an objection to a complaint on a contract, which on its face is regular and lawful, except that it shows that it was executed on Sunday, cannot be reached by demurrer, but only by answer.—*Western Union Tel. Co. v. Eskridge*, 7 Ind. App. 208, 33 N. E. 238.

[qq] (Sup. 1896)

A demurrer will not lie against a petition which is defective only in not separately stating and numbering the several causes of the action supposed to be stated therein.—*Cargar v. Fee*, 39 N. E. 93, 140 Ind. 572.

Misjoinder of causes of action and of parties cannot be remedied by demurrer.—*Id.*

[qqq] (App. 1896)

The improper joinder of two causes of action is no ground for a demurrer for want of

facts.—*Leak v. Thorn*, 13 Ind. App. 335, 41 N. E. 602.

The fact that the complaint shows a separate action against each of the defendants is no ground for demurrer for want of facts.—*Id.*

[r] (Sup. 1896)

Where facts sufficient to constitute a cause of action are stated in the complaint, a demurrer assigning want of sufficient facts because the theory of the complaint was not apparent, or because it is difficult to tell which of two theories is the true one, will not be sustained.—*Scott v. Cleveland, C., C. & St. L. R. Co.*, 43 N. E. 133, 144 Ind. 125, 32 L. R. A. 154.

[rr] (App. 1896)

Where a copy of a note sued on is filed with the complaint as an exhibit, the fact that the exhibit varies from the note described in the complaint as to the time of maturity, rate of interest, and attorney's fees does not make the complaint bad on demurrer, for if the exhibit was a proper one it controlled the statements of the complaint so far as there was a conflict between them.—*Clark v. Trueblood*, 44 N. E. 679, 16 Ind. App. 98.

[rrr] (App. 1898)

In an action for failure to stop a car at intermediate points, as provided in the bill of lading, at the request of the consignee, the fact that the request was unreasonable, not timely made, and not sufficiently definite is a proper matter of defense, and cannot be determined on demurrer.—*Tebbs v. Cleveland, C., C. & St. L. Ry. Co.*, 50 N. E. 486, 20 Ind. App. 192.

[s] (Sup. 1899)

The fact that a complaint shows another action pending between the parties, for the same cause, does not make it demurrable for want of facts, since the defense of a former action pending is a separate ground for demurrer, under *Burns' Rev. St. 1894*, § 342, subd. 3 (*Horner's Rev. St. 1897*, § 339, subd. 3).—*Basye v. Basye*, 52 N. E. 797, 152 Ind. 172.

[ss] (App. 1899)

A complaint failing to state a cause of action is bad on demurrer, although originally filed in the mayor's court.—*Postal v. Kreps*, 54 N. E. 816, 23 Ind. App. 101.

[sss] (App. 1899)

The fact that part of the obligors whose names appear in the body of an appeal bond did not sign it is no ground for demurrer for want of facts to a complaint against those who signed it, but must be pleaded as a defense.—*Davis v. O'Bryant*, 55 N. E. 261, 23 Ind. App. 376.

[t] (App. 1901)

An objection to the jurisdiction over defendant's person cannot be raised by a demurrer unless want of jurisdiction appears on the face of the complaint.—*Delaware Tp. v. Board of Com'rs of Ripley Co.*, 59 N. E. 189, 26 Ind. App. 97.

[tt] (App. 1901)

In an action to foreclose a chattel mortgage securing three notes, the notes and mortgage were filed with the complaint, and referred to and made a part of the first paragraph, as Exhibits A, B, C, and D, and were referred to and made a part of the second paragraph as Exhibits E, F, G, and H, which alleged that they were filed with it. *Held* that, though a demurrer to the first paragraph was sustained, the mortgage and notes remained a part of the record, so that a demurrer to the second paragraph of the complaint on the ground that the mortgage was not filed with the complaint was properly overruled.—*Hornbrook v. Hetzel*, 60 N. E. 965, 27 Ind. App. 79.

[ttt] (App. 1902)

The insufficiency of a complaint against a city for injuries from a defective street, in failing to allege that the city was responsible for the defect, was properly taken advantage of by demurrer.—*City of Indianapolis v. Crans*, 63 N. E. 478, 28 Ind. App. 584.

[u] Where a pleading avers sufficient facts to entitle plaintiff to some relief, it is good against a demurrer for want of facts.—(App. 1902) *Gowdy Gas Well, Oil & Mineral Water Co. v. Pattison*, 64 N. E. 485, 29 Ind. App. 261; (1906) *Gilman v. Fultz*, 77 N. E. 746, 37 Ind. App. 609.

[uu] (App. 1902)

A complaint showing on its face that the action is premature is demurrable.—*Middaugh v. Wilson*, 65 N. E. 555, 30 Ind. App. 112.

Burns' Rev. St. 1901, § 342, cl. 5, provides that a defendant may demur to a complaint on the ground that it does not state sufficient facts. *Held*, that a demurrer on the ground that the action is prematurely brought is within such clause.—*Id.*

[uuu] (App. 1902)

Burns' Rev. St. 1901, § 342, subd. 5, provides that a defendant may demur to a complaint when it appears on the face thereof that it does not state facts constituting a cause of action. A complaint alleged that defendant city was indebted to plaintiff for services as a nurse rendered at the request of defendant, and a bill of particulars gave the items. A demurrer alleged that "defendant demurs to plaintiff's complaint for the reason that it fails to state a cause of action against it, as it is a municipal corporation, and can only speak by resolution or ordinance." *Held* that, conceding the demurrer was on the ground that the complaint failed to state a cause of action, as the authority of defendant to employ plaintiff could have been presented on the trial, the demurrer was not well taken.—*City of Greenfield v. Johnson*, 65 N. E. 542, 30 Ind. App. 127.

[uuuu] (App. 1903)

The improper joining of causes of action is ground for demurrer.—*Thomas v. Dabblesmont*, 67 N. E. 463, 31 Ind. App. 146.

[v] (App. 1904)

Where more than one cause of action is stated in a single paragraph of complaint, the remedy is by motion to separate or by demurrer for misjoinder.—*Blanchard-Hamilton Furniture Co. v. Colvin*, 69 N. E. 1032, 32 Ind. App. 398.

[vv] (App. 1904)

Burns' Ann. St. 1901, § 455, provides that the execution of a written contract includes the subscribing and delivery thereof, and section 365 declares that, when any pleading is founded on a written instrument, the original, or a copy thereof, must be filed with the pleading. *Held* that, where a complaint in an action on a contract averred that plaintiff and defendant entered into a contract in writing, "a copy of which is filed herewith, whereby," etc., and the body of the writing purported to be an executory contract between defendant on the one part and no person on the other, and was signed by plaintiff alone, it could not be presumed that defendant's name in the body of the instrument was placed there by way of signature; and, in the absence of an averment to such effect, the pleading did not show a completed contract, and was therefore demurrable.—*Ellison v. Towne*, 72 N. E. 270, 34 Ind. App. 22.

[vvv] (Sup. 1905)

Defects of substance in a bill must be taken advantage of by demurrer.—*Guthrie v. Howland*, 73 N. E. 259, 164 Ind. 214.

[vvvv] (App. 1905)

While a complaint in a single paragraph can contain but a single theory, to be determined from its leading allegation, it is not demurrable for want of facts because more than a single cause of action is stated in such paragraph.—*State ex rel. Millice v. Petersen*, 75 N. E. 602, 36 Ind. App. 269.

[vvvvv] (Sup. 1905)

Where the facts set forth in a complaint for personal injuries are of a character to be reasonably subject to more than one inference or conclusion under established rules of law, the ultimate fact of contributory negligence is a question for the jury, and the complaint is not subject to demurrer.—*Greenawaldt v. Lake Shore & M. S. R. Co.*, 165 Ind. 219, 74 N. E. 1081.

[w] (Sup. 1905)

In an action by a shipper against a carrier for damage to goods, an omission to file the bill of lading or a copy thereof is ground for demurrer.—*Chicago, I. & L. Ry. Co. v. Reyman*, 166 Ind. 278, 76 N. E. 970.

[ww] (Sup. 1906)

A complaint showing that plaintiff is entitled to part of the relief demanded is sufficient as against a demurrer.—*Dyer v. Woods*, 166 Ind. 44, 76 N. E. 624.

[www] (Sup. 1906)

Where an instrument not properly a part of or an exhibit to a complaint is attached as an exhibit pursuant to an erroneous order of

court, questions as to the effect of this instrument are not properly raised by a demurrer to the complaint.—*Heaston v. Krieg*, 77 N. E. 805, 167 Ind. 101, 119 Am. St. Rep. 475.

[www] (App. 1906)

A complaint drawn on a definite theory should be good on such theory, or it is bad on demurrer.—*Union Mut. Life Ins. Co. v. Adler*, 38 Ind. App. 530, 73 N. E. 835, 75 N. E. 1088.

[x] (App. 1906)

A demurrer to a complaint does not lie because of a want of theory, but for want of sufficient facts.—*Holliday v. Perry*, 38 Ind. App. 588, 78 N. E. 877.

[xx] (App. 1906)

The complaint in a suit praying for an injunction to restrain breach of a written contract, being founded on a written instrument, is bad on demurrer, under the express provisions of Burns' Ann. St. 1901, § 363, on failure to file with the complaint or set out therein the contract.—*Elwood Natural Gas & Oil Co. v. Glaspy*, 77 N. E. 956, 38 Ind. App. 634; *Same v. Hughes*, 77 N. E. 957, 38 Ind. App. 703; *Same v. Etclusion*, Id.

[xxx] (Sup. 1907)

A complaint stating a good cause of action is not demurrable because of uncertainty, inconsistency, repugnancy, or duplicity.—*Chicago & E. R. Co. v. Lawrence*, 169 Ind. 319, 79 N. E. 363, 82 N. E. 768.

A complaint so uncertain as not to state intelligently a substantially good cause of action is demurrable for not stating a cause of action.—Id.

[y] (App. 1907)

Where, in an action for injuries to real estate and growing crops by the diversion of water, the complaint is defective in that the description of the premises is indefinite, the objection should not be by demurrer.—*Evansville & Princeton Traction Co. v. Broermann*, 80 N. E. 972, 40 Ind. App. 47.

[yy] (App. 1907)

In an action under the Code, if the facts stated in the complaint entitle plaintiff to any relief either at law or in equity, the complaint is sufficient on demurrer.—*Lake Erie & W. R. Co. v. Hobbs*, 40 Ind. App. 511, 81 N. E. 90.

[yyy] (Sup. 1908)

A demurrer, not assigning any of the grounds prescribed by Burns' Ann. St. 1908, § 344, is properly overruled.—*Conrad v. Hansen*, 171 Ind. 43, 85 N. E. 710.

[yyyy] (Sup. 1909)

Where a complaint stated a right of action in favor of relator to compel defendants in their official capacities to perform certain statutory duties, the complaint was not demurrable for want of facts, though it did not entitle relator to an injunction prayed for.—*Sahm v. State ex rel. Cleveland, C., C. & St. L. R. Co.*, 172 Ind. 237, 88 N. E. 257.

[z] (Sup. 1909)

An ordinance provided that a street railroad company operating under a franchise from the city should use "Johnson," or "girder," rails on all streets repaved with asphalt or brick, and, in suit to enjoin construction with T-rails, the complaint charged that "safe and permanent streets can be made with brick only where car tracks are constructed with Johnson rails." *Held*, that it was not demurrable, but, if not as explicit as it should be, the remedy was by motion.—*City of New Albany v. New Albany St. R. Co.*, 172 Ind. 487, 87 N. E. 1084.

[zz] (Sup. 1909)

If the complaint is sufficient to entitle plaintiff to any of the relief demanded, a demurrer thereto should be overruled. Rehearing, 87 N. E. 215, denied.—*Indianapolis Northern Traction Co. v. Brennan*, 90 N. E. 65.

[zzz] (App. 1910)

The complaint alleged that defendant was a railroad corporation maintaining a large number of switches in a certain city, and that intestate had been employed by it for about four months before March 28, 1906, as brakeman, switchman, and yard conductor, and on that date was engaged as yard conductor in such city in moving defendant's cars in such yards, and was killed because of a defective car. *Held*, that the complaint was not demurrable for not alleging the existence of the relation of master and servant at the time intestate was killed.—*Cleveland, C., C. & St. L. Ry. Co. v. Heine-man*, 90 N. E. 899.

[zzzz] (App. 1910)

A complaint against a railroad, with a count on Burns' Ann. St. 1901, § 5324, requiring a railroad to build a fence on its right of way, joined with a count on section 5325, requiring a railroad to maintain fences built on its right of way, was not demurrable, as defendant was not harmed by joining a paragraph on which plaintiff was entitled to relief with one on which he was not entitled to relief.—*Vandalia R. Co. v. Miller*, 90 N. E. 907.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 428-443; 12

CENT. DIG. Corp. § 2044.

See, also, 31 Cyc. pp. 288-302.

§ 194. Grounds for demurrer to plea or answer, or to defense therein.

Consistency or repugnancy of allegations in general, see ante, § 21.

Objections reached by general demurrer, see post, § 205.

[a] (Sup. 1885)

In an action for money had and received, a plea in abatement alleging that prior to the commencement of the suit plaintiff sued the defendant in assumpsit before a justice of the peace on the same contract on which this action is founded, and that the defendant obtained a judgment, from which the plaintiff took an

appeal, which is still pending, is not demurrable.—*Tracy v. Reed*, 4 Blackf. 56.

[b, c] (Sup. 1853)

Where the general issue and special pleas are filed to the action, and the defense set up in the special pleas is admissible under the general issue, it is immaterial whether a demurrer to the special pleas is sustained or overruled.—*Burton v. Cochran*, 4 Ind. 289.

[d, e] (Sup. 1859)

While other defenses, contained in the same paragraph with a denial, and whether equivalent to it or not, may be stricken out on motion, it would be error to sustain a demurrer to them; no objection having been made to that mode of presenting the questions.—*Indianapolis, P. & C. R. Co. v. Taffe*, 11 Ind. 458.

[f] (Sup. 1861)

Where the facts estopping defendant from maintaining his defense appear on the face of the pleadings, a demurrer to the answer should be sustained.—*French v. Blanchard*, 16 Ind. 143.

[g] Where facts pleaded in a paragraph of an answer were admissible under a general denial pleaded, it was not error for the court to sustain a demurrer to such paragraph.—(Sup. 1871) *Waggoner v. Liston*, 37 Ind. 357; (1873) *Lewis v. Edwards*, 44 Ind. 333; (App. 1902) *Muselman v. Hays*, 62 N. E. 1022, 28 Ind. App. 360; (1906) *Maris v. Masters*, 67 N. E. 699, 31 Ind. App. 235; (1905) *Farmers' Mut. Fire Ins. Co. of De Kalb County v. Jackman*, 73 N. E. 730, 35 Ind. App. 1; (1905) *McFarland v. Stanifer*, 76 N. E. 124, 36 Ind. App. 486.

[h] (Sup. 1873)

That a pleading does not "state facts sufficient to bar the action," and that it does not "state facts enough for a counterclaim," are not grounds of demurrer known to the statute.—*Campbell v. Routt*, 42 Ind. 410.

[i] (Super. 1873)

Where a special plea amounting to a general issue is pleaded with the general issue, objection should not be taken by demurrer.—*Greenstreet v. Norris*, Wils. 419.

[j] (Sup. 1878)

Where a complaint alleged that plaintiff was a creditor of a firm which had sold its stock to defendant in consideration of a promise by defendant to pay the firm debts, and that defendant had not paid plaintiff's claim, an answer alleging that defendant's promise was to sell the stock and apply the proceeds first in satisfaction of certain debts—that he had done so—and had exhausted such proceeds, while an argumentative denial of the complaint, was good against demurrer.—*Loeb v. Weis*, 64 Ind. 285.

[k] (Sup. 1879)

Where a paragraph of answer is pleaded to the whole complaint, its sufficiency is to be

tested by demurrer for want of sufficient facts.—*State ex rel. Nave v. Newlin*, 69 Ind. 108.

[k] (Sup. 1880)

An answer which does not controvert any of the facts of the complaint, but which ineffectually attempts to set up the defense of limitations, is bad on demurrer.—*Cole v. Wright*, 70 Ind. 179.

[kk] (Sup. 1880)

In an action by a passenger for injuries, an answer alleging that the plaintiff had executed a written release by which he assumed all risk of personal injuries and relieved the defendant from liability to him as a carrier, and averring that copies of the contract under which plaintiff was riding on its train and the release were filed with and made part of the answer, was demurrable where the copies referred to in the answer were not in fact filed with it.—*Ohio & M. Ry. Co. v. Nickless*, 71 Ind. 271.

[l] (Sup. 1881)

A plea which professes to answer the whole declaration, but answers only a part, is bad on demurrer.—*Smith v. Smith*, 77 Ind. 80; *Harmony School Tp. v. Moore*, 80 Ind. 276.

[ll] (Sup. 1881)

Though a paragraph of the answer which amounts to a general denial may have been unnecessary, it cannot be said to be bad on demurrer for that reason.—*Mays v. Hedges*, 79 Ind. 288.

[m] (Sup. 1882)

Where all defenses were admissible under the general denial, no error was committed in sustaining the demurrer to the remaining paragraphs, though each of them was good.—*Porter v. Mitchell*, 82 Ind. 214.

[mm] (Sup. 1882)

It is not error to sustain a demurrer to a general denial of an application for a receiver, though the better practice is to reach the same result by means of a motion to strike out or to reject.—*Bitting v. Ten Eyck*, 85 Ind. 357.

[n] (Sup. 1882)

A demurrer to an answer on the ground that neither of the paragraphs thereto "constitutes any defense to this action" does not present any of the grounds for demurrer enumerated in the Code, and was properly overruled.—*Reed v. Higgins*, 86 Ind. 143.

[nn] (Sup. 1883)

Where two defenses are blended in one paragraph, the remedy is not by demurrer.—*Woodworth v. Zimmerman*, 92 Ind. 349.

[o] (Sup. 1884)

It is error to overrule demurrers to special paragraphs of an answer, though the facts pleaded were admissible under the general denial, which was also pleaded.—*State ex rel. Dunham v. Roche*, 94 Ind. 372.

[oo] (Sup. 1884)

It was not error to sustain a demurrer to a paragraph of an answer where the same evidence was admissible under another paragraph.—*Fleetwood v. Dorsey Mach. Co.*, 95 Ind. 491.

[p] (Sup. 1893)

As a demurrer to an answer admits the truth of the allegations thereof, where the answer alleges a former adjudication of the matters in controversy by a court having jurisdiction of the parties and subject-matter, such demurrer cannot be sustained.—*Gilmore v. McClure*, 133 Ind. 571, 33 N. E. 351.

[pp] (Sup. 1893)

A plea not responsive to allegations of the complaint is not for this reason demurrable.—*Miller v. Rapp*, 135 Ind. 614, 34 N. E. 981, 35 N. E. 693.

[q] (App. 1893)

In an action by a tenant for damages to his growing crops, and for undermining his house, resulting from the removal of gravel from the land, where the defense relied on is payment of such damages assessed to the landlord under condemnation proceedings, the answer is not bad, on demurrer, for want of a copy of such proceedings.—*Shauver v. Phillips*, 7 Ind. App. 12, 32 N. E. 1131, 34 N. E. 450.

[qq] (App. 1896)

An answer, in an action against an alleged tenant, for possession, which alleges that defendant holds possession under a contract to purchase from plaintiff, and that the purchase price was settled by a transfer to plaintiff of defendant's interest in other lands, is sufficient on demurrer.—*Corbin v. Thompson*, 12 Ind. App. 511, 40 N. E. 824.

[r] (App. 1895)

Where a defense is set out in one paragraph which might have been available under another, a demurrer to such paragraph is properly sustained.—*Germania Fire Ins. Co. v. Stewart*, 42 N. E. 286, 13 Ind. App. 627.

[s] (Sup. 1897)

The proper method of testing the legal sufficiency of affirmative defenses contained in an answer is by demurrer.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Mahony*, 46 N. E. 917, 148 Ind. 196, 40 L. R. A. 101, 62 Am. St. Rep. 503.

[ss] (Sup. 1898)

An answer directed to an entire complaint must, in order to withstand a demurrer, be good as to all the causes of action stated in the complaint.—*Walker v. Walker*, 50 N. E. 68, 150 Ind. 317.

[t] (App. 1899)

It is not error to sustain a demurrer to a plea in abatement where the facts alleged go to the merits of the cause, and not to its abatement.—*Sloan v. Lowder*, 54 N. E. 135, 23 Ind. App. 118.

[u] (App. 1900)

As a note does not lose its negotiability by reason of installments of interest remaining unpaid, demurrers to the third and sixth paragraphs of defendant's answer, based upon this theory, were properly sustained.—*Cooper v. Merchants' & Manufacturers' Nat. Bank*, 57 N. E. 569, 25 Ind. App. 341.

[uu] (App. 1901)

Where suit is brought on a note and to foreclose a mortgage securing it, an answer purporting on its face to answer the entire complaint, but only alleging facts showing a defense to the mortgage, and wholly silent as to the liability on the note, is subject to demurrer.—*Hollingsworth v. McColly*, 60 N. E. 371, 26 Ind. App. 609.

[v] (App. 1902)

In an action brought by the custodian of an insane ward against his guardian to recover for care of the ward, etc., a demurrer to a plea setting up services rendered by the ward to plaintiff was properly sustained where there was a general denial, and, in addition, other paragraphs in the answer under which the matter alleged in the plea was provable.—*Hart v. Miller*, 64 N. E. 239, 29 Ind. App. 222.

[vv] (App. 1903)

The sustaining of demurrers to special answers was not error, where the matter alleged therein was admissible under a general denial pleaded.—*Nowlin v. State ex rel. Board of Com'rs of Dearborn County*, 66 N. E. 54, 30 Ind. App. 277.

[w] (App. 1905)

In a suit by a township trustee to restrain defendants from using a schoolhouse for religious purposes, it was not error to sustain a demurrer to a paragraph of the answer, alleging that prior to defendants' use of the building, they with other legal voters of the district obtained the trustee's permission to use the same "when unoccupied for common school purposes," and in pursuance thereof, they entered and used the building for religious purposes on Sundays and occasionally on Friday and Saturday nights, and had done so for several years, such facts being admissible under a general denial.—*Baggerly v. Lee*, 73 N. E. 921, 37 Ind. App. 139.

[x] (App. 1906)

Where all the facts averred in a special paragraph of the answer were admissible under the general denial pleaded, the sustaining of the demurrer to such paragraph was not error.—*Richardson v. Stephenson*, 78 N. E. 256, 38 Ind. App. 339.

[xx] (Sup. 1906)

An answer asserting a defense founded on an unconstitutional statute is insufficient on demurrer.—*Kraus v. Lehman*, 170 Ind. 408, 83 N. E. 714, 84 N. E. 769.

[7] (App. 1909)

Paragraphs of the answer the allegations of which were provable under the general denial, as expressly provided by Burns' Ann. St. 1908, § 1101, are demurrable.—*Ripley v. Lemcke*, 43 Ind. App. 336, 87 N. E. 237.

[77] (App. 1909)

Where, in an action on a judgment for alimony, the complaint alleged that plaintiff's testatrix signed a satisfaction while of unsound mind, and that she continued to be of unsound mind until her death, an answer directed to the whole complaint, but which did not deny or avoid such allegations was demurrable.—*Wilson v. Fahnestock*, 80 N. E. 1037.

[1] (App. 1909)

In an action for conversion of certain oil well fixtures and machinery against plaintiff's landlord, a special defense that the lease provided that plaintiff might remove all property at any time, and, if it failed to operate any one well for 60 days or pay defendants \$1 a day for the time it was not operated, the ten acres on which it was located should be returned to defendants; that plaintiff on December 12, 1902, ceased to operate the wells, abandoned the premises, and removed therefrom all its machinery and remained away thereafter until the 15th day of April, 1903, when defendants took possession of the wells, casing and drive pipe and proceeded to operate the same; and that defendants did not appropriate any machinery belonging to plaintiff, but only property attached to and forming a part of the real estate, which could not be removed therefrom without damage—was provable under the general denial pleaded, and hence the sustaining of a demurrer thereto was not error.—*Perry v. Acme Oil Co.*, 88 N. E. 859.

[12] (App. 1910)

Under Burns' Ann. St. 1908, § 371, providing that an answer in bar and a plea in abatement cannot be pleaded together, where, in an action against a municipal corporation, a plea to the jurisdiction is joined with an answer in bar, the plea might have been struck out on motion, but the same result may be attained by sustaining a demurrer.—*Town of Knox v. Golding*, 91 N. E. 857.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 444-446, 449-452.

See, also, 31 Cyc. pp. 302-305.

§ 195. Grounds for demurrer to set-off, counterclaim, or cross-complaint.

[a] (Sup. 1881)

A cross-complaint, to withstand a demurrer for want of facts, must, like any other, state facts sufficient to constitute a cause of action.—*Shoemaker v. Smith*, 74 Ind. 71.

[b] (Sup. 1886)

Under Rev. St. 1881, § 350, defining a counterclaim as "any matter arising out of or connected with the cause of action, which might be the subject of an action in favor of the defendant or which would tend to reduce the plaintiff's claim or demand for damages," and section 351, referring to the counterclaim as "a matter arising out of the contract or transaction set forth in the complaint, as the ground of the plaintiff's claims or any of them," the counterclaim for damages not arising out of, and in no way connected with any of the items set forth in plaintiff's bill of particulars, is bad on demurrer for the want of sufficient facts.—*Miller v. Roberts*, 5 N. E. 707, 106 Ind. 63.

[c] (Sup. 1889)

Where a paragraph of a counterclaim was insufficient on the theory on which it was pleaded, there was no error in sustaining a demurrer to it.—*Rahm v. Deig*, 23 N. E. 141, 121 Ind. 283.

[d] (App. 1892)

Where an answer of set-off, which is filed in an action in which a set-off is not allowed by law, states a cause of action against plaintiff, it cannot be reached by demurrer.—*Howlett v. Dilts*, 4 Ind. App. 23, 30 N. E. 313.

[e] (App. 1894)

In an action for a breach of a contract of employment, defendants alleged that plaintiff violated the contract by leaving their employ during a season when his services were most needed, by which defendants "were damaged in the sum of \$200." *Held*, that the allegations constitute a counterclaim which is good on demurrer.—*Blaney v. Postal*, 10 Ind. App. 131, 34 N. E. 849.

[f] (App. 1896)

A paragraph in an answer pleading a counterclaim is not demurrable when any of the matters therein pleaded constitute a cause of action.—*Anglemyer v. Blackburn*, 45 N. E. 483, 16 Ind. App. 352.

[g] (App. 1908)

A counterclaim not arising from nor legally connected with the subject-matter of complaint is bad on demurrer for want of facts, though the facts set forth might have been a good defense if pleaded by answer.—*State ex rel. Carter v. Spencer*, 42 Ind. App. 650, 86 N. E. 492.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 447, 448.

See, also, 31 Cyc. pp. 305, 306.

§ 196. Grounds for demurrer to replication or reply or to subsequent pleadings.

[a] (Sup. 1866)

The causes assigned as grounds of demurrer by the Code apply to the reply as well as

the complaint.—*Western Plank-Road Co. v. Stockton*, 7 Ind. 500.

[b] A departure in pleading may be reached by demurrer.—(Sup. 1860) *Will v. Whitney*, 15 Ind. 194; (1865) *McAroy v. Wright*, 25 Ind. 22; (Super. 1871) *Bohring v. Root*, Wils. 29. CONTRA, see (Sup. 1862) *Deacon v. Schwartz*, 18 Ind. 285.

[c] (Sup. 1861)

Departure is not a ground for demurrer.—*Reilly v. Rucker*, 16 Ind. 303.

[d] (Sup. 1882)

Where the paragraph of the answer to which replies were pleaded was a denial and the issue was complete without the reply, it was proper to sustain a demurrer thereto, as the matters averred in the reply could be proved without it.—*Porter v. Mitchell*, 82 Ind. 214.

[e] (Sup. 1890)

A demurrer may be sustained to a paragraph of a reply where defenses pleaded therein may be pleaded under the general denial.—*Hillenbrand v. Stockman*, 24 N. E. 370, 123 Ind. 598.

[f] (Sup. 1891)

Defendant having set up an arbitration of the matter in controversy as a bar, plaintiff replied first by a general denial, and second by alleging that the arbitrators did not award him anything on account of the matters set up in the complaint. *Held*, that the facts provable under the second paragraph were admissible under the general denial; thus justifying the sustaining of a demurrer to such paragraph.—*Baltes v. Bass Foundry & Machine Works*, 28 N. E. 319, 129 Ind. 185.

[g] (App. 1891)

The sustaining of a demurrer to a reply is proper where such reply does not respond to the paragraph of the answer to which it is addressed.—*Collier v. Cunningham*, 28 N. E. 341, 2 Ind. App. 254.

[h] (Sup. 1906)

It was proper to overrule a demurrer to a reply on the ground that the reply did not state facts sufficient to constitute a defense to the answer; no such grounds for demurring to a reply being recognized by the Civil Code. Judgment, 77 N. E. 666, affirmed.—*Scott v. Collier*, 78 N. E. 184, 166 Ind. 644.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 453-455.

See, also, 31 Cyc. pp. 306, 307.

§ 197. Right to demur, and leave of court.

[a] (Sup. 1861)

At the first calling of a cause, rule was granted against defendants to answer the complaint on a certain day, on which day the application of the defendant's attorney for an extension of time on account of his client's absence

was granted till the next day, when, a second extension being refused, he offered to file a demurrer. The complaint appeared to be good, and the refusal to allow him to file the demurrer was held correct.—*Van Allen v. Spadone*, 16 Ind. 319.

[b] (Sup. 1871)

A statute enabling a party to call for a bill of particulars of a demand pleaded will not be construed as impairing his right to demur to the pleading for insufficiency, instead of calling for particulars.—*Wolf v. Schofield*, 38 Ind. 175.

[c] (Sup. 1881)

One in whose favor a judgment is opened, he having had notice of the suit by publication only, may demur to the complaint in like manner as he could have done in the first instance.—*Smith v. King*, 81 Ind. 217.

[d] (Sup. 1884)

One defendant cannot demur to a complaint showing a cause of action against him on the ground that it shows no cause of action against another defendant.—*Holzman v. Hibben*, 100 Ind. 338.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 456-460.

See, also, 31 Cyc. pp. 273, 274.

§ 198. Joint or separate demurrers.

Demurrer to pleading good as to part of co-parties, see post, § 204.

To separate causes of action, see post, § 203.

[a] (Sup. 1882)

Where two defendants unite in one demurrer to the complaint, it must be regarded as a joint demurrer, though they state that they demur severally.—*Axtel v. Chase*, 83 Ind. 546; *Anthony v. Sturgis*, 86 Ind. 479.

[b] (Sup. 1882)

A demurrer *held* to be a joint one within the rule adopted in *Silvers v. Junction Railroad Co.*, 43 Ind. 435.—*City of Connersville v. Connersville Hydraulic Co.*, 86 Ind. 235.

[c] (Sup. 1884)

A demurrer in form: "Defendants separately and severally demur, to the first and second paragraphs of the plaintiff's complaint, and for cause of demurrer say that neither of said paragraphs states facts sufficient to constitute a cause of action against them"—is joint as to the parties.—*Carver v. Carver*, 97 Ind. 497.

[d] (Sup. 1887)

Where defendants did not demur until after plaintiff had filed his supplemental complaint, and then they filed separate demurrers to the separate parts of such complaint for the alleged insufficiency of the facts therein to constitute a cause of action, the court erred in entertaining the separate demurrers to the separate

parts of the complaint as then constituted, and the complaint as it was constituted on the filing of the supplemental complaint stands unchallenged by demurrer and unanswered, and the judgment of the court that plaintiff take nothing by his suit rendered as on the sustaining of a demurrer to such complaint was wholly unauthorized.—*Farris v. Jones*, 14 N. E. 484, 112 Ind. 498.

[e] (Sup. 1890)

A demurrer by several defendants was as follows: "Now comes [naming the defendants], and separately and severally demur to the plaintiff's cause of action, and say that said complaint does not state facts sufficient to constitute a cause of action against them jointly or severally." *Held*, that this was a joint demurrer to the parties as well as to the pleading.—*Hanover School Tp. v. Gant*, 125 Ind. 557, 25 N. E. 872.

[f] (Sup. 1892)

A demurrer which purports on its face to have been filed by all the defendants will control the statement of the clerk, which omits the name of one defendant as a demurring party.—*Holland v. Holland*, 131 Ind. 196, 30 N. E. 1075.

[g] (Sup. 1896)

A demurrer reciting that "defendants separately and severally demur" to different paragraphs of a complaint, because neither of the paragraphs states a cause of action against them, is joint as to the parties defendant.—*Armstrong v. Dunn*, 143 Ind. 433, 41 N. E. 540.

[h] (Sup. 1903)

A separate demurrer of a codefendant challenges the sufficiency of the complaint as to the demurring party, as if he were the sole defendant.—*Frankel v. Garrard*, 66 N. E. 687, 160 Ind. 209.

[i] (Sup. 1907)

Where two or more parties desire to demur separately to the same pleading on the same ground, each is not required to file a separate paper, but they may all act separately in demurring and yet unite in the same paper.—*Whitesell v. Strickler*, 167 Ind. 602, 78 N. E. 845, 119 Am. St. Rep. 524.

[j] (Sup. 1907)

Where each of several defendants filed a demurrer, alleging that "the defendant and each of them separately demurs to the plaintiff's complaint" for each of the following reasons, etc., the demurrer was several and not joint.—*McCleary v. Babcock*, 169 Ind. 228, 82 N. E. 433.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. §§ 461-463.

See, also, 31 Cyc. p. 321.

§ 199. Time for filing or serving demurrer.

[a] (Sup. 1833)

A special demurrer cannot be filed after the day for which the cause is set for trial.—*State Bank of Indiana v. Brooks*, 4 Blackf. 485.

[b] (Sup. 1880)

It is within the discretion of the court below whether or not to permit a demurrer to a reply after a judgment for the plaintiff and the grant of a new trial thereon.—*Thornton v. Williams*, 14 Ind. 518.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. §§ 464-469.

See, also, 31 Cyc. pp. 274-276.

§ 200. Form and requisites of demurrer in general.

[a] (Sup. 1906)

Error cannot be based on the overruling of a defective demurrer.—*City of Huntington v. Amiss*, 167 Ind. 375, 79 N. E. 199.

[b] (App. 1906)

A demurrer to a complaint for that it does not constitute a good cause of action is sufficient, as the word "good" will be considered as surplusage.—*Kintz v. Johnson*, 39 Ind. App. 280, 79 N. E. 533.

[c] (App. 1910)

A demurrer to a counterclaim or set-off must assign as the cause "want of sufficient facts to constitute a cause of action."—*Albaugh Bros., Dover & Co. v. Lynas*, 90 N. E. 908.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. §§ 470, 471.

See, also, 28 Cyc. p. 45, 31 Cyc. pp. 307-321.

§ 201. Form and requisites of demurrer under codes of procedure.

[a] (Sup. 1856)

A demurrer as follows: "The plaintiff demurs to the first, second, and third paragraphs of defendant's answer for the following grounds of objection: That they are insufficient in law to constitute a legal defense to the action,"—is not sufficient under the practice of this state.—*Lane v. State*, 7 Ind. 426.

[aa] (Sup. 1856)

A demurrer that an answer "is insufficient in law to entitle the defendant to defend this suit," not being in conformity to any cause of demurrer specified in the Code, should have been overruled.—*Dugdale v. Culbertson*, 7 Ind. 664.

[b] (Sup. 1857)

Where the answer contained several paragraphs, and the whole answer was demurred to, the cause of demurrer to each paragraph being separately assigned, the demurrer was held to be sufficient in respect of form.—*State ex rel. Board of Com'rs of Daviess County v. Clark*, 9 Ind. 241.

[bb] (Sup. 1858)

Causes of demurrer need not be stated in the approved form, if, with sufficient certainty, they show the alleged defects.—*Lagow v. Neilson*, 10 Ind. 183.

[c] (Sup. 1858)

A demurrer under 2 Rev. St. p. 38, § 50, subd. 5, authorizing a demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action, is good in the language of the statute, and where the demurrer is not taken in the language of the statute, but points out a fact necessary to constitute a cause of action not alleged in the complaint, it is good, so far as it goes, but it does not embrace any objection to the sufficiency of the cause of action other than that specifically pointed out, though there be other defects that would have been reached by using the language of the statute.—*State ex rel. Robinson v. Leach*, 10 Ind. 308.

A demurrer, substantially pointing out one of the defects for which demurrers are allowed by statute (2 Rev. St. p. 38), is good.—*Id.*

[cc] (Sup. 1858)

A demurrer that the answer does not contain "matter" sufficient, the phrase of the statute being "facts," is good.—*Bennett v. Shern*, 11 Ind. 324.

[d] (Sup. 1859)

A demurrer, "for that the complaint does not contain facts enough to entitle the plaintiff to relief," is sufficient under 2 Rev. St. p. 38, § 50.—*Pace v. Oppenheim*, 12 Ind. 533.

[dd] (Sup. 1861)

Where there is a misjoinder of causes of action, the demurrer should be to the whole complaint, and not to each paragraph supposed to be misjoined.—*Bougher v. Scobey*, 16 Ind. 151.

[e] (Sup. 1861)

A misnomer, whereby plaintiff characterizes his pleading as a "reply," when its legal effect was in fact a demurrer, is not a material mistake, and leaves no error in the record.—*Thompson v. Voss*, 16 Ind. 297.

[ee] (Sup. 1861)

A demurrer to an answer, stating "that the same is not sufficient in law to enable the defendant to sustain his said defense, or to bar the plaintiff's complaint," is bad, as assigning no statutory cause.—*Tenbrook v. Brown*, 17 Ind. 410.

[f] (Sup. 1865)

Under the direct provisions of 2 Gav. & H. St. p. 76, § 50, a demurrer that the facts alleged do not "entitle the plaintiff to the relief demanded" is bad.—*Cincinnati & C. R. Co. v. Washburn*, 25 Ind. 259.

[ff] (Sup. 1867)

A demurrer to a complaint cannot be sustained under our laws (2 Gav. & H. St. p. 77, § 50), if it only assigns "that the same is not

sufficient in law to entitle the plaintiff to the relief demanded." It raises no question.—*Kemp v. Mitchell*, 29 Ind. 163.

[g] A demurrer to a pleading must specify the grounds of the objection.—(Sup. 1860) *Hicks v. Reigle*, 32 Ind. 360; (1872) *Jewett v. Honey Creek Draining Co.*, 39 Ind. 245; (1882) *Heslin v. Heck*, 88 Ind. 449.

[gg] (Sup. 1871)

An assignment of ground of demurrer, under the Code of Procedure, that the complaint "is not good and sufficient in law," is not equivalent to alleging that the complaint does not state facts sufficient to constitute a cause of action, nor to any other of the grounds of demurrer allowed by the Code, but is wholly insufficient.—*Porter v. Wilson*, 35 Ind. 348.

[h] (Sup. 1871)

A statute requiring a demurrer to number the grounds of objection relied on (2 Gav. & H. St. p. 77, § 50, cl. 6) does not apply to a demurrer which sets up only one ground of objection.—*Wolf v. Schofield*, 38 Ind. 175.

[hh] (Sup. 1872)

A demurrer to an answer on the ground that the answer, "as a defense to plaintiff's cause of action, is not sufficient in law," is bad.—*Gordon v. Swift*, 39 Ind. 212.

[i] (Sup. 1873)

A demurrer was filed to a reply, in the following language: "Now come the defendants in the above cause and demur to the second, third, and fourth paragraphs of plaintiff's reply to defendants' answer upon the following grounds: (1) Said second paragraph does not state facts sufficient to constitute a defense to said answer, or to enable said plaintiff to recover; (2) said third paragraph does not state facts sufficient to constitute," etc. (the same as the first, and as to the fourth paragraph the same). *Held*, that the demurrer was good, and raised the question as to the sufficiency of the facts stated in the reply.—*Silvers v. Junction R. Co.*, 43 Ind. 435.

[ii] (Sup. 1874)

Where to an answer alleging affirmative matter and praying for specific relief a demurrer was filed on the ground that the answer did not state facts sufficient to constitute "a defense to the action," *held*, that the demurrer was sufficiently formal.—*Fall v. Hazelrigg*, 45 Ind. 576, 15 Am. Rep. 278.

[j] (Sup. 1877)

Where a reply consists of several paragraphs, a demurrer alleging that "neither of said paragraphs constitutes a good reply to said answer," is informal, and cannot be sustained.—*Vaughn v. Ferrall*, 57 Ind. 182.

[jj] (Sup. 1877)

A demurrer to a pleading must clearly designate the pleading to which it is addressed.—*Davis v. Binford*, 58 Ind. 457.

[k] (Sup. 1880)

Under Code, § 50, subd. 5, authorizing a demurrer on the ground "that the complaint does not state facts sufficient to constitute a cause of action," a demurrer on the ground that the complaint "does not state facts sufficient" sufficiently raises the question of the sufficiency of the complaint to state a cause of action.—*Petty v. Trustees of Church of Christ in City of Muncie*, 70 Ind. 290.

[kk] (Sup. 1882)

A demurrer for that "the complaint does not state facts sufficient to constitute a complaint" is meaningless, and presents no question.—*Pine Civil Tp. v. Huber Mfg. Co.*, 83 Ind. 121.

[kkk] (Sup. 1882)

A demurrer to an answer, which states simply that "neither of said paragraphs constitutes any defense to this action," is too general, and is defective.—*Reed v. Higgins*, 86 Ind. 143.

[l] (Sup. 1882)

Under Rev. St. § 346, providing for a demurrer where the facts are not sufficient "to constitute a cause of defense," a demurrer, because the facts were not sufficient "to constitute an answer to plaintiff's complaint," is insufficient.—*Thomas v. Goodwine*, 88 Ind. 458.

[ll] (Sup. 1883)

A demurrer on the ground that "said paragraphs, nor either one of them, contain facts sufficient to constitute a cause of action," is sufficient.—*State ex rel. Clawson v. Younts*, 89 Ind. 313.

[lll] (Sup. 1883)

A demurrer on the ground that the facts stated by an answer do not state a valid defense is not bad because of the use of the word "valid."—*Wright v. Nipple*, 92 Ind. 310.

[lm] (Sup. 1884)

A demurrer to an answer on the ground that the answer "does not state facts sufficient to constitute a good defense to plaintiff's said cause of action herein" is insufficient in form.—*Young v. Warder*, 94 Ind. 357.

[lmm] (Sup. 1884)

Where defendant set up a counterclaim, a reply stating that plaintiff demurs to the answer for the reason that such paragraph does not state facts sufficient on answer herein, though informal, was sufficient to call in question the sufficiency of the facts stated in the counterclaim to constitute a cross-demand against the plaintiff.—*Terre Haute & I. R. Co. v. Pierce*, 95 Ind. 496.

[mmm] (Sup. 1885)

A defect in the form of a demurrer is cause for overruling it.—*Hildebrand v. McCrum*, 101 Ind. 61.

A demurrer to an answer, alleging that it did not state facts sufficient to constitute a bar to plaintiff's complaint, is defective in form.—*Id.*

[n] (Sup. 1885)

Under Rev. St. 1881, § 357, providing that the defendant may demur to any paragraph of the reply on the ground that the facts stated therein are not sufficient to avoid the paragraph of answer, a demurrer to the paragraphs of a reply for the reason that neither of them states facts sufficient to constitute a reply or avoidance of the facts stated in the paragraphs of answer to which the paragraphs reply are respectively pleaded is sufficient.—*Miller v. White River School Tp.*, 101 Ind. 503.

[nn] (Sup. 1886)

It is sufficient if a demurrer indicates with reasonable certainty the pleading to which it is addressed, and substantially states one of the statutory grounds of demurrer.—*Buscher v. Knapp*, 107 Ind. 340, 8 N. E. 263.

[nnn] (Sup. 1887)

A demurrer, in the ordinary form, that the answer does not state facts sufficient to constitute a cause of defense, is sufficient when addressed to a plea in abatement as well as when addressed to a plea in bar.—*Bryan v. Scholl*, 109 Ind. 367, 10 N. E. 107.

[o] (Sup. 1888)

Under Rev. St. 1881, § 346, which provides that, where the facts stated are not sufficient to constitute a cause of defense, plaintiff may demur to one or more of several defenses, a demurrer is good which alleges that the second paragraph does not state facts sufficient to constitute a defense to plaintiff's action; the word "defense" being enough, instead of "cause of defense."—*Lewellen v. Crane*, 113 Ind. 289, 15 N. E. 515.

[oo] (Sup. 1889)

A demurrer to a petition "for the reason that the same does not state facts sufficient to constitute a good and sufficient petition" is not sufficient to raise the question of whether the petition states a cause of action.—*Grubbs v. King*, 117 Ind. 243, 20 N. E. 142.

[ooo] (Sup. 1889)

An objection that each paragraph of a complaint states a cause of action in favor of some and not all of the plaintiffs should be taken by separate demurrer to each paragraph, and an objection directed against the entire complaint, and made for the first time on appeal, is unavailing, where the complaint, taken as an entirety, states a cause of action in favor of all the plaintiffs.—*Murdock v. Cox*, 118 Ind. 206, 20 N. E. 786.

[p] (Sup. 1889)

Under Rev. St. § 357, providing that a cause for a demurrer to a reply shall be "that the facts therein stated are not sufficient to avoid the answer," a demurrer which assigns as a cause that the reply does not state facts sufficient to constitute a good reply to the defendant's answer, to which it is directed, is not sufficient.—*Peden v. Mail*, 118 Ind. 556, 20 N. E. 493.

[pp] (Sup. 1890)

A demurrer to certain paragraphs of an answer specifying for cause "that neither of said paragraphs states facts sufficient" is sufficiently definite.—*Ross v. Menefee*, 125 Ind. 432, 25 N. E. 545.

[ppp] (Sup. 1891)

Where a pleading to which a demurrer has been sustained is wholly insufficient, the fact that the demurrer is defective in form is no ground for reversing the decision thereon.—*Wayne Pike Co. v. Hammons*, 129 Ind. 368, 27 N. E. 487.

[q] (App. 1891)

A demurrer to a complaint, on the ground that it "does not state facts sufficient to constitute a ground of complaint," is not equivalent to a demurrer for the statutory ground that it fails to "state facts sufficient to constitute a cause of action or paragraph of complaint."—*Firestone v. Werner*, 1 Ind. App. 293, 27 N. E. 623.

[qq] (App. 1891)

A several demurrer to a complaint consisting of more than one paragraph, although it need not be in terms addressed to each paragraph of the complaint, cannot be sufficient as a several demurrer, unless its phraseology be such as to declare that neither of the paragraphs taken separately states facts sufficient to constitute a cause of action.—*Baker v. Groves*, 27 N. E. 640, 1 Ind. App. 522.

[qqq] (App. 1892)

Under Rev. St. 1881, § 346, providing as a cause of demurrer to an answer that it does not state facts "sufficient to constitute a cause of defense," a demurrer alleging that the answer does not state facts sufficient "to bar the plaintiff's action" is insufficient.—*Angaletos v. Meridian Nat. Bank*, 4 Ind. App. 573, 31 N. E. 368.

A demurrer must sufficiently fulfill the statutory requirements, or it will not be error to overrule it.—*Id.*

[r] (Sup. 1893)

A demurrer to an answer containing several paragraphs, setting forth that plaintiff demurs severally to the 2d, 3d, and 4th paragraphs thereof for the reason that neither of said paragraphs contains sufficient facts, in law to constitute a defense to the complaint, is unobjectionable in form, and challenges the sufficiency of each paragraph.—*Funk v. Rentchler*, 134 Ind. 68, 33 N. E. 364, 898.

[rr] (Sup. 1893)

A demurrer to an answer alleging that it does not state facts sufficient to constitute a cause of action is bad, answers being required to state only causes of defense.—*Hawley v. Zigerly*, 135 Ind. 248, 34 N. E. 219.

[rrr] (App. 1894)

A demurrer which states that "defendant herein demurs generally to the plaintiff's complaint, and to each paragraph thereof separately,

ly, and for cause of demurrer says that the same does not state facts sufficient to constitute a cause of action against this defendant," is ambiguous and uncertain as to whether it is general or several.—*Merrill v. Pepperdine*, 9 Ind. App. 416, 36 N. E. 921.

[s] (App. 1894)

A demurrer to an answer on the ground that it "does not state facts sufficient to constitute a good answer" is defective; it should be that the answer "does not state facts sufficient to constitute a cause of defense."—*Wade v. Huber*, 38 N. E. 351, 10 Ind. App. 417.

[ss] (Sup. 1895)

Under Rev. St. 1894, § 360 (Rev. St. 1881, § 357), providing that the defendant may demur to any paragraph of the reply "on the ground that the facts stated therein are not sufficient to avoid the paragraph of the answer," a demurrer to a paragraph of a reply on the ground that it "does not contain facts sufficient to constitute a good defense or reply to the answer" was properly overruled, as defective in form.—*Krathwohl v. Dawson*, 140 Ind. 1, 38 N. E. 467, 39 N. E. 496.

[sss] (Sup. 1895)

A demurrer to one of the paragraphs of an answer upon the ground that it "does not state facts sufficient to make a good answer to the complaint" is defective, and presents no question for the determination of the court.—*Thomas v. Goodwine*, 88 Ind. 458, followed.—*Dawson v. Eads*, 140 Ind. 208, 39 N. E. 919.

[t] (App. 1895)

A demurrer reading, "Comes now the cross-complainant, and demurs to the second paragraph of answer to cross-complaint, and says that said paragraph does not contain facts sufficient to constitute a cause of action," is insufficient in form, and does not test the sufficiency of the facts alleged in the answer to constitute a defense to the cause of action set out in the cross complaint.—*School City of Noblesville v. Heinzman*, 41 N. E. 464, 13 Ind. App. 195.

[tt] (App. 1895)

A demurrer "to each, the second and third paragraphs of defendants' answer, for the reason that neither said second and third paragraphs of defendants' answer a good defense to the complaint," is defective in form, and presents no question as to the sufficiency of either paragraph.—*W. B. Barry Saw & Supply Co. v. Campbell*, 41 N. E. 955, 13 Ind. App. 455.

[ttt] (Sup. 1896)

Where affirmative pleas of set-off and counterclaim do not state a cause of action, they will not be upheld on appeal because the demurrer on which they were held bad was informal.—*Blue v. Capitol Nat. Bank*, 145 Ind. 518, 43 N. E. 655.

[u] (App. 1896)

Where the record shows that the plaintiff filed a demurrer to the first paragraph of the

amended answer, the omission of the word "amended" from the demurrer does not render it defective.—*Long v. Johnson*, 44 N. E. 552, 15 Ind. App. 498.

[uu] (Sup. 1898)

A demurrer to an answer, as not stating facts "sufficient to constitute a good answer to the complaint," is insufficient to question the sufficiency of the answer.—*Wintrode v. Renbarger*, 50 N. E. 570, 150 Ind. 556.

[uuu] (Sup. 1898)

A demurrer to a reply, as not stating facts sufficient "to constitute a cause of reply herein," is not a compliance with Rev. St. 1894, § 360 (Horner's Rev. St. 1897, § 357), providing that a defendant may demur to any paragraph of the reply on the ground that the facts are not sufficient to avoid the paragraph of the answer, or, if the answer be a counterclaim or set-off, any part thereof.—*Pritchett v. McGaughy*, 52 N. E. 397, 151 Ind. 638.

[v] (App. 1899)

The word "contains" is a substantial equivalent of the word "states," as used in Horner's Rev. St. 1897, § 339, cl. 5, declaring it a ground of demurrer that the complaint does not "state" facts sufficient to constitute a cause of action.—*Leach v. Adams*, 52 N. E. 813, 21 Ind. App. 547.

[vv] (App. 1899)

A demurrer to a counterclaim should state that it does not state facts sufficient to constitute a cause of action, and not that "the same does not state facts sufficient to constitute a good counterclaim."—*Storrs & Harrison Co. v. Fuselman*, 55 N. E. 245, 23 Ind. App. 293.

[vvv] (Sup. 1900)

Where a paragraph in a complaint was insufficient for want of facts, it was not error to sustain a demurrer thereto, though the demurrer was so defective in form that it could have been disregarded.—*Garrett v. Bissell Chilled Plow Works*, 56 N. E. 667, 154 Ind. 319.

[w] (App. 1901)

Under Burns' Rev. St. 1894, § 350, declaring that a counterclaim must allege facts which would constitute a cause of action against the plaintiff, a demurrer to an answer purporting to allege a counterclaim, on the ground that it does not state facts "sufficient to constitute a defense or a counterclaim" to plaintiff's cause of action, without alleging that it did not state facts sufficient to constitute a "cause of action," was insufficient.—*Flanagan v. Reitemier*, 59 N. E. 389, 26 Ind. App. 243.

[ww] (App. 1902)

A demurrer reciting that defendants demurred to several paragraphs of the complaint for the reason that neither one of them states facts sufficient to constitute a good paragraph of complaint against either one of said defendants, not being in the form prescribed by the statute, presents no question.—*Jones v. Peters*, 62 N. E. 1019, 28 Ind. App. 383.

[www] (App. 1903)

Burns' Rev. St. § 360 (Horner's Rev. St. 1901, § 357), provides that the defendant may demur to any "paragraph of reply on the ground that the facts stated therein are not sufficient to avoid the paragraph of answer." *Held*, that a demurrer to four paragraphs of a reply "for the reason that neither of said paragraphs states facts sufficient to constitute a defense or reply to the defendant's answer," as well as a demurrer to another paragraph because "it does not state facts sufficient to constitute a reply to the defendant's answer," was properly overruled, as failing to follow statutory form.—*Sovereign Camp Woodmen of the World v. Haller*, 66 N. E. 186, 30 Ind. App. 450.

[x] (App. 1903)

Where paragraphs of a reply were addressed separately to paragraphs of the answer, a demurrer on the ground that neither of such paragraphs was sufficient to avoid "both" paragraphs of the answer was properly overruled.—*Franklin Ins. Co. v. Wolff*, 66 N. E. 756, 30 Ind. App. 534.

[xx] (App. 1903)

A demurrer "for the reason that said complaint does not state a cause of action" is sufficient in form.—*Toledo, St. L. & W. R. Co. v. Beery*, 68 N. E. 702, 31 Ind. App. 556.

[xxx] (App. 1905)

A demurrer on the ground that the complaint does not state facts sufficient to constitute a "good" cause of action, thus following the language of the statute except for the insertion of the word "good," is a sufficient demurrer, and that word will be treated as surplusage.—*City of Vincennes v. Spees*, 35 Ind. App. 389, 74 N. E. 277.

A demurrer that the complaint "does not state facts sufficient to constitute a good cause of action" is equivalent to the statutory ground of demurrer—that it "does not state sufficient facts to constitute a cause of action."—*Id.*

[y] (App. 1905)

A demurrer that an answer does not state facts sufficient to constitute a "ground of defense" is sufficient, though the language of the statute (Burns' Ann. St. 1901, § 349) is "cause of defense."—*Durbin v. Northwestern Scraper Co.*, 73 N. E. 297, 36 Ind. App. 123.

[yy] (Sup. 1906)

It is not error to sustain a demurrer, though so defective in form as to present no question, when the pleading to which it is addressed is bad.—*Spaulding v. Mott*, 76 N. E. 620, 167 Ind. 58.

[yyy] (App. 1906)

A demurrer to a complaint was not objectionable, because the ground alleged was that the complaint did not "contain" facts sufficient to constitute a cause of action, instead of charging that the complaint did not "state" sufficient

facts, etc.—*Hay v. Bash*, 76 N. E. 644, 37 Ind. App. 167.

[z] (Sup. 1907)

Where a demurrer on its face showed that each of the defendants demurred separately to each paragraph of the complaint, for that neither paragraph stated facts sufficient to constitute a cause of action, it sufficiently raised the question whether it stated facts sufficient to constitute a cause of action against any one of the defendants.—*Southern Ry. Co. v. Elliott*, 170 Ind. 273, 82 N. E. 1051.

[zz] (App. 1908)

Burns' Ann. St. 1901, § 349, declares that, when the facts stated in any paragraph of the answer are not sufficient to constitute a cause of defense, plaintiff may demur under the rules prescribed for demurring to a complaint. *Held*, that a demurrer to a paragraph of the answer, alleging that plaintiff demurred to such paragraph for the reason that it was not sufficient to constitute a sufficient cause of defense to plaintiff's cause of action, did not state any cause of demurrer enumerated in the Code, and was therefore insufficient.—*Oglebay v. Tippecanoe Loan & Trust Co.*, 41 Ind. App. 481, 82 N. E. 404.

[zzz] (App. 1908)

A demurrer to a plea in abatement should be in the statutory form; the same as when addressed to any other answer.—*Minnich v. Packard*, 42 Ind. App. 371, 85 N. E. 787.

Burns' Ann. St. 1908, § 351, provides that, where a paragraph of the answer does not state a cause of defense, plaintiff may demur under the rules for demurring to a complaint. A demurrer to a plea in abatement recited: "Plaintiff demurs to defendant's answer of abatement on the ground that said answer does not state facts sufficient to constitute a cause why plaintiff should not be allowed to prosecute this action in this court." *Held*, that it was insufficient, because not presenting any of the causes of demurrer enumerated in the Code.—*Id.*

[zzzz] (Sup. 1909)

A demurrer to the answer in quo warranto that neither of the paragraphs contained facts sufficient to constitute an answer to the complaint and information presents no question for decision.—*State ex rel. McGuyer v. Huff*, 172 Ind. 1, 87 N. E. 141.

The Code provides for but one form of demurrer to an answer, and it must be substantially followed.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 473-479.

See, also, 31 Cyc. pp. 307-309.

§ 202. Demurrer incorporated in answer.

[a] (Sup. 1898)

Under *Rev. St. 1894*, § 346 (*Rev. St. 1881*, § 343), providing that, when any of the grounds for demurrer do not appear upon the face of

the complaint, the objection may be taken by answer, if issue is joined on an answer in which objection has been so taken, and the proof establishes the truth of the answer, the complaint will be defeated in the same manner as if the facts of the answer appeared in the complaint, and a demurrer had been sustained to it.—*McIntosh v. Zaring*, 49 N. E. 164, 150 Ind. 301.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 480.

See, also, 31 Cyc. pp. 309, 310.

§ 203. Scope and extent of demurrer in general.

Special demurrer, see post, § 209.

[a] (Sup. 1859)

A demurrer cannot be enlarged to embrace other causes than those which it specially points out as the causes upon which the party relies.—*Vance v. Cowling*, 13 Ind. 460.

[b] (Sup. 1861)

A demurrer to one paragraph only goes to the validity of that paragraph alone.—*Bougher v. Scobey*, 16 Ind. 151.

[c] (Sup. 1864)

A demurrer to three paragraphs of an answer, in these words: "Said plaintiff comes and demurs to the first, second, and third paragraphs of the defendant's answer, and each of them, for the following grounds of exception, viz., that said paragraphs of defendant's answer do not state facts sufficient to constitute a defense,"—should be treated as joint, and not several.—*Barner v. Morehead*, 22 Ind. 354.

[d] A demurrer to a part of a paragraph is not authorized by the Code.—(Sup. 1866) *Beals v. Beals*, 27 Ind. 77; (1867) *Smith v. Muncie Nat. Bank*, 29 Ind. 158.

[e] (Sup. 1857)

A demurrer in this form, "The plaintiff demurs separately to the first, second, third, and fourth paragraphs of the answer, because neither of said paragraphs states sufficient facts," etc., is a several, not a joint, demurrer.—*Hume v. Dessar*, 29 Ind. 112.

[f] (Sup. 1871)

Inasmuch as a copy of the articles of association of a draining company does not properly form a part of a complaint in an action by the company to collect an assessment, where such copy is filed with the complaint, a demurrer to the complaint does not present the question of the sufficiency of the articles of association.—*Excelsior Draining Co. v. Brown*, 38 Ind. 384.

[g] (Sup. 1872)

A demurrer to several paragraphs of a pleading mentioned by number is a several demurrer to such paragraph.—*Cain v. Hunt*, 41 Ind. 466.

[h] (Sup. 1873)

To make a demurrer several, it is not necessary that it should be addressed in terms to each paragraph of the pleading to which it is filed. The use of the words "severally" and "each" will cause a demurrer to be treated as several.—*Silvers v. Junction R. Co.*, 43 Ind. 435.

[i] (Sup. 1873)

A demurrer was in the following form: "The said defendant demurs to the first, second, and third paragraphs of the complaint for the reason that the same do not, nor does either of them, state facts sufficient to constitute a cause of action." *Held*, that this was a demurrer to the whole complaint, and not to either paragraph separately. Assigning the cause of demurrer to each paragraph did not make the demurrer separate.—*Meyer v. Bohlring*, 44 Ind. 238.

[j] (Sup. 1873)

A demurrer stating that the plaintiffs "demur to the second, third, and fourth paragraphs" of answer, for the reason that "said paragraphs nor either of them state facts sufficient," etc., is a joint demurrer.—*Washington Tp. v. Bonney*, 45 Ind. 77.

[k] (Sup. 1876)

A demurrer to the "second, third, fourth, fifth, and sixth paragraphs of the answer of the defendant," upon the ground that "neither of said second, third, fourth, fifth, or sixth paragraphs of the answer alleges facts sufficient to constitute a defense to the plaintiff's cause of action," is a joint demurrer to all of the paragraphs named.—*Stanford v. Davis*, 54 Ind. 45.

[l] (Sup. 1877)

A demurrer to a pleading raises no objection as to a bill of particulars attached to such pleading.—*Brown v. College Corner & R. Gravel Road Co.*, 56 Ind. 110.

[m] (Sup. 1877)

Where an answer is filed to a motion to set off one judgment against another, a demurrer thereto for insufficiency does not raise the question of the necessity of the answer, but only of the sufficiency of the facts stated therein to constitute a valid legal reason why the motion should not be granted.—*McAllister v. Willey*, 60 Ind. 195.

[n] (Sup. 1879)

Where plaintiff sued upon a written guarantee of the payment of a judgment with interest, a demurrer to the complaint on the ground that it did not state a cause of action was insufficient to raise the question as to whether the guarantee was limited merely to the payment of the interest, or extended also to the payment of the judgment.—*Frash v. Polk*, 67 Ind. 55.

[o] (Sup. 1881)

A demurrer, "The defendants herein demur to each of the paragraphs of the complaint,

for the reason that neither of said paragraphs states facts sufficient to constitute a cause of action," is sufficient as a several demurrer.—*Stone v. State ex rel. Burdsall*, 75 Ind. 235.

[p] (Sup. 1881)

The question of the sufficiency of a cause of action is raised by a demurrer to the complaint, petition, or affidavit, and the writ or order issued thereon.—*Potts v. State ex rel. Ogg*, 75 Ind. 336.

[q] (Sup. 1881)

Separate demurrers may be filed to the specifications of the grounds for injunction against the collection of an assessment, though such specifications are not set out in separate paragraphs in the complaint.—*Ricketts v. Spraker*, 77 Ind. 371.

[r] (Sup. 1881)

A demurrer "to the first, second, and third paragraphs of the complaint, each separately, for the reason that neither paragraph separately considered states facts sufficient to constitute a cause of action," is separate, and not joint.—*Stribling v. Brougher*, 79 Ind. 328.

[s] (Sup. 1881)

A demurrer addressed to the different paragraphs of the complaint "separately" enables the court to apply it to each paragraph.—*Mitchell v. Stinson*, 80 Ind. 324.

[ss] (Sup. 1884)

Where the ground of a demurrer to several paragraphs is "that neither of said separate paragraphs * * * states facts separately and severally sufficient," the demurrer is to each paragraph.—*Clodfelter v. Hulett*, 92 Ind. 426.

[t] (Sup. 1884)

A demurrer "to the first and second paragraphs of the complaint, for the reason that the same, and neither one of the same, constitute a cause of action," is joint to both paragraphs.—*Cooper v. Hayes*, 96 Ind. 386.

[tt] (Sup. 1884)

A demurrer in form, "Defendants separately and severally demur to the first and second paragraphs of the plaintiff's complaint, and for cause of demurrer say that neither of said paragraphs states facts sufficient to constitute a cause of action against them," is separate as to each paragraph.—*Carver v. Carver*, 97 Ind. 497.

[u] (Sup. 1887)

Under section 376, Rev. St. Ind. 1881, enjoining liberality in construing pleadings, a demurrer "separately to the first, second, third, fourth, fifth, and sixth paragraphs of the complaint, for the reason that none of said paragraphs state facts sufficient," etc., calls in question the sufficiency of each separate paragraph.—*Indiana, B. & W. Ry. Co. v. Dalley*, 110 Ind. 75, 10 N. E. 631.

[uu] (Sup. 1890)

A demurrer by several defendants was as follows: "Now come [naming the defendants] and separately and severally demur to the plaintiff's cause of action, and say that said complaint does not state facts sufficient to constitute a cause of action against them jointly or severally." Held, that this was a joint demurrer to the pleading.—*Hanover School Tp. v. Gant*, 125 Ind. 557, 25 N. E. 872.

[v] (App. 1891)

A demurrer "to the several paragraphs of plaintiff's complaint, for the reason that said complaint does not state facts sufficient to constitute a cause of action," is a joint demurrer.—*Baker v. Groves*, 1 Ind. App. 522, 27 N. E. 640.

[vv] (Sup. 1892)

Where defendant demurs "severally to each paragraph of the complaint as amended, because the same does not state facts sufficient to constitute a cause of action," the demurrer will be considered as addressed to each paragraph of the complaint.—*Terre Haute & L. R. Co. v. Sherwood*, 132 Ind. 129, 31 N. E. 781, 32 Am. St. Rep. 239, 17 L. R. A. 339.

[w] (App. 1892)

A demurrer to certain paragraphs of defendant's answer "separately," because "neither of said paragraphs states facts sufficient," is not joint, but several.—*Glass v. Murphy*, 4 Ind. App. 530, 30 N. E. 1097, 31 N. E. 545.

[ww] (Sup. 1896)

A demurrer reciting that "defendants separately and severally demur" to different paragraphs of a complaint, because neither of the paragraphs states a cause of action against them, is separate as to the paragraphs.—*Armstrong v. Dunn*, 143 Ind. 433, 41 N. E. 540.

[x] (Sup. 1898)

A demurrer to a petition seeking relief under a certain statute puts at issue the validity of such statute.—*State ex rel. Harrison v. Menough*, 51 N. E. 117, 357, 151 Ind. 260, 43 L. R. A. 408, 418.

[xx] (App. 1900)

A demurrer to a complaint alleging two causes of action, "that the court had no jurisdiction over the subject of the action alleged in either paragraph," is not objectionable as a joint demurrer.—*Chicago & S. E. Ry. Co. v. Spencer*, 55 N. E. 882, 23 Ind. App. 605.

[y] (App. 1901)

A joint demurrer to an answer is not sufficient to raise the question of the invalidity of a single paragraph thereof.—*Hollingsworth v. McColly*, 60 N. E. 371, 26 Ind. App. 609.

A demurrer to an answer, which states that plaintiff demurs to the second, third, and fourth paragraphs on the ground that neither states facts constituting a cause of action, operates as a joint demurrer to the entire answer.—*Id.*

[yy] (App. 1904)

A demurrer to a complaint in several paragraphs on the ground "that neither of said paragraphs states facts sufficient to constitute a cause of action" is not joint.—*Case v. Hursh*, 70 N. E. 818, 34 Ind. App. 211.

[z] (Sup. 1905)

Where a complaint for negligence in two paragraphs was demurred to by a demurrer which, though styled a separate demurrer to such paragraphs, disclosed no effort separately to question the sufficiency of each paragraph, but charged that the facts set out in both paragraphs did not constitute a cause of action, it was a joint demurrer, and could not be given a distributive effect by separate assignments of error to the overruling thereof.—*Town of Winamac v. Stout*, 165 Ind. 365, 75 N. E. 158, 65 L.

[zz] (App. 1908)

Though a demurrer which sought to attack the complaint as a whole and each paragraph thereof for want of sufficient facts in the complaint and in each paragraph was ambiguous, the trial court, by overruling it as to each paragraph of the complaint, thereby construed it as a demurrer to each paragraph separately.—*Chicago & E. I. R. Co. v. Hamilton*, 42 Ind. App. 512, 85 N. E. 1044.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 482-484.

See, also, 31 Cyc. pp. 321-343.

§ 204. Demurrer to part of pleading or to pleading good in part.

Will contest, see WILLS, § 284.

[a] A demurrer going to the whole declaration, and not to each count, is properly overruled if any count is sustainable.—(Sup. 1820) *McCarty v. Rhea*, 1 Blackf. 55; (1823) *Board of Com'rs of Gibson County v. Harrington*, 1 Blackf. 260; (1841) *Dillon v. State Bank of Indiana*, 6 Blackf. 5; (1871) *Jeffersonville, M. & I. R. Co. v. Cox*, 37 Ind. 325; (1872) *Jeffersonville, M. & I. R. Co. v. Vancant*, 40 Ind. 233; (1877) *Romine v. Romine*, 59 Ind. 346; (1881) *City of Aurora v. Fox*, 78 Ind. 1; (1882) *Buck v. Axt*, 85 Ind. 512; (1883) *Millikan v. Temple*, 94 Ind. 261; (1884) *State ex rel. Padgett v. Foulkes*, 94 Ind. 493; (1890) *Freeman v. Sanderson*, 24 N. E. 239, 123 Ind. 264; (App. 1896) *Harter v. Parsons*, 14 Ind. App. 331, 42 N. E. 1025; (Sup. 1903) *Lake Erie & W. R. Co. v. Charman*, 67 N. E. 923, 161 Ind. 95.

[aa] A general demurrer to a declaration containing several counts cannot be sustained, if any count is sufficient.—(Sup. 1823) *Board of Com'rs of Gibson County v. Harrington*, 1 Blackf. 260; (1833) *Farnham v. Hay*, 3 Blackf. 167; (1833) *Haworth v. Fisher*, Id. 249; (1840) *Horton v. Smelser*, 5 Blackf. 428; (1842) *Bishop v. Yeazle*, 6 Blackf. 127; (1842) *James v. Nicholson*, Id. 288; (1860) *Alexander v. Gaar*, 15 Ind. 89; (1860) *Webb v. Bowless*, Id. 242; (1861) *Brown v. Gooden*, 16 Ind. 444.

[b] (Sup. 1823)

A general demurrer to a plea improperly joining several distinct defenses cannot be sustained, if any one of the defenses is good.—*Martin v. Ray*, 1 Blackf. 291.

[bb] (Sup. 1840)

Where a plea of set-off contains several distinct matters, a demurrer to the whole will be bad, if a part is sufficient.—*Shearman v. Fellows*, 5 Blackf. 450.

[c] Where a complaint contains one good count, joined with other bad counts, a general demurrer to the whole complaint must be overruled.—(Sup. 1842) *Wingate v. Ellis*, 1 Blackf. 563; (1881) *Baddeley v. Patterson*, 78 Ind. 157.

[cc] A demurrer to a declaration containing the assignment of several breaches, some of which are well and others improperly assigned, will be overruled.—(Sup. 1842) *Rock v. Gordon*, 6 Blackf. 192; (1851) *Kintner v. State ex rel. Skelton*, 3 Ind. 86; (1859) *State ex rel. Leach v. Scott*, 12 Ind. 529; (1883) *McFall v. Howe Sewing Mach. Co.*, 90 Ind. 148.

[ccc] (Sup. 1845)

In case of a misjoinder of actions, there should not be a separate demurrer to each count, but one demurrer to the whole declaration.—*Fletcher v. Piatt*, 7 Blackf. 522.

[d] (Sup. 1846)

Where a single count containing a divisible claim is good in part and bad in part, a demurrer to the whole will not lie, as the plaintiff is entitled to recover for so much as is well demanded.—*Milnes v. Vanhorn*, 8 Blackf. 198.

[dd] (Sup. 1847)

If one of several pleas to the whole action be adjudged good on demurrer, the suit is barred.—*Doremus v. Bond*, 8 Blackf. 368.

[ddd] (Sup. 1850)

In an action against two defendants, the declaration contained a good cause of action against one of them. *Held*, that the demurrer was improperly sustained as to the whole declaration.—*Board of Com'rs of Franklin County v. White Water Val. Canal Co.*, 2 Ind. 162.

[e] (Sup. 1851)

A plea of payment contained also two items of set-off, one of which was clearly inadmissible as such. *Held*, that the plea was not bad on general demurrer.—*Bates v. Halliday*, 3 Ind. 159.

[ee] (Sup. 1857)

If a defendant demur to a declaration containing several counts, and any one of them be good, the plaintiff is entitled to judgment on that count, or to have the demurrer overruled.—*State ex rel. Board of Com'rs of Daviess County v. Clark*, 9 Ind. 241.

[eee] Where any one of several paragraphs to a pleading is sufficient, a demurrer questioning the sufficiency of the entire pleading cannot be

sustained.—(Sup. 1859) *Indianapolis, P. & C. R. Co. v. Taffe*, 11 Ind. 458; (1861) *Urton v. Luckey*, 17 Ind. 213; (1862) *Wright v. Indianapolis & C. R. Co.*, 18 Ind. 168; (1862) *Bondurant v. Bladen*, 19 Ind. 160; (1877) *Dehority v. Nelson*, 56 Ind. 414; (1878) *Board of Com'rs of Jennings County v. Verberg*, 63 Ind. 107; (1879) *Rout v. Woods*, 67 Ind. 310; (1883) *Millikan v. Temple*, 94 Ind. 261; (1884) *Poland v. Miller*, 95 Ind. 387, 48 Am. Rep. 730; (1885) *Burk v. Simonson*, 104 Ind. 173, 2 N. E. 309, 3 N. E. 826, 54 Am. Rep. 304; (1889) *City of Plymouth v. Milner*, 117 Ind. 324, 20 N. E. 235; (1891) *Baker v. Groves*, 1 Ind. App. 522, 27 N. E. 640; (1893) *Lime City Bldg., Loan & Sav. Ass'n v. Black*, 136 Ind. 544, 35 N. E. 829; (1894) *Brake v. Payne*, 137 Ind. 479, 37 N. E. 140.

[eeee] A joint demurrer must be overruled if the pleading is good as to any demurrant.—(Sup. 1859) *Pace v. Oppenheim*, 12 Ind. 533; (1862) *Estep v. Burke*, 19 Ind. 87; (1862) *Teter v. Hinders*, 19 Ind. 93; (1871) *Trisler v. Trisler*, 38 Ind. 282; (1877) *Wilkerson v. Rust*, 57 Ind. 172; (1878) *Price v. Sanders*, 60 Ind. 310; (1879) *Carter v. Zenblin*, 68 Ind. 436; (1882) *Wilcox v. Moudy*, 82 Ind. 219; (1882) *Sanders v. Farrell*, 83 Ind. 28; (1882) *Campbell v. Martin*, 87 Ind. 577; (1883) *Rector v. Shirk*, 92 Ind. 31; (App. 1891) *Benedict v. Farlow*, 1 Ind. App. 160, 27 N. E. 307; (Sup. 1893) *Miller v. Rapp*, 135 Ind. 614, 34 N. E. 981, 35 N. E. 693.

[f] A demurrer to an answer, containing both a general denial and a special defense, is properly overruled.—(Sup. 1861) *Dean v. Richards*, 16 Ind. 114; (1862) *Adkins v. Wiseman*, 19 Ind. 90; (App. 1896) *Austin v. McMains*, 14 Ind. App. 514, 43 N. E. 141.

[ff] (Sup. 1861)

Where an answer seems on its face to be entirely sufficient, a demurrer cannot be sustained to a bill of particulars annexed thereto.—*Bougher v. Scobey*, 16 Ind. 151.

[fff] (Sup. 1861)

If a complaint or bill of particulars sets forth one good cause of action, it is not subject to demurrer.—*Downs v. McCombs*, 16 Ind. 211.

[ffff] (Sup. 1861)

To a complaint against several defendants, stating a good cause of action as to some of them, a joint demurrer by them all will not lie; but those against whom no cause is stated may demur separately.—*Bennett v. Preston*, 17 Ind. 291.

[g] A demurrer "to each paragraph" of an answer in several paragraphs must be taken distributively, and may be overruled as to some paragraphs and sustained as to others.—(Sup. 1862) *Parker v. Thomas*, 19 Ind. 213, 81 Am. Dec. 385; (1863) *Fankboner v. Fankboner*, 29 Ind. 62.

[gg] Where any one of two or more paragraphs of an answer is good, a joint demurrer to all of such paragraphs should be overruled.—(Sup. 1864) *Barner v. Morehead*, 22 Ind. 354; (1872) *Jewett v. Honey Creek Draining Co.*, 39 Ind. 245; (1873) *Washington Tp. v. Bonney*, 45 Ind. 77; (1874) *Towell v. Pence*, 47 Ind. 304; (1876) *Nichol v. McCalister*, 52 Ind. 586; (1876) *Stanford v. Davis*, 54 Ind. 45; (1880) *Boys v. Simmons*, 72 Ind. 593; (1883) *Gregory v. Gregory*, 89 Ind. 345; (1884) *Crawford v. Powell*, 101 Ind. 421.

[ggg] (Sup. 1864)

Where a complaint is in one paragraph, objection cannot be taken to a part thereof by demurrer, as the objection should have been by motion to strike out.—*Tousey v. Bell*, 23 Ind. 423.

[h] (Sup. 1866)

A demurrer will not lie to a part of a complaint consisting of a single paragraph and containing only one cause of action. The objection must be taken either by motion or answer.—*O'Haver v. Shidler*, 26 Ind. 278.

[hh] (Sup. 1867)

Where an account sued on consisted of several items, including a balance due on land and for certain wheat, and the complaint showed a right of recovery as to the wheat, and the only error assigned is that a demurrer to the complaint was overruled, the judgment will be affirmed.—*Wade v. Wade's Adm'r*, 27 Ind. 520.

[hhh] (Sup. 1868)

A demurrer will not lie to a part of a paragraph of a complaint. The remedy is by motion to strike out.—*Voorhees v. Hushaw*, 30 Ind. 488.

[i] (Sup. 1869)

A father conveyed property to one of his sons in consideration of the latter's agreement to support and educate his brothers and sisters. In a suit by the administrator of the estate of one of them, the complaint alleged that the grantee in the conveyance had refused to support and maintain the decedent for a certain period prior to his death, and, after the making of said agreement, there was necessarily expended of his estate for his support a certain sum, and asked judgment for such sum and the foreclosure of a mortgage given to secure the performance of the agreement. *Held*, that an objection to that part of the complaint claiming a foreclosure of the mortgage, could not be raised by demurrer, but only by motion to strike out such part.—*Green's Adm'r v. Green*, 32 Ind. 276.

[ii] (Sup. 1870)

A demurrer to an entire pleading should be overruled if such pleading contain any good paragraph.—*Heavenridge v. Mondy*, 34 Ind. 28.

[iii] A complaint which states a cause of action against one of several defendants is good against

a joint demurrer.—(Sup. 1870) *Skeen v. Muir*, 34 Ind. 310; (1874) *Shore v. Taylor*, 46 Ind. 345; (1874) *Owen v. Cooper*, *Id.* 524; (1881) *Eichbrecht v. Angerman*, 80 Ind. 208; (1882) *Axtel v. Chase*, 83 Ind. 546; (1883) *Ayers v. Slifer*, 89 Ind. 433; (1884) *Carver v. Carver*, 97 Ind. 497.

[iiii] A demurrer to an answer containing several paragraphs must be overruled, if there is one good paragraph.—(Sup. 1871) *Leach v. Lewis*, 38 Ind. 160; (1882) *First Nat. Bank v. Essex*, 84 Ind. 144.

[j] (Sup. 1873)

Where several breaches of an official bond are set out in a complaint of a single paragraph, a demurrer "to each and every paragraph of the plaintiff's complaint, for the reason that the same, in connection with neither of the breaches, nor with all of them, does not set forth facts sufficient," etc., must be overruled, if either breach presents a good cause of action.—*Armington v. State ex rel. City of Greensburgh*, 45 Ind. 10.

[jj] (Sup. 1873)

If a complaint shows a good cause of action as to any part of the demand, it is good on demurrer.—*Howe v. Dibble*, 45 Ind. 120.

[jjj] (Sup. 1874)

A joint demurrer to several paragraphs of an answer should be overruled, if any one of the paragraphs is good.—*Griffin v. Kemp*, 46 Ind. 172; *Excelsior Draining Co. v. Brown*, 47 Ind. 19; *Modlin v. Northwestern Turnpike Co.*, 48 Ind. 492.

[k] (Sup. 1874)

A complaint or any paragraph thereof is bad on demurrer of any defendant against whom no cause of action is shown therein.—*Betson v. State ex rel. Torrence*, 47 Ind. 54.

[kk] (Sup. 1874)

In a suit upon a guardian's bond, where several breaches are assigned, on a demurrer to the whole complaint, if one or more of the breaches be good, the demurrer should be overruled.—*Colburn v. State ex rel. Arnold*, 47 Ind. 310.

[kkk] A joint demurrer addressed to several paragraphs of a pleading must be overruled if any one of the paragraphs is sufficient.—(Sup. 1874) *Davidson v. King*, 47 Ind. 372; (1882) *City of Connersville v. Connersville Hydraulic Co.*, 86 Ind. 235.

[l] (Sup. 1877)

Where the complaint in an action on a note and to foreclose a collateral mortgage is sufficient as to the note, the fact that is insufficient as to the mortgage is not ground for a demurrer to the complaint for want of sufficient facts.—*Hodshire v. Ewan*, 57 Ind. 561.

[ll] (Sup. 1878)

A demurrer interposed by codefendants to a complaint was properly overruled, although

the complaint failed to state a cause of action against one defendant, where it stated a cause of action against a codefendant.—*Craig v. Donovan*, 63 Ind. 513.

[iii] (Sup. 1879)

An assignment of error that neither paragraph of a cross-complaint states facts sufficient to constitute a cause of action calls in question only the sufficiency of the entire complaint, and not of each paragraph thereof, and is not available if the complaint contains one good paragraph.—*Leedy v. Nash*, 67 Ind. 311.

[m] (Sup. 1880)

A demurrer to an answer as a whole should be overruled, one of the several defenses therein being good.—*Goldsberry v. State ex rel. Haugham*, 69 Ind. 430.

[mm] (Sup. 1880)

Where several breaches of the covenants in a deed are stated in a single paragraph of the complaint, the sufficiency of each breach may be separately tested by a demurrer thereto.—*Sheetz v. Longlois*, 69 Ind. 491.

[mmm] (Sup. 1880)

A demurrer to an entire complaint is properly overruled where it is not good as to one of the causes of action therein.—*Bayless v. Glenn*, 72 Ind. 5.

[n] (Sup. 1881)

Where plaintiffs jointly sue on separate causes of action, having a unity of interest in the object or purpose of the suit, those who have a good cause of action ought to be permitted to prosecute their suit without being subjected to a demurrer for the want of sufficient facts.—*Strong v. Taylor School Tp.*, 79 Ind. 208.

[nn] (Sup. 1881)

A complaint good in part, and entitling plaintiff to judicial assistance, is sufficient to repel an attack by demurrer.—*Decker v. Gilbert*, 80 Ind. 107.

[ann] (Sup. 1882)

A complaint to set aside as fraudulent against creditors conveyances and transfers of real and personal property is not insufficient on demurrer where the complaint is sufficient in respect to the real estate, though it may fail to state the cause of action in respect to the personal property.—*Nugen v. First Nat. Bank of Cambridge City*, 86 Ind. 311.

[o] (Sup. 1882)

Where a count assigns several breaches, a demurrer thereto cannot be sustained, if there is one good breach.—*State ex rel. Sidener v. White*, 88 Ind. 587.

[oo] (Sup. 1883)

In an action on a bond, where several breaches are assigned and they are distinct and independent, demurrers may be addressed to each breach.—*McFall v. Howe Sewing Mach. Co.*, 90 Ind. 148.

[ooo] An answer purporting to be a defense to the whole of the complaint, but bad as to a part of it, is insufficient against a demurrer.—(Sup. 1884) *Hunt v. State ex rel. Edger*, 93 Ind. 311; (1894) *Orb v. Coapstick*, 36 N. E. 278, 136 Ind. 313.

[p] (Sup. 1885)

Under a demurrer to a complaint stating for cause the want of sufficient facts, defendants may take advantage of a want of sufficient facts as to any one of plaintiffs.—*Holzman v. Hibben*, 100 Ind. 338.

[pp] (Sup. 1886)

Where a complaint omits a material allegation, but, taking all the facts stated together, the paragraph shows with certainty sufficient to withstand the demurrer, it was not error to overrule it.—*Byard v. Harkrider*, 9 N. E. 294, 108 Ind. 376.

[ppp] (Sup. 1889)

A demurrer to an entire reply, which is composed of an affirmative paragraph and a general denial, the latter being good, is properly overruled.—*Smail v. Sanders*, 118 Ind. 105, 20 N. E. 296.

[q] (Sup. 1890)

Where a demurrer to the complaint in an action against several defendants proceeded on the theory that there was no cause of action, and the complaint alleged a cause of action as to some of the defendants, the demurrer was properly overruled.—*Clark v. Crawfordsville Coffin Co.*, 25 N. E. 288, 125 Ind. 277.

[qq] (App. 1892)

A demurrer to certain paragraphs of defendant's answer "separately," because "neither of said paragraphs states facts sufficient," is not joint, but several; and if any one of the said paragraphs, therefore, is bad, the demurrer ought to be sustained.—*Glass v. Murphy*, 4 Ind. App. 530, 30 N. E. 1097, 31 N. E. 545.

[qqq] (App. 1893)

Where a complaint is in two paragraphs and a demurrer thereto is joint as is the assignment of error, the ruling against the demurrer will be upheld if either paragraph was sufficient.—*Chicago & E. R. Co. v. Smith*, 33 N. E. 241, 6 Ind. App. 262.

[r] (Sup. 1895)

Where, in a suit to foreclose a mortgage, infancy was pleaded as a defense to the note and mortgage, but was not a good defense to the note or bond secured thereby, the plea was demurrable.—*United States Saving Fund & Investment Co. v. Harris*, 40 N. E. 1072, 41 N. E. 451, 142 Ind. 226.

[rr] (Sup. 1896)

Where a complaint to set aside a deed was demurred to as an entirety, it was not error for the court to overrule the demurrer, though the complaint was defective for failure to contain a special averment as to the disaffirmance of

the deed by the grantor or by plaintiffs, as his heirs, which defect was subsequently cured by amendment.—*Raymond v. Wathen*, 41 N. E. 815, 142 Ind. 387.

Where the complaint in a suit to set aside a deed alleges in one paragraph, as ground therefor, both mental incapacity and undue influence, in the absence of a motion to require defendant to paragraph his complaint there is no available error in overruling a general demurrer if either one of the grounds is sufficiently set forth.—*Id.*

[rrr] (Sup. 1895)

A demurrer under Rev. St. 1894, § 342, subd. 6 (Rev. St. 1881, § 339, subd. 6), on the ground that several causes of action have been improperly joined, must be taken to the whole complaint, and not to one of several paragraphs.—*Gillenwater v. Campbell*, 142 Ind. 529, 41 N. E. 1041.

[s] (App. 1895)

A separate demurrer of a defendant to the first paragraph of the complaint that the complaint did not state facts to constitute a cause of action, but not claiming that the complaint failed to show that the plaintiff was not entitled to recover against the other defendant, was not well taken.—*Leak v. Thorn*, 41 N. E. 602, 13 Ind. App. 335.

[ss] (App. 1896)

Since a plaintiff may plead in one paragraph, and rely on, different defects in machinery as the cause of an injury, an insufficient allegation of one, where a number are charged, will not render a complaint demurrable.—*Pennsylvania Co. v. Witte*, 43 N. E. 319, 15 Ind. App. 583; *Id.*, 44 N. E. 377.

[sss] (Sup. 1897)

Where one is entitled to some relief under her cross-complaint, demurrer thereto is properly overruled.—*Shobe v. Brinson*, 47 N. E. 625, 148 Ind. 285.

[t] (Sup. 1897)

A demurrer which "demurs to each the first, second, third, and fourth paragraphs of the plaintiff's complaint separately and severally" is a demurrer to the paragraphs severally and may be sustained as to any paragraph not good.—*Baltimore & O. S. Ry. Co. v. Little*, 48 N. E. 862, 149 Ind. 167.

[tt] A demurrer to two paragraphs of a pleading because neither states a cause of action or defense is joint, and hence must fail, unless both paragraphs are demurrable.—(Sup. 1898) *Rownd v. State*, 51 N. E. 914, 52 N. E. 395, 152 Ind. 39; (App. 1899) *Gilmore v. Ward*, 52 N. E. 810, 22 Ind. App. 106; (1899) *Storrs & Harrison Co. v. Fusselman*, 55 N. E. 245, 23 Ind. App. 293.

[ttt] (App. 1898)

A demurrer addressed jointly to four paragraphs of an answer should be overruled, if any of the paragraphs is good.—*Tell City v. Bielefeld*, 49 N. E. 1090, 20 Ind. App. 1.

[u] (Sup. 1899)

Where an answer pleaded in bar is sufficient only as to a part, it is demurrable.—*Pittsburgh, C. & St. L. Ry. Co. v. Hosea*, 53 N. E. 419, 152 Ind. 412.

[uu] (App. 1899)

It is not error to overrule a demurrer addressed to two paragraphs jointly, though one of the paragraphs is bad.—*Colles v. Lake Cities Electric Ry. Co.*, 53 N. E. 256, 22 Ind. App. 86.

[uuu] (App. 1899)

Where a joint demurrer to several paragraphs of a pleading is not good as to some, it need not be considered as to the others.—*Kennedy v. Wells*, 55 N. E. 774, 23 Ind. App. 490.

[v] (App. 1899)

Where the validity, as a defense, of a paragraph of defendant's answer, depends solely upon the effect of a certain written assignment, which is set out in another paragraph of the same answer, and is in controversy, it is not error to sustain a demurrer thereto.—*Phenix Ins. Co. v. Jacobs*, 55 N. E. 778, 23 Ind. App. 509.

[vv] (App. 1900)

Where a complaint contains several paragraphs, a demurrer "that the complaint does not state facts sufficient to constitute a cause of action" is a joint demurrer, and, if one of the paragraphs is good, the demurrer should be overruled.—*Green v. Eden*, 56 N. E. 240, 24 Ind. App. 583.

[vvv] (Sup. 1901)

A demurrer to several paragraphs of a reply on the ground that none of them states facts sufficient to avoid the answer is joint, and not several, and must fail unless all the paragraphs are demurrable.—*Maynard v. Waidlich*, 60 N. E. 348, 156 Ind. 562.

[w] (App. 1902)

Where, in an action for injuries to a servant, the complaint alleges three distinct grounds of recovery, one of which is good, the complaint is not bad because the other two are not sufficiently stated.—*Buehner Chair Co. v. Feulner*, 63 N. E. 239, 28 Ind. App. 479.

[ww] (Sup. 1903)

Where, in an action for death against a railroad and its yardmaster, one count of the complaint stated a sufficient cause of action against the latter, whether it stated a sufficient cause of action against the railroad could not be considered on the yardmaster's separate demurrer thereto.—*Lake Erie & W. R. Co. v. Charman*, 67 N. E. 923, 161 Ind. 95.

[www] (Sup. 1903)

Where the last two paragraphs of a complaint state a cause of action, a demurrer to the complaint is properly overruled, though the matters alleged in such paragraphs are also alleged in the first paragraph.—*Lake Erie & W. R. Co. v. Holland*, 69 N. E. 138, 162 Ind. 406, 63 L. R. A. 948.

[x] (Sup. 1904)

A complaint that does not state a good cause of action as to all who join in it, though it does as to some, is bad on demurrer as to all for insufficiency of facts.—*State ex rel. Stuart v. Holt*, 71 N. E. 653, 163 Ind. 198.

[ix] (Sup. 1905)

A demurrer to a paragraph of an answer assigning for cause a want of facts is insufficient, and is properly overruled.—*White v. Sun Pub. Co.*, 73 N. E. 890, 164 Ind. 426.

[xxx] (Sup. 1905)

If the plaintiff is entitled to any part of the relief demanded, it is error to sustain a demurrer to his complaint for want of facts.—*Hargis v. Board of Com'rs of Perry County*, 165 Ind. 194, 73 N. E. 915.

[y] (Sup. 1905)

Where a complaint, in an action for breach of contract to furnish wheels, stated a cause of action as respects a claim for damages on wheels not delivered, a demurrer thereto was properly overruled.—*Connersville Wagon Co. v. McFarlan Carriage Co.*, 76 N. E. 294, 166 Ind. 123, 3 L. R. A. (N. S.) 709.

[y] (App. 1905)

A demurrer "to plaintiff's complaint and to each paragraph thereof," on the ground that "said complaint does not, nor does any paragraph thereof, state facts sufficient to constitute a cause of action," is a joint demurrer, addressed to the complaint as a whole, which admits the truth of all facts therein stated, and is bad if upon consideration of the whole complaint any paragraphs thereof are sufficient to state a cause of action.—*Pittsburgh, C. & St. L. Ry. Co. v. Reed*, 75 N. E. 50, 36 Ind. App. 67.

[yyy] (App. 1905)

A general demurrer to a complaint on a bond must be overruled, if there is a single well-assigned breach.—*Harrah v. State ex rel. Dyer*, 76 N. E. 443, 77 N. E. 747, 38 Ind. App. 495.

[z] (App. 1907)

Where, in an action for injuries to real estate and growing crops by the diversion of water, it was objected on demurrer to each paragraph of the complaint that the description of the premises was indefinite, but under its averments plaintiff was entitled to damages for the use of the land, the demurrer was properly overruled.—*Evansville & Princeton Traction Co. v. Broermann*, 40 Ind. App. 47, 80 N. E. 972.

[z] (App. 1907)

Where a complaint is composed of two paragraphs, a general demurrer is properly overruled if either paragraph is sufficient, although the second paragraph was filed after issue was formed on the first paragraph.—*Frederick v. Koons*, 40 Ind. App. 421, 81 N. E. 1155.

A demurrer to raise the question of the sufficiency of a particular paragraph of the complaint, must be addressed to that paragraph, and not to the complaint as a whole.—*Id.*

[zzz] (App. 1909)

Where one paragraph of a complaint is good, the complaint is not demurrable as an entirety.—*Vandalia R. Co. v. McAninch*, 43 Ind. App. 221, 86 N. E. 1031; *Same v. Cox*, 43 Ind. App. 736, 86 N. E. 1032.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 486-490.

See, also, 31 Cyc. pp. 326-329.

§ 205. General demurrer.

Motion to strike out general demurrer, see post, § 355.

Objections reached by demurrer to declaration in assumpsit, see ASSUMPSIT, ACTION OF, § 18.

Remedy by another on motion to strike out, see post, § 354.

Remedy by general demurrer or motion to strike out, see post, § 352.

To pleading good in part, see ante, § 204.

[a] (Sup. 1822)

Though, in an action against partners on a promissory note signed with the name of the firm, a plea denying the partnership of the defendants amounts to the general issue, it cannot be objected to on general demurrer.—*Springer v. Peterson*, 1 Blackf. 188.

[b] (Sup. 1940)

An objection to a special traverse, that the inducement does not substantially deny the pleading it was intended to answer, can only be reached by special demurrer.—*Ferrand v. Walker*, 5 Blackf. 424.

[c] (Sup. 1841)

Mere formal defects cannot be taken advantage of on general demurrer.—*Woods v. Harris*, 5 Blackf. 585.

[d] (Sup. 1846)

A demurrer to a plea, assigning for cause that the plea is double, without showing in what the duplicity consists, is a general demurrer.—*Lomax v. Bailey*, 7 Blackf. 599.

[e] (Sup. 1857)

A demurrer may be general, if it assign specific causes.—*State ex rel. Board of Com'rs of Daviess County v. Clark*, 9 Ind. 241.

[f] (Sup. 1859)

If a demurrer will lie at all for want of verification of a complaint filed to enjoin the collection of a judgment, still one which assigns for cause that the complaint does not state facts sufficient, etc., will not reach such defect. Such defect is not one of the statutory causes for demurrer.—*Denny v. Moore*, 13 Ind. 418.

[g] (Sup. 1861)

A demurrer ran, "the plaintiff demurs to the first, second, third, and fourth paragraphs of defendant's answer, and assigns for cause of demurrer that they do not state facts sufficient to constitute a defense to the action." *Held*, that the demurrer was to the entire answer.—*Brown v. Gooden*, 16 Ind. 444.

[h] (Sup. 1863)

The objection of a former action pending cannot be raised on a demurrer, assigning for cause want of sufficient facts, but is itself a distinct cause of demurrer.—*Aiken v. Bruen*, 21 Ind. 137.

[hh] (Sup. 1867)

An objection to a complaint for trespass that it does not state where the trespass was committed is not raised by a demurrer for want of sufficient facts.—*Lowry v. Dutton*, 28 Ind. 473.

[i] (Sup. 1871)

A demurrer assigning for cause that a complaint does not state facts sufficient to constitute a cause of action does not raise any question as to the verification of the complaint.—*Turner v. Cook*, 36 Ind. 129.

[ii] In an action against a railroad company for killing an animal, where the complaint does not allege that it was killed in the county where the action was commenced, the defect is jurisdictional, and is not reached by demurrer alleging insufficiency of facts to show a cause of action.—(Sup. 1876) *Toledo, W. & W. Ry. Co. v. Milligan*, 52 Ind. 505; (1892) *Lake Erie & W. Ry. Co. v. Fishback*, 5 Ind. App. 403, 32 N. E. 346; (1894) *Louisville, N. A. & C. Ry. Co. v. Johnson*, 11 Ind. App. 328, 36 N. E. 766.

[j] (Sup. 1876)

If a complaint states any cause of action in favor of the plaintiff against the defendant, it will be held good on demurrer assigning want of sufficient facts without regard to the question as to what the form of action would have been at common law.—*Grose v. Dickerson*, 53 Ind. 460.

[j] (Sup. 1878)

A demurrer to an answer does not raise the question of its verification.—*Tell City Furniture Co. v. Nees*, 63 Ind. 245.

[k] (Sup. 1880)

A general demurrer will not reach additional and special matters set up in defense which are merely redundant and argumentative.—*Voss v. Prier*, 71 Ind. 128.

[kk] (Sup. 1881)

Argumentativeness in pleading cannot be reached by general demurrer.—*State ex rel. Shuckman v. Neff*, 74 Ind. 146.

[l] (Sup. 1881)

An objection that a pleading is not subscribed by the party or his attorney is not avail-

able on demurrer thereto because of the want of sufficient facts.—*Lentz v. Martin*, 75 Ind. 228.

[m] (Sup. 1881)

A demurrer to a pleading for the want of facts will not reach objections to its prayer for relief.—*Mark v. Murphy*, 76 Ind. 534; *Stribling v. Brougher*, 79 Ind. 328.

[m] A general demurrer will not reach duplicity.—(Sup. 1881) *Jones v. Hathaway*, 77 Ind. 14; (1895) *Armstrong v. Dunn*, 143 Ind. 433, 41 N. E. 540.

[mm] (Sup. 1882)

That the facts averred in the complaint do not entitle plaintiff to the full relief prayed for does not render it subject to demurrer for want of sufficient facts.—*Ætna Life Ins. Co. v. Nexsen*, 84 Ind. 347, 43 Am. Rep. 91.

[n] (Sup. 1882)

An objection to a complaint that "part" of the damages sought are too remote cannot be reached by demurrer for want of facts.—*City of Anderson v. Neal*, 88 Ind. 317.

[nn] (Sup. 1883)

Where a complaint states two causes of action in one paragraph, as to one of which the court has no jurisdiction, a demurrer for want of facts does not present any question as to jurisdiction.—*Wabash, St. L. & P. Ry. Co. v. Rooker*, 90 Ind. 581.

[o] (Sup. 1884)

A demurrer assigning for cause want of sufficient facts presents no question as to the jurisdiction of the court over the subject-matter.—*Whitewater R. Co. v. Bridgett*, 94 Ind. 216.

[oo] (Sup. 1884)

A demurrer to a paragraph of an answer to two paragraphs of the complaint "for the reason that the same does not state facts sufficient to constitute a good answer to" the paragraphs does not present the question of the sufficiency of the facts stated in the answer to constitute a cause of defense; and hence the action of the court in overruling it is not reviewable.—*Young v. Warder*, 94 Ind. 357.

[p] A demurrer for want of sufficient facts to constitute a cause of action calls in question not only the sufficiency of the facts to constitute a cause of action, but also the right or authority of the particular plaintiff to maintain a suit upon such cause of action.—(Sup. 1885) *Wilson v. Galey*, 103 Ind. 257, 2 N. E. 736; (1886) *Board of Com'rs of Tipton County v. Kimberlin*, 108 Ind. 449, 9 N. E. 407; (1887) *Farris v. Jones*, 112 Ind. 498, 14 N. E. 484.

[pp] (Sup. 1886)

A demurrer to a complaint on the ground that it does not state facts sufficient to constitute a cause of action (Rev. St. 1881, § 339, subsec. 5) calls in question not only the sufficiency of the facts stated in such complaint to constitute a cause of action, but also the right

or authority of the particular plaintiff to institute or maintain a suit upon such cause of action.—*Frazer v. State*, 7 N. E. 203, 106 Ind. 471.

[q] (Sup. 1887)

Where a demurrer is in form and substance a general demurrer as prescribed by statute, neither a rule of the trial court requiring a brief statement of the points relied on to be filed therewith, nor a memorandum calling attention to certain points in compliance with such rule, can alter the demurrer from a general to a special demurrer, or in any way affect it.—*Pouder v. Tate*, 111 Ind. 148, 12 N. E. 291.

[qq] (Sup. 1890)

On demurrer to a complaint for want of facts constituting a cause of action (Rev. St. 1881, § 339), the objection will not be considered that there is another action pending for the same cause.—*Williams v. Lewis*, 124 Ind. 344, 24 N. E. 733.

[r] (Sup. 1890)

That several causes of action have been improperly joined is a separate statutory cause for demurrer, and a demurrer founded upon the statutory cause that the complaint does not state facts sufficient to constitute a cause of action does not raise any question as to misjoinder of causes of action.—*Nesbit v. Miller*, 25 N. E. 148, 125 Ind. 106.

[rr] (Sup. 1893)

A demurrer to paragraphs in an answer, as not being sufficient "in law" to constitute a defense, questions the sufficiency of the answer, not only as to legal, but also as to equitable defenses.—*Funk v. Rentchler*, 134 Ind. 68, 33 N. E. 364, 898.

[s] (App. 1893)

A demurrer for want of sufficient facts being the fifth statutory ground under section 339, Rev. St. 1881, calls in question not only whether or not a cause of action is stated against defendant in favor of any one, but also whether any cause of action is stated in favor of the plaintiff, which she is entitled to sue upon and enforce.—*Louisville, E. & St. L. Consol. R. Co. v. Lohges*, 33 N. E. 449, 6 Ind. App. 288.

[ss] (App. 1893)

Where a complaint states a cause of action entitling a plaintiff to some relief, though not to all demanded, it is error to sustain a demurrer thereto for want of sufficient facts.—*Jessup v. Jessup*, 34 N. E. 1017, 7 Ind. App. 573.

[t] (App. 1895)

An objection in an action against a railroad company for the killing of a horse that it did not appear that the horse was killed in the county where the suit was brought could not be raised under a demurrer for want of facts.—*Chicago & S. E. Ry. Co. v. Wheeler*, 42 N. E. 480, 14 Ind. App. 62.

[tt] (Sup. 1898)

It has been decided that a demurrer to a complaint for want of facts does raise the question of the right of the plaintiff to maintain the action.—*Kinsley v. Kinsley*, 40 N. E. 819, 150 Ind. 67.

[u] (App. 1898)

A demurrer to an answer, "for the reason that said answer does not state facts sufficient to constitute a good answer," presents no question.—*Tell City v. Bielefeld*, 40 N. E. 1090, 20 Ind. App. 1.

[uu] (App. 1898)

Unnecessary allegations in an answer do not make the pleading bad, as against a demurrer, for want of facts.—*Samples v. Carnahan*, 51 N. E. 425, 21 Ind. App. 55.

[v] (Sup. 1899)

The fact that a complaint shows another action pending between the parties, for the same cause, does not make it demurrable for want of facts, since the defense of a former action pending is a separate ground for demurrer, under *Burns' Rev. St. 1894*, § 342, subd. 3 (*Horner's Rev. St. 1897*, § 339, subd. 3).—*Basye v. Basye*, 52 N. E. 797, 152 Ind. 172, overruling *Rose v. Rose* (1884) 93 Ind. 179.

[vv] (App. 1900)

A demurrer to an answer in bar because it does not state facts sufficient to constitute a cause of action presents no question.—*Hollis v. Roberts*, 58 N. E. 502, 25 Ind. App. 426.

[w] (Sup. 1901)

Where a taxpayer, suing to enjoin the collection of taxes on the ground that he had paid all that he was liable for according to an assessment by the state board of tax commissioners, avers that the minutes of the action of such board in reducing the assessment were indefinite, but that they were on a later date made more certain and definite, a demurrer for want of facts raises no question as to the sufficiency of the board's record, or its admissibility in evidence, or the right of the board to make the record definite.—*First Nat. Bank v. Greger*, 62 N. E. 21, 157 Ind. 479.

[ww] (App. 1902)

Failure to verify a cross-complaint was not reached by a demurrer for want of facts.—*J. I. Case Threshing Mach. Co. v. Millikan*, 63 N. E. 777, 28 Ind. App. 686.

[x] (App. 1903)

A misjoinder of causes of action is not reached by a demurrer for want of sufficient facts.—*Shroyer v. Pittenger*, 67 N. E. 475, 31 Ind. App. 158; *Board of Com'rs of Clay County v. Redifer*, 69 N. E. 305, 32 Ind. App. 93.

[xx] (Sup. 1904)

Where complainant was entitled to any part of the relief sought on the theory of his case made the complaint must be held good as against a general demurrer for want of facts sufficient to constitute a cause of action.—*Migatz v. Stieglitz*, 77 N. E. 400, 106 Ind. 361.

[y] (App. 1906)

A demurrer to a complaint for want of facts is sufficient to raise the question of plaintiff's authority to maintain a suit on the cause of action.—*State ex rel. Ackerman v. Karr*, 37 Ind. App. 120, 76 N. E. 780.

[yy] (App. 1906)

Where there is nothing in the complaint filed in the circuit court to show whether the court has jurisdiction, its jurisdiction will be presumed, and the question cannot be raised by demurrer to the complaint for want of facts.—*Rudisell v. Jennings*, 77 N. E. 959, 78 N. E. 263, 38 Ind. App. 403.

[z] (App. 1906)

A complaint will be sustained, on a demurrer to it for want of facts to state a cause of action, if it is good on any theory.—*Holliday v. Perry*, 38 Ind. App. 588, 78 N. E. 877.

[zz] (App. 1906)

The point that plaintiffs, having elected to sue on an executory contract, were estopped to assert that it was an executed contract is not raised by demurrer for want of facts.—*Jennings v. Shertz*, 88 N. E. 729.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 491-510.

See, also, 31 Cyc. pp. 271-273.

§ 206. Special demurrer.

Character of pleading as general or special demurrer, see ante, § 205.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 511-520.

See, also, 31 Cyc. pp. 271-273.

§ 207. — Nature and necessity.

[a] (Sup. 1822)

An objection to a declaration on account of its being in the debet and detinet instead of in the detinet only can be taken advantage of only by special demurrer. Stat. 1817, p. 41.—*Hamilton v. Noble*, 1 Blackf. 188.

[b] (Sup. 1823)

A pleading that is bad for duplicity will be held so only when the demurrer is special and points out wherein the duplicity consists.—*Martin v. Ray*, 1 Blackf. 291.

[c] There is no special demurrer under the Code.—(Sup. 1864) *Estep v. Estep*, 23 Ind. 114; (1878) *Graham v. Martin*, 64 Ind. 567; (1891) *Johnson v. Brown*, 130 Ind. 534, 28 N. E. 698.

[d] (Sup. 1883)

The Code of Civil Procedure does not warrant special demurrer.—*Main v. Ginther*, 92 Ind. 180.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 511, 512.

See, also, 31 Cyc. pp. 271, 272.

§ 208. — Specification of grounds.

[a] (Sup. 1841)

A special demurrer for argumentativeness must point out with precision the objection relied on.—*Vance v. State ex rel. Goodlander*, 6 Blackf. 80.

[b] (Sup. 1845)

A demurrer to a replication because it is argumentative should show how it is argumentative.—*Jarrell v. Snyder*, 7 Blackf. 551.

[c] (Sup. 1846)

A demurrer to a special plea, amounting to the general issue, which does not assign as a cause of demurrer that the plea so amounts to the general issue, should be overruled.—*Crookshank v. Kellogg*, 8 Blackf. 256.

[d] (Sup. 1854)

General demurrers being no longer authorized, a special demurrer must prevail, if at all, for the specific cause assigned, and no other; and it seems that a demurrer assigning any other cause than those specified in the statute, might be rejected on motion, or treated by the court as frivolous.—*Kenworthy v. Williams*, 5 Ind. 375.

[e] (Sup. 1858)

In the assignment of causes of demurrer, the precise language of the statute need not be used.—*Snyder v. Lane*, 10 Ind. 424.

[f] (Sup. 1870)

It seems that the refusal of the defendant's attorney to point out the specific objection to the complaint intended to be reached by a demurrer thereto filed by him cannot, in the absence of a rule of court, prejudice the rights of his client, except perhaps by the striking out of the demurrer.—*Uhrig v. Sinex*, 32 Ind. 493.

[g] (Sup. 1881)

2 Rev. St. 1876, p. 58, § 50, providing that, "unless the demurrer shall distinctly specify and number the grounds of objection to the complaint, it shall be overruled," though mandatory in form, is merely directory, especially where only one "ground of objection" is assigned in the demurrer.—*Stribling v. Brougher*, 79 Ind. 328.

[h] (App. 1900)

A demurrer to a complaint in the circuit court claiming \$8 damages for the killing of stock, "that the court had no jurisdiction over the subject of the action alleged," is sufficient to raise the question of jurisdiction of said court, under *Burns' Rev. St. 1894*, § 5313, which provides that actions for the killing of stock, where the value does not exceed \$50, can only be enforced before a justice of the peace.—*Chicago & S. E. Ry. Co. v. Spencer*, 55 N. E. 882, 23 Ind. App. 605.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 513-519.

See, also, 31 Cyc. pp. 271-273.

§ 209. — Scope and extent.

[a] (Sup. 1862)

Where a party demurs, setting forth the particular grounds of objection, he should be held to his restricted demurrer.—*Sluss v. Shrewsbury*, 18 Ind. 79.

[b] (Sup. 1879)

The questions presented by a demurrer to a complaint, on the ground that the plaintiff has not legal capacity to sue, are only as to some legal disability.—*Dale v. Thomas*, 67 Ind. 570.

[c] (Sup. 1883)

A demurrer to a complaint, on the ground that the plaintiffs have no legal capacity to sue, raises only the question of some such legal disability as their infancy, idiocy, or coverture, and not that the complaint, upon its face, fails to show a right of action in the plaintiffs.—*Dewey v. State ex rel. McCollum*, 91 Ind. 173; *Traylor v. Dykins*, 91 Ind. 229.

[d] (Sup. 1889)

A demurrer to a complaint, on the ground that plaintiff has no legal capacity to sue, does not reach an objection that the complaint shows no right of action in plaintiff.—*Campbell v. Campbell*, 121 Ind. 178, 23 N. E. 81.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 520.

See, also, 31 Cyc. pp. 271-273.

§ 210. Speaking demurrer.

[a] (Sup. 1875)

It is not the office of a demurrer to bring into a case new facts. A demurrer must be sustained, if at all, for defects apparent on the face of the pleading to which it is addressed.—*Douglass v. Blankenship*, 50 Ind. 160.

FOR CASES FROM OTHER STATES,

See 31 Cyc. p. 323.

§ 212. Abandonment or waiver of demurrer.

Withdrawal of demurrer, see post, § 339.

[a] A demurrer is waived by pleading over.—(Sup. 1843) *Davis v. Davis*, 6 Blackf. 394; (1856) *Eward v. Lawrenceburgh & U. M. R. Co.*, 7 Ind. 711; (1856) *Keen v. Younkman*, 8 Ind. 254; (1857) *Kile v. Chapin*, 9 Ind. 150; (1870) *The John Shallcross*, 35 Ind. 19; (1877) *De La Hunt v. Holderbaugh*, 58 Ind. 285; (1878) *Moss v. Witness Printing Co.*, 64 Ind. 125; (1878) *Morrison v. Fishel*, Id. 177; (1881) *Board of Com'rs of Cass County v. Adams*, 76 Ind. 504.

[b] (Sup. 1859)

A demurrer is waived by pleading over and going to trial.—*Bell v. Hungate*, 13 Ind. 382.

[c] (Sup. 1860)

Joining issue on an answer is a waiver of a demurrer thereto.—*Blake v. Holley*, 14 Ind. 383.

[d] Where the parties go to trial upon the merits without calling the court's attention to a demurrer to a pleading, the demurrer is waived.—(Sup. 1867) *Haun v. Wilson*, 28 Ind. 206; (App. 1901) *Lahr v. Ulmer*, 60 N. E. 1009, 27 Ind. App. 107.

[e] Where a party files an answer while a demurrer to the complaint is under advisement, he waives his right to a ruling upon the demurrer.—(Sup. 1880) *Washburn v. Roberts*, 72 Ind. 213; (1887) *Ludlow v. Ludlow*, 109 Ind. 199, 9 N. E. 769.

[f] (Sup. 1887)

Where plaintiff answered a cross-complaint before the decision of a demurrer which he had filed thereto, he waived the demurrer.—*Ludlow v. Ludlow*, 9 N. E. 769, 109 Ind. 199.

[g] (Sup. 1888)

An answer after a demurrer is an abandonment of the demurrer.—*Moore v. Glover*, 115 Ind. 367, 16 N. E. 163.

[h] (Sup. 1893)

A demurrer is waived by proceeding to trial without a ruling thereon.—*Claypool v. Jaqua*, 135 Ind. 499, 35 N. E. 285.

[i] (App. 1906)

A demurrer to the complaint raises no question where an amended complaint is on file.—*Richardson v. Stephenson*, 38 Ind. App. 339, 78 N. E. 256.

[j] (App. 1907)

Where defendants, after the court sustained their demurrer to the complaint, pleaded a general denial without insisting upon judgment on demurrer, they waived their right under the court's ruling.—*Diven v. Burlington Sav. Bank*, 40 Ind. App. 678, 82 N. E. 1020.

[k] (App. 1910)

Under the statutes of Indiana, as well as at common law, the demurrer precedes an answer to the complaint; and, if not thus filed before pleading to the merits, it will be deemed waived, unless the answer is withdrawn by leave of court.—*Baker v. Anderson Tool Co.*, 91 N. E. 514.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 521-524; 1 CENT. DIG. Abate. & R. § 9.

See, also, 31 Cyc. pp. 343-345.

§ 213. Operation and effect of demurrer in general.

Waiver of grounds of abatement, see ABATEMENT AND REVIVAL, § 83.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 485.

See, also, 31 Cyc. pp. 321-343.

§ 214. Admissions by demurrer.

[a] (Sup. 1828)

If a plea of former recovery aver the causes of action to be the same, and the record do

not show them to be different, the averment, on a demurrer to the plea, must be taken as true.—*Cutler v. Cox*, 2 Blackf. 178, 18 Am. Dec. 152.

[b] (Sup. 1848)

A bond purported to have been executed by a town corporation as principal and certain persons as sureties. A declaration in debt on the bond, in an action against A., one of the sureties, contained two counts; the first alleging the bond to have been made by A., with other persons and the corporation of the town, by the name and style of the president and select council; the second alleging the execution of the bond by A. and 15 others, naming them, and B., president of the council, etc., in behalf of the corporation. The third was similar to the second. On demurrer to all the counts, it was held that the demurrers admitted the execution of the bond by the corporation.—*State ex rel. Board of Com'rs of Dearborn County v. Calhoun*, 1 Ind. 147, Smith, 72.

[c] (Sup. 1850)

Ry demurring to a plea, which avers the cause of action in the second to be the same as the first, the plaintiff admits that averment to be true.—*Britzell v. Fryberger*, 2 Ind. 176.

[d] A demurrer does not admit as true conclusions stated by the pleader.—(Sup. 1859) *Lane v. Ready*, 12 Ind. 475; (1881) *Worley v. Moore*, 77 Ind. 567; (1887) *Winstandley v. Rariden*, 11 N. E. 15, 110 Ind. 140; (1888) *Pein v. Mizner*, 170 Ind. 659, 84 N. E. 981.

[e] A demurrer admits the truth of all facts well pleaded.—(Sup. 1859) *Lane v. Ready*, 12 Ind. 475; (1884) *Reid v. Mitchell*, 93 Ind. 469; (1905) *Greenawaldt v. Lake Shore & Mich. S. R. Co.*, 165 Ind. 219, 74 N. E. 1081; (1909) *Ft. Wayne & W. V. Traction Co. v. Roubush*, 88 N. E. 676.

[f] (Sup. 1863)

If, in an action by A. and wife on certain notes made payable to the latter by B., B. answers that A. was the owner and real party in interest in said notes, and A. and wife demur to the answer, they thereby admit the ownership by A. of the note sued on as alleged in the answer.—*Schoppenhast v. Bollman*, 21 Ind. 280.

[g] (Sup. 1875)

A demurrer to a complaint for want of sufficient facts admits, for the purposes of the demurrer, that the facts are as alleged in the complaint.—*Swafford v. Kitch*, 51 Ind. 78.

[h] (Sup. 1880)

Where a complaint for the unlawful taking of a dwelling house by the defendants and converting it to their own use averred that the house in question was personalty, a contention by the defendants on demurrer to the complaint that the house could not be treated as personalty was untenable.—*Griffin v. Ransdell*, 71 Ind. 440.

[i] A demurrer only admits facts which are well pleaded.—(Sup. 1881) *Goddard v. Stockman*, 74 Ind. 400; (1881) *Peyton v. Kruger*, 77 Ind. 486; (1881) *Du Pont v. Beck*, 81 Ind. 271; (1882) *Johnston v. Griest*, 85 Ind. 503; (1883) *Ayers v. Slifer*, 89 Ind. 433; (1887) *Winstandley v. Rariden*, 11 N. E. 15, 110 Ind. 140; (App. 1891) *Kash v. Huncheon*, 27 N. E. 645, 1 Ind. App. 361; (Sup. 1905) *Malott v. Sample*, 74 N. E. 245, 164 Ind. 645; (1908) *Caywood v. Supreme Lodge Knights & Ladies of Honor*, 171 Ind. 410, 86 N. E. 482, 23 L. R. A. (N. S.) 304, 131 Am. St. Rep. 253.

[j] (Sup. 1881)

In an action by an administrator on a note, an averment in the answer that decedent's widow had a right to the possession of the note was not an averment of fact, but merely a legal conclusion which was not admitted by demurrer.—*Foglesong v. Wickard*, 75 Ind. 258.

An averment, by defendant sued on a note, that under an agreement between him and the payee a third person had the right to the possession of the note after the payee's death, is an averment of a mere legal conclusion, and not of a fact admitted by demurrer.—*Id.*

[k] (Sup. 1881)

On demurrer to a complaint alleging a fact which defendant was estopped to aver, held, that it was to be regarded true, even on his behalf.—*Willson v. Glenn*, 77 Ind. 585.

[l] (Sup. 1881)

A demurrer to a complaint to be relieved from a judgment taken against the plaintiff by default admits the truth of the complaint only to test its sufficiency, and after the demurrer is overruled the defendant may controvert the alleged excuse for suffering a default.—*Lawler v. Couch*, 80 Ind. 369.

[m] (Sup. 1882)

By demurring to an answer containing denials of the allegations of the complaint the plaintiff concedes that the denials are expressive of the truth, and in so conceding confesses that the controverted allegations of the complaint are not true.—*Hays v. Carr*, 83 Ind. 275.

[n] (Sup. 1884)

Facts contradictorily pleaded are not sufficiently pleaded, and hence are not admitted by demurrer.—*State ex rel. Padgett v. Foulkes*, 94 Ind. 493.

[nn] (Sup. 1884)

Where, in an action on a subscription for the erection of a building, an answer denied mainly that there was any delivery of the instrument sued on, and asserted that the building erected was not of the dimensions as provided in the contract, the allegations as to the size of the building were not pertinent to the main scope of the answer, and cannot be regarded as confessed by the demurrer.—*Petty v. Trustees of Church of Christ, etc.*, 95 Ind. 278.

[n] (Sup. 1885)

Where an answer avers that the cause sued on is the same as in a prior action and the record does not show it to be different, the averment is to be taken as true on demurrer.—*City of North Vernon v. Voegler*, 2 N. E. 821, 103 Ind. 314.

[nn] (Sup. 1885)

A demurrer admits the truth of facts well pleaded, but does not admit the truth of epithets, such as "illegal" and "false," that are nothing more than conclusions of law.—*Read v. Yeager*, 104 Ind. 195, 3 N. E. 856.

[o] (Sup. 1887)

In a suit on a note, where the answer is that the consideration of the note was the purchase of an interest in land, the averment in the answer "that, by the terms of purchase, the defendant was entitled to a deed for said land, and to the possession thereof," is a mere conclusion of law, the truth of which is not admitted by demurrer.—*Winstandley v. Rariden*, 110 Ind. 140, 11 N. E. 15.

[oo] (Sup. 1888)

In directly assailing a pleading only such facts as are sufficiently pleaded are admitted. A fact not well pleaded adds no strength to the pleading.—*Lake Shore & M. S. Ry. Co. v. Cincinnati, W. & M. Ry. Co.*, 19 N. E. 440, 116 Ind. 578.

[p] (Sup. 1889)

A complaint for injunction alleged that defendants were about to convert a building adjoining plaintiff's residence into a shop for horseshoeing and general blacksmithing; then, without alleging that such business could not be conducted so as not to be detrimental to plaintiff, nor that defendants were intending to conduct it improperly, and to plaintiff's essential injury, nor that they could not or would not so construct the building as to prevent all injury, it stated that "the erection and maintaining of a blacksmith shop at such place will destroy the free use of plaintiff's property," interfere with the comfort and health of himself and family, etc. *Held*, that a demurrer did not admit the truth of these allegations of injury, which were mere conclusions, and that the demurrer should have been sustained.—*Bowen v. Mauzy*, 117 Ind. 258, 19 N. E. 526.

[pp] (Sup. 1891)

Where the superintendent of a poorfarm employed by the county board for five years was dismissed by the board before the expiration of the contract, and his complaint alleged that they acted without cause in such dismissal, a demurrer to the complaint was an admission of the allegation, and was properly overruled.—*Board of Com'rs of Pulaski County v. Shields*, 130 Ind. 6, 29 N. E. 385.

[q] (App. 1891)

Where a complaint is founded on a contract in writing, incorrect and irrelevant averments in relation thereto and incorrect con-

structions thereof are not admitted by a demurrer.—*Kash v. Huncheon*, 27 N. E. 645, 1 Ind. App. 361.

A demurrer admits the facts that are relevant and well pleaded.—*Id.*

[qq] (Sup. 1892)

Plaintiff alleged, in a suit to enjoin the enforcement of a decree of partition, that he obtained a decree against defendant, quieting title to the lands, and afterwards defendant sued him for partition, and that at the trial plaintiff put in evidence the former decree, whereupon he learned for the first time that a description of the land had been omitted therefrom by mistake, rendering the decree void. *Held*, that an allegation in the complaint that plaintiff was the owner of the land, taken in connection with the statement that defendant had obtained against him such decree, must be regarded merely as the assertion of a claim, and not as an allegation of a fact which is admitted by demurrer.—*Ratliff v. Stretch*, 130 Ind. 282, 30 N. E. 30.

[r] (Sup. 1893)

Where a demurrer to affirmative matter set up in the answer in an action for an injunction is erroneously sustained, plaintiff cannot contend, on appeal, that the allegation in the answer were, in fact, not true, and that defendant could have avoided the injury which was the occasion of the suit.—*Barnard v. Sherl*, 135 Ind. 547, 34 N. E. 600, 35 N. E. 117, 41 Am. St. Rep. 454, 24 L. R. A. 568.

[rr] (Sup. 1895)

A demurrer admits facts well pleaded, but does not admit all the conclusions which may be drawn from such facts by the pleader.—*Western Union Telegraph Company v. Taggart*, 40 N. E. 1051, 141 Ind. 281, 60 L. R. A. 671, judgment affirmed (1896) 16 S. Ct. 1054, 163 U. S. 1, 41 L. Ed. 49.

[s] (App. 1895)

Where, in an action on an insurance policy, plaintiff sets forth facts connected with an arbitration agreement entered into subsequent to the loss for determining the value of the goods destroyed and the extent of the injury to those remaining, his demurrer to defendant's answer, wherein defendant admits the policy, the loss, the arbitration agreement, and the award to plaintiff, but insists that the proceedings thereunder were invalid for fraud, cannot be considered as admitting the truth of such allegations as do not constitute a good defense.—*Germania Fire Ins. Co. of City of New York v. Warner*, 13 Ind. App. 406, 41 N. E. 969.

[ss] (App. 1896)

An allegation that plaintiff was injured by defendant's acts is not admitted by a demurrer if the specific facts averred show that he could not have been injured.—*Williams v. Hanly*, 45 N. E. 622, 16 Ind. App. 464.

[t] (App. 1899)

One demurring to a complaint for want of facts thereby waives any possible objection that plaintiff did not have legal capacity to sue.—*Chicago & E. Ry. Co. v. Cummings*, 53 N. E. 1026, 24 Ind. App. 192.

[tt] (Sup. 1900)

In an action by a grantee against his grantor to restrain the release of an indemnity mortgage taken by grantor from his vendor, on other land, as security against a defect in the title, defendant demurred to the petition, and appealed from an order overruling same. *Held*, that defendant could not object that the petition failed to show that plaintiff's land had any value above a mortgage subject to which defendant had conveyed it to plaintiff, as defendant had admitted by his demurrer an allegation therein that the release of the indemnity mortgage would cause plaintiff irreparable loss.—*Rowe v. Hamburger*, 57 N. E. 534, 154 Ind. 604.

[u] (App. 1903)

An allegation in a complaint that it was the duty of a railway company to place a car of horses on its track in position to unload is admitted by demurrer.—*Toledo, St. L. & W. R. Co. v. Beery*, 68 N. E. 702, 31 Ind. App. 556.

[uu] (Sup. 1904)

Allegations in a complaint by a servant against his master for damages for personal injuries that the work plaintiff was engaged in doing had no connection with, and was not in any way incident to or a part of, the work or employment of the motorman or servants in charge of a passenger car of defendant which ran into the work car in which plaintiff was seated; that he was simply a passenger on the work car; that defendant owed him a duty, and was bound to carry him safely, are mere conclusions of the pleader, not admitted by demurrer.—*Indianapolis & G. R. T. Co. v. Foreman*, 69 N. E. 669, 162 Ind. 85, 102 Am. St. Rep. 185.

[v] (Sup. 1907)

A demurrer to a complaint admits the facts well pleaded with all reasonable inferences therefrom.—*Antioch Coal Co. v. Rockey*, 169 Ind. 247, 82 N. E. 76.

[vv] (Sup. 1907)

Allegations in a sheriff's complaint that the county was not entitled to certain fees, that they were the property of the sheriff, and were paid to the county for his use and benefit, were conclusions not admitted by demurrer.—*Board of Com'rs of Clinton County v. Given*, 169 Ind. 468, 80 N. E. 965, 82 N. E. 918.

[w] (App. 1907)

A demurrer to a pleading admits only the issuable facts alleged.—*Hays v. Hays*, 40 Ind. App. 471, 82 N. E. 90.

[ww] In an action for death of a railroad engineer by running into an open switch, statements

in the complaint that defendant knew that the day was dark and hazy and the atmosphere filled with flying frost, and that it was impossible for decedent to see along the track more than a short distance, were not allegations of fact, but mere recitals, which were not admitted by demurrer, which admits only facts well pleaded.—(Sup. 1908) *Chicago, I. & L. Ry. Co. v. Barker*, 169 Ind. 670, 83 N. E. 369, 17 L. R. A. (N. S.) 542, transferred from Appellate Court (1907) 40 Ind. App. 256, 81 N. E. 1179.

A demurrer admits the truth of those facts which are affirmatively alleged and not the truth of mere recitals.—*Id.*

[x] (Sup. 1908)

Only inferences necessarily arising from facts alleged will be indulged in determining the sufficiency of a pleading against a demurrer.—*Cleveland, C., C. & St. L. Ry. Co. v. Perkins*, 171 Ind. 307, 86 N. E. 405.

[xx] (App. 1909)

A demurrer to a complaint to review a judgment, the complaint alleging that the proof of publication was never sworn to by the publisher of the paper, admits the truth of such allegation.—*Deputy v. Dollarhide*, 42 Ind. App. 554, 86 N. E. 344.

[y] (Sup. 1909)

Allegations of a pleading must be taken as true on demurrer thereto.—*Inland Steel Co. v. Yedinak*, 172 Ind. 423, 87 N. E. 229, transferred from the Appellate Court (1908) 42 Ind. App. 629, 86 N. E. 503.

[yy] (Sup. 1909)

A demurrer to the paragraphs of an answer admitted the truth of the facts alleged therein.—*State ex rel. May v. Hall*, 89 N. E. 855.

[z] (App. 1910)

Well-pleaded facts are presumed to be true against a demurrer.—*Stahl v. Illinois Oil Co.*, 90 N. E. 632.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 525-534; 12 CENT. DIG. Corp. § 2044.

See, also, 31 Cyc. pp. 333-337.

§ 215. Joinder in issue on demurrer.

[a] (Sup. 1847)

If a defendant refuse to join in a demurrer to his plea, judgment may be rendered against him as for want of plea.—*Helms v. Sisk*, 8 Blackf. 503.

[b] (Sup. 1882)

No joinder in demurrer can be required while there is any matter of fact in controversy between the parties.—*Plant v. Edwards*, 85 Ind. 588.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 401.

See, also, 31 Cyc. p. 321.

§ 216. Scope of inquiry and matters considered on demurrer in general.

Allegations of matters of fact or conclusions, see ante, § 8.

In action to enforce penalty for violation of municipal ordinance, see MUNICIPAL CORPORATIONS, § 633.

[a] (Sup. 1845)

If a defendant, having craved and obtained oyer of an instrument declared on, demur to the declaration without spreading the instrument on the record, the demurrer stands as if oyer had not been craved.—*Daniels v. Richie*, 7 Blackf. 391.

[b] (Sup. 1867)

A wife sued her husband, alleging that certain lands had been bought with her separate property; that she did not intend to give them to her husband, but being ignorant of the proper way to secure the title, she suffered the conveyance to be made to him on his representation that such a conveyance secured the land to her and that he could not convey any interest therein without her consent. A judgment creditor of the husband was made a defendant, and demurred to the complaint. Held that, as the rights of the judgment creditor were not involved in the complaint, the complaint, if good against the husband, was good against such judgment creditor.—*Watkins v. Jones*, 28 Ind. 12.

[c] (Sup. 1880)

Where a complaint merely required certain defendants to answer if they had any claim to the property in controversy, and stated no cause of action against such defendants, and sought no relief against them, their demurrer thereto presented no question on the merits of their claim to the property.—*Woollen v. Wishmier*, 70 Ind. 103.

[d] (Sup. 1880)

In determining the sufficiency of a pleading the court will not consider a paper filed with, but not constituting the foundation of, the pleading.—*Stahl v. Hammontree*, 72 Ind. 103.

[e] (Sup. 1881)

In replevin by a chattel mortgagee against a purchaser from the mortgagor, the mortgage is not the foundation of a defense based on the insufficiency of the description contained therein, and cannot, on demurrer to the answer, though filed therewith, be examined to sustain or overthrow the same.—*Tindall v. Wasson*, 74 Ind. 495.

[f] (Sup. 1881)

A reference to the evidence or to the verdict is not available for the purpose of aiding an exception to the trial court's ruling on demurrer to a pleading.—*Abell v. Riddle*, 75 Ind. 345.

[g] (Sup. 1882)

A demurrer raises questions upon the pleadings, and the court cannot assume facts

not shown by the pleadings for the purpose of sustaining the demurrer.—*Kocher v. Christian*, 88 Ind. 81.

[h] (Sup. 1885)

A demurrer can be sustained only for defects apparent on the face of the pleading to which it is filed, and evidence cannot be examined for the purpose of determining the sufficiency of the pleading.—*Thames Loan & Trust Co. v. Beville*, 100 Ind. 309.

[i] (Sup. 1888)

The sufficiency of a paragraph of a pleading, when demurred to, must be determined by the facts stated therein, and not on matters elsewhere appearing in the record.—*American Ins. Co. v. Replogle*, 114 Ind. 1, 15 N. E. 810.

[j] (Sup. 1894)

The sufficiency of the facts stated in a pleading, on demurrer thereto, cannot be affected by facts stated in subsequent pleadings, or by those proven on the trial.—*Cole v. Gray*, 139 Ind. Sup. 396, 38 N. E. 856.

[k] (Sup. 1896)

Where an answer setting up the statute of limitations is demurred to, the court cannot look beyond the facts so admitted by the demurrer to the averments in the complaint to ascertain when the cause of action accrued.—*State ex rel. Harrison, v. Osborn*, 42 N. E. 921, 143 Ind. 671.

[l] (App. 1900)

Where a particular paragraph in the answer is addressed to a particular paragraph in the complaint, only such facts as are well pleaded in answer to the particular paragraph in the complaint can be considered in determining the sufficiency of the answer, and other facts addressed to other paragraphs in the complaint are unavailable.—*Indiana Natural & Illuminating Gas Co. v. Anthony*, 58 N. E. 868, 26 Ind. App. 307.

[m] (App. 1901)

Where a pleading is tested by demurrer, it must stand or fall on its own averments, and it can neither be weakened nor strengthened by a reference to other parts of the record.—*Midland Steel Co. v. Citizens' Nat. Bank*, 59 N. E. 211, 26 Ind. App. 71.

[n] (App. 1902)

Under a demurrer to an answer reaching back to the complaint, the complaint will be considered with the same strictness as to matters appearing on the face thereof as under a demurrer directed to the complaint itself.—*Hall v. Brownlee*, 62 N. E. 457, 28 Ind. App. 178.

[o] (App. 1902)

Where, in a suit to cancel a bond and mortgage, they are not made a part of the complaint, but merely filed as exhibits, they cannot be considered on a demurrer to the complaint, in determining the sufficiency of the pleading.—*Marley v. National Building, Loan &*

Savings Ass'n, No. 2., 62 N. E. 1023, 28 Ind. App. 369.

[p] (*Sup.* 1904)

On demurrer to a complaint for want of facts, allegations which are mere conclusions of facts, stated by way of recital only, cannot be considered.—*Indianapolis & Greenfield Rapid Transit Co. v. Foreman*, 69 N. E. 669, 162 Ind. 85, 102 Am. St. Rep. 185.

[q] (*Sup.* 1910)

On demurrer to a complaint for insufficient facts, the court must determine the complaint's sufficiency with no aid outside of it.—*Friedersdorf v. Lacy*, 90 N. E. 766.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 535-539; 1

CENT. DIG. Abate. & R. § 205.

See, also, 31 Cyc. pp. 321-343.

§ 217. Effect of demurrer as opening record.

[a] A demurrer opens all errors in the pleadings, and judgment thereon goes against the first bad pleader.—(*Sup.* 1820) *Tillotson v. Stipp*, 1 Blackf. 77; (1861) *Bank of State of Indiana v. Lockwood*, 16 Ind. 306.

[b] A demurrer reaches back to the first defect substance in the pleadings.—(*Sup.* 1820) *Tillotson v. Stipp*, 1 Blackf. 501; (1881) *Dorrell v. Hannah*, 80 Ind. 497; (1881) *Du Pont v. Beck*, 81 Ind. 271.

[c] (*Sup.* 1825)

On demurrer to a bad replication, where the plea is bad and the declaration good, the plaintiff is entitled to judgment.—*Puntenny v. Paddock*, 1 Blackf. 415.

[d] (*Sup.* 1844)

A demurrer to a plea opens the previous pleadings, and reaches back to the declaration.—*Ferguson v. Rhoades*, 7 Blackf. 262.

[e] (*Sup.* 1852)

Where a declaration contains several counts, and on demurrer to a special plea and a consequent examination of the declaration the first count is found to be insufficient and the special plea is good as to the other counts, it is of no consequence whether the plea is valid or not in regard to the first count, as a bad plea is sufficient for a bad count.—*First v. Bonewitz*, 3 Ind. 546.

[f] A demurrer to a replication goes back to the plea, and raises objections to defects therein.—(*Sup.* 1853) *Cooper v. McJunkin*, 4 Ind. 290; (1853) *Barker v. Adams*, 4 Ind. 574; (1877) *Ross v. Boswell*, 60 Ind. 235; (1880) *Dunkleberger v. Whithall*, 70 Ind. 214; (1881) *Farman v. Chamberlain*, 74 Ind. 82; (1881) *Town of Tipton v. Jones*, 77 Ind. 307; (1881) *Marshall v. Stewart*, 80 Ind. 189; (1881) *Knippenberg v. Morris*, 80 Ind. 540; (1882) *State ex rel. Metsker v. Mills*, 82 Ind. 126; (1882) *Axtel v. Chase*, 83 Ind. 546; (1882)

Reed v. Higgins, 86 Ind. 143; (1883) *Woods v. Kessler*, 93 Ind. 356; (1885) *Cupp v. Campbell*, 2 N. E. 565, 103 Ind. 213; (1890) *Lieb v. Lichenstein*, 23 N. E. 284, 121 Ind. 483; (*App.* 1891) *Western Union Telegraph Co. v. Trumbull*, 27 N. E. 813, 1 Ind. App. 121; (1891) *Starke v. Dicks*, 28 N. E. 214, 2 Ind. App. 125; (1892) *Jackson v. Butts' Estate*, 32 N. E. 96, 5 Ind. App. 384; (1894) *Pittsburg, C., C. & St. L. R. Co. v. Henderson*, 36 N. E. 376, 9 Ind. App. 480; (1899) *Beckett v. Little*, 54 N. E. 1069, 23 Ind. App. 65.

[g] (*Sup.* 1853)

In an action for trespass, the first count in the declaration was in the usual form for assault and battery. The second alleged that defendant unlawfully, and with inhuman violence, bruised, cut, and gashed the face of plaintiff. The answer alleged that the relation of teacher and pupil subsisted between the parties; that plaintiff as such pupil was disorderly, and defendant, as teacher, finding it necessary for the good government of the school, moderately corrected plaintiff as he lawfully might, averring that the lawful correction constituted the several acts of trespass mentioned in the declaration. *Held*, that the answer was not good to the second count, and, a replication to it having been demurred to, the answer was reached by the demurrer.—*Cooper v. McJunkin*, 4 Ind. 290.

[h] Under Code, § 50, prescribing the grounds of demurrer to a complaint, and section 54, directing that when any of the matters enumerated in the preceding section do not appear on the complaint the objection may be taken by answer, and if no such objection is taken either by demurrer or answer the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the court, a demurrer only reaches to the particular pleading demurred to, and the court cannot examine the pleadings for the first error, unless for the purpose of determining the jurisdiction.—(*Sup.* 1854) *Johnson v. Stebbins*, 5 Ind. 364; (1855) *Mason v. Toner*, 6 Ind. 323; (1855) *Freeman v. Robinson*, 7 Ind. 321; (1856) *Gimbel v. Smidth*, *Id.* 627.

[hh] (*Sup.* 1854)

Under the present system of pleading, demurrers cannot reach back through all the pleadings for error, but only for the purpose of examining the jurisdiction of the court.—*Johnson v. Stebbins*, 5 Ind. 364.

[i] (*Sup.* 1855)

No merely formal defect in a declaration can be inquired into on demurrer to a defective plea.—*Shook v. State ex rel. Stevens*, 6 Ind. 113.

[ii] (*Sup.* 1855)

A demurrer, under the practice act of 1852, does not extend beyond the pleading to which it is addressed.—*Mason v. Toner*, 6 Ind. 323.

[i] (Sup. 1859)

A demurrer to a replication which denied a material allegation of the answer relates back to the complaint as a whole, and as the complaint contained one good paragraph, the demurrer was properly overruled.—Hayworth v. Junction R. Co., 13 Ind. 348.

[jj] A demurrer to an insufficient reply will be carried back to the answer.—(Sup. 1860) Wiley v. Howard, 15 Ind. 169; (1865) Ellis v. Kenyon, 25 Ind. 134; (1865) Dunning v. Driver, 25 Ind. 269; (1884) Wilhite v. Hamrick, 92 Ind. 594; (1887) Gray v. National Ben. Ass'n, 111 Ind. 531, 11 N. E. 477.

[k] (Sup. 1861)

In a suit for the possession of personal property, the answer was—First, a general denial; second, a claim under a mortgage. A reply alleged that the mortgage was procured by a fraudulent representation, and the incapacity of the defendant to execute it. *Held*, that a demurrer to the defective paragraph of the reply reached back to the defective answer, to which it was offered in reply, and which was bad for a failure to properly plead the mortgage.—Louchheim v. Gill, 17 Ind. 139.

[kk] A demurrer to an answer in abatement does not reach back to the complaint, because such answers are not addressed to the complaint.—(Sup. 1862) Price v. Grand Rapids & I. R. Co., 18 Ind. 137; (1886) Indiana, B. & W. Ry. Co. v. Foster, 107 Ind. 430, 8 N. E. 264.

[l] (Sup. 1863)

Where both complaint and answer are bad, a demurrer to the latter reaches back to and should be sustained as to the complaint.—Sugar Creek Tp. v. Johnson, 20 Ind. 280.

[ll] A demurrer to an answer to a complaint reaches back to the complaint.—(Sup. 1864) McEwen v. Hussey, 23 Ind. 395; (1871) Lytle v. Lytle, 37 Ind. 281; (1872) Whitman v. Mason, 40 Ind. 189; (1872) Hain v. Northwestern Gravel Road Co., 41 Ind. 196; (1874) Kretsch v. Helm, 45 Ind. 438; (1874) Nelson v. Blakey, 47 Ind. 38; (1876) Batty v. Fount, 54 Ind. 482; (1879) Kellogg v. Tout, 65 Ind. 146; (1881) Pittsburgh, C. & St. L. Ry. Co. v. Hixon, 70 Ind. 111; (1881) Dorrell v. Hannah, 80 Ind. 497; (1881) Aetna Ins. Co. v. Black, Id. 513; (1881) Same v. Kittles, 81 Ind. 96; (1882) State ex rel. Braden v. Krug, 82 Ind. 58; (1882) Worley v. Harris, Id. 493; (1882) Headrick v. Brattain, 83 Ind. 188; (1882) Gilmore v. Hamilton, Id. 196; (1883) State ex rel. Martin v. Porter, 89 Ind. 260; (1884) Newcomer v. Alexander, 96 Ind. 453; (1885) Bowen v. Striker, 100 Ind. 45; (1886) Reeves v. Howes, 6 N. E. 904, 104 Ind. 435; (1890) State ex rel. Fry v. Board of Com'rs of Martin County, 25 N. E. 286, 125 Ind. 247; (App. 1892) Indiana Live Stock Ins. Co. v. Bogeman, 30 N. E. 7, 4 Ind. App. 237; (1894) Davis & Rankin Bldg. & Mfg. Co. v. Booth, 10 Ind. App. 364, 37 N. E. 818;

(1894) Board of Com'rs of Posey County v. Stock, 11 Ind. App. 167, 36 N. E. 928; (Sup. 1895) State ex rel. Magnet v. Kemp, 141 Ind. 125, 40 N. E. 661; (App. 1897) Western Assur. Co. v. Koontz, 46 N. E. 95, 17 Ind. App. 54; (1901) Repp v. Leshner, 61 N. E. 609, 27 Ind. App. 360; (1902) Hall v. Brownlee, 62 N. E. 457, 28 Ind. App. 178; (Sup. 1903) Alexander v. Spaulding, 66 N. E. 694, 160 Ind. 176; (1903) State ex rel. Keifer v. Wheatley, 66 N. E. 684, 160 Ind. 183; (1904) Mitchell v. City of Peru, 71 N. E. 132, 163 Ind. 17; (1906) Whitesell v. Strickler, 78 N. E. 845, 167 Ind. 602, 119 Am. St. Rep. 524; (App. 1906) Bonham v. Doyle, 77 N. E. 859, 79 N. E. 458, 39 Ind. App. 438.

[m] (Sup. 1871)

Under 2 Gav. & H. St. p. 92, § 64, providing that, where the facts stated in the answer are not sufficient to constitute a cause of defense, plaintiff may demur, and unless objection be so taken by demurrer, it shall be deemed to be waived, does not prevent a demurrer to a reply being carried back to a defective answer.—Menifee v. Clark, 35 Ind. 304; Turpin v. Clark, Id. 378.

[mm] (Sup. 1872)

In an action on a note secured by a mortgage on a portable sawmill, the answer alleged that the note was given in consideration of the sale of the mill, which sale was made on a written agreement, executed by plaintiff to defendant, warranting it to be in good and complete running order, and that there was a breach of such warranty, etc. There was no copy of the written contract filed with the answer. To this there was a reply that the written contract was simply preliminary to an examination of the mill by defendant, and that such examination had been made, and the note thereupon executed, and the written contract surrendered up. A demurrer to this reply was overruled. *Held*, that the reply was good, and that if bad, the demurrer should have been sustained to the answer for the failure to file therewith a copy of the written agreement.—Drook v. Irvine, 41 Ind. 430.

[n] (Sup. 1877)

Where an insufficient answer is pleaded to the whole of a complaint consisting of sufficient and insufficient paragraphs, a demurrer to such answer cannot be so carried back as to sustain it to the insufficient paragraphs of such complaint.—Tracewell v. Peacock, 55 Ind. 572.

[nn] (Sup. 1877)

If a complaint is found to be insufficient on demurrer, the insufficiency of the answer need not be considered.—Bundy v. Hall, 60 Ind. 177.

[o] (Sup. 1880)

A demurrer to an answer to a cross-complaint should have been carried back to the cross-complaint and sustained where it failed to state a cause of action.—Godfrey v. Wilson, 70 Ind. 50.

[oo] (Sup. 1881)

On demurrer to the answer, defendant may attack the complaint on the ground that it does not state facts sufficient to constitute a cause of action.—*Gould v. Seyer*, 75 Ind. 50.

[p] (Sup. 1881)

A demurrer to a paragraph of the reply which is sufficient cannot reach back and be sustained to the answer, some of the paragraphs of which are good, though a demurrer might be correctly sustained as to others.—*Bradford v. Russell*, 79 Ind. 64.

[pp] A bad reply to a bad answer will be held good on demurrer.—(Sup. 1882) *State ex rel. Metsker v. Mills*, 82 Ind. 126; (1882) *Ashley v. Foreman*, 85 Ind. 55; (1893) *Peden v. Cavins*, 134 Ind. 494, 34 N. E. 7, 39 Am. St. Rep. 276.

[q] (Sup. 1882)

A bad answer is a good enough answer to a bad cross-complaint.—*Axtel v. Chase*, 83 Ind. 546.

[qq] (Sup. 1882)

The overruling of demurrers to separate answers addressed severally to each paragraph of the complaint does not reach back so as to call in question on appeal the sufficiency of each paragraph of the complaint.—*Haymond v. Saucer*, 84 Ind. 3.

[r] (Sup. 1882)

A demurrer to a paragraph of an answer brings the sufficiency of the complaint in question only so far as the sufficiency of that paragraph of the answer is concerned.—*Jenkins v. Rice*, 84 Ind. 342.

[rr] (Sup. 1882)

On demurrer to a cross-complaint defendant cannot avail himself of the fact that the complaint was defective.—*Anderson Building Loan Fund & Savings Ass'n v. Thompson*, 88 Ind. 405.

[s] (Sup. 1883)

The common-law rule that a demurrer searches the record cannot prevail in all its rigor under the Code.—*Scheible v. Slagle*, 89 Ind. 323.

[ss] (Sup. 1883)

If the complaint is insufficient, a demurrer to the answer should not be sustained, whether the answer is good or bad.—*Scott v. State*, 89 Ind. 368.

[t] (Sup. 1886)

Where the answer of the defendant is held good on demurrer, a demurrer to the reply will not be carried back to the complaint by the court, of its own motion.—*Gilbert v. Bakes*, 106 Ind. 558, 7 N. E. 257.

[tt] (Sup. 1893)

Where a cross-complaint was bad the overruling of demurrers to certain paragraphs of the answer was not error, as a bad answer is good to a bad complaint.—*Alkire v. Alkire*, 32 N. E. 571, 134 Ind. 350.

[u] (Sup. 1897)

A demurrer to an answer that purports to answer only one paragraph of the complaint cannot be carried back and sustained as a demurrer to the whole complaint.—*State ex rel. Goodman v. Halter*, 47 N. E. 665, 49 N. E. 7, 149 Ind. 292.

[uu] (Sup. 1898)

The right to carry a demurrer to an answer back to and sustain it to the complaint depends entirely on whether the facts stated in the answer as an objection to the complaint and admitted by the plaintiff's demurrer to the answer can be considered as a part of the facts on which the complaint rests.—*McIntosh v. Zaring*, 49 N. E. 164, 150 Ind. 301.

[v] (Sup. 1899)

Where a complaint fails to state a cause of action, it is not error to overrule demurrers to the answers; a bad answer being good enough for a bad complaint.—*Hiatt v. Town of Darlington*, 53 N. E. 825, 152 Ind. 570.

[vv] (Sup. 1900)

A demurrer to an answer in abatement cannot be carried back and sustained to the complaint.—*Goldsmith v. Chipps*, 55 N. E. 855, 154 Ind. 28.

[w] (App. 1905)

Where defendant's answer is held good on demurrer, failure to carry the demurrer back to the complaint is not error.—*Embree v. Emmerson*, 37 Ind. App. 16, 74 N. E. 44, 1110.

[ww] (Sup. 1907)

A demurrer to a reply will be carried back and sustained to an insufficient answer—*Glens Falls Ins. Co. v. Michael*, 167 Ind. 659, 74 N. E. 964, 79 N. E. 905, 8 L. R. A. (N. S.) 708.

[x] (App. 1907)

A bad reply is good enough for a bad answer.—*Ætna Life Ins. Co. v. Bockting*, 39 Ind. App. 586, 79 N. E. 524.

[xx] A bad answer is good enough for a bad complaint.—(App. 1907) *Bonham v. Doyle*, 39 Ind. App. 438, 77 N. E. 859, 79 N. E. 458; (Sup. 1909) *Town of Windfall City v. State ex rel. Wood*, 172 Ind. 302, 88 N. E. 505.

[y] (App. 1909)

A demurrer to an answer for want of facts will search the record and test the sufficiency of the complaint for want of facts to state a cause of action, and, when properly assigned in an appellate court, will be applied to the complaint with the same force as a demurrer to the complaint alone.—*Cobe v. Malloy*, 88 N. E. 620.

[yy] (App. 1909)

A demurrer to an answer will search the record and test the sufficiency of the complaint for want of facts to state a cause of action, although there may be no actual ruling on the demurrer to the answer.—*Neyens v. Flesher*, 88 N. E. 626.

[a] (App. 1909)

An answer to a complaint for materials sold and delivered and labor performed, alleged by its first paragraph pleaded a general denial and in a second paragraph that plaintiff did the work and sold the material under a contract with defendant's husband, and that she in no way authorized him to purchase the material or do the work. To this the reply averred that defendant's husband was her general agent, and by her direction and with her knowledge and consent he built the greenhouse in question on her land. *Held*, that all the facts in the second paragraph of the answer could have been proved under the general denial to the complaint, and that the matters alleged were surplusage, so that the reply, even if a departure, was sufficient as to the answer.—*Colt v. Lawrenceburg Lumber Co.*, 88 N. E. 720.

[az] (Sup. 1910)

A demurrer to a plea in abatement does not search the record and cannot be carried back, and sustained, to the complaint.—*Darnell v. State*, 90 N. E. 769.

[axx] (App. 1910)

In an action on a life policy, where defendant's liability was predicated on extended insurance, the complaint affirmatively showed that the company was organized and transacting business under a certain statute, and the answer alleged that the company had no authority to issue a policy for extended insurance. *Held*, that if the contention was correct the demurrer to the answer should be carried back and sustained to the complaint.—*Federal Life Ins. Co. v. Arnold*, 90 N. E. 493.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 540-548.

See, also, 31 Cyc. pp. 338-343.

§ 218. Hearing and determination on demurrer.

To plea in abatement, see ante, § 111.

[a] (Sup. 1832)

Three pleas in bar were filed, and issue in fact was taken on the first plea. The second was not noticed. There was a replication to the third plea, and demurrer to the replication, and judgment for the plaintiff. *Held*, that the second plea and the issue should be disposed of before the plaintiff could have final judgment.—*Hanna v. Ewing*, 3 Blackf. 34.

[b] (Sup. 1832)

Two pleas were filed to an action, and a demurrer to the first plea was sustained, and final judgment rendered thereon for the plaintiff. *Held*, that the judgment was erroneous, the second plea not being disposed of.—*Patterson v. Salmon*, 3 Blackf. 131.

[c] (Sup. 1832)

The defendant, in replevin, pleaded three pleas in bar. A replication to one of them was demurred to, and the demurrer overruled. *Held*

that, while the other pleas were undisposed of, the plaintiff could not have final judgment.—*Fitch v. Dunn*, 3 Blackf. 142.

[d] (Sup. 1835)

If a declaration on a bastardy bond, setting out the condition and assigning breaches, be demurred to, and the demurrer be not sustained, the judgment on demurrer should be interlocutory only; and the truth of the breaches and amount of the damages should be ascertained. After that, final judgment may be rendered for the penalty, with costs, and execution be awarded for the damages assessed and the costs.—*Trimble v. State ex rel. Hobaugh*, 4 Blackf. 42.

[e] (Sup. 1839)

In a suit against A. and B., the plaintiff, pursuant to the statute, entered a suggestion of "not found" as to B. Afterwards both the defendants appeared and filed a general demurrer to the declaration. *Held*, that the court, on overruling the demurrer in such case, should render judgment against both defendants.—*Tip-ton v. Barron*, 5 Blackf. 154.

[f] (Sup. 1841)

On overruling a demurrer to a declaration on a constable's bond, final judgment ought not to be rendered for the plaintiff without a jury of inquiry.—*Jones v. State ex rel. Lafayette Ins. Co.*, 5 Blackf. 492.

[g] (Sup. 1841)

If a declaration on a constable's bond, setting out the condition of the bond, etc., be demurred to, and the demurrer be overruled, the damages should be assessed by a jury under the statute.—*Graham v. State*, 6 Blackf. 32.

[h] (Sup. 1842)

In debt on a promissory note, the pleas were (1) nil debet; (2) payment and set-off. There were two replications to the second plea, and demurrers to the replications. The demurrers were overruled, and final judgment was entered for the plaintiff. *Held*, that the judgment, the general issue remaining undisposed of, was erroneous.—*Cook v. Brown*, 6 Blackf. 220.

[i] (Sup. 1848)

Where there are several pleas filed and demurred to, and one of the pleas is held valid on demurrer, final judgment must be rendered for the defendant, though the demurrers to the other pleas are sustained.—*Culver v. Smart*, 1 Ind. 65, Smith, 50.

[j] (Sup. 1854)

It is error to proceed to the trial of an issue of fact without disposing of a demurrer.—*Gray v. Cooper*, 5 Ind. 506.

[k] (Sup. 1853)

An answer was in three paragraphs. The plaintiff demurred to the first, whereupon the defendant withdrew the other two; the demurrer being for substance. *Held* no error to enter judgment on sustaining the demurrer, without allowing further answer.—*Mangeot v. Block*, 11 Ind. 244.

[l] (Sup. 1859)

Under the statute, where a demurrer to the answer has been overruled, and a demurrer to the replication sustained, if the plaintiff makes no further reply, final judgment must be rendered for the defendant.—*Wilson v. Ray*, 13 Ind. 1.

[m] (Sup. 1859)

When a demurrer to an answer is sustained, if the defendant does not ask leave to amend, the court may render final judgment against him.—*Giles v. Gullion*, 13 Ind. 487.

[n] (Sup. 1860)

One good paragraph of an answer, admitted by a demurrer, will sustain a judgment, though the general issue has been pleaded and not tried.—*Talbot v. Armstrong*, 14 Ind. 254.

[o] (Sup. 1860)

On overruling a demurrer, our statute does not require the court to expressly order the party to plead over. It is enough that no opposition is made by the court to his pleading over.—*Sage v. Matheny*, 14 Ind. 369.

[p] (Sup. 1860)

A judgment on a trial on an issue of fact raised by answer will not be reversed because a demurrer to the complaint was pending undecided.—*Lasselle v. Wilson*, 14 Ind. 520.

[q] (Sup. 1861)

Where a cause is submitted to the court for trial, there being an issue of law upon demurrer not disposed of, it will be presumed that that issue was decided in the general finding; but it is error to try issues of fact before the jury, when issues of law remain undisposed of.—*Anderson v. Weaver*, 17 Ind. 223.

[r] (Sup. 1862)

In a suit against a husband and wife, the plaintiff demurred to the wife's answer. *Held*, that it was error to go to a trial of the issues of fact before a disposal of this demurrer.—*Waldo v. Richter*, 17 Ind. 634.

[s] (Sup. 1866)

Where a demurrer assigning several causes is sustained, the court cannot be required to specify the ground on which its action is based.—*Nave v. King*, 27 Ind. 356.

[t] (Sup. 1871)

After the submission of a cause, if it be discovered that an issue of law on a demurrer is undisposed of, the submission should be set aside.—*Miles v. Buchanan*, 36 Ind. 490.

[u] (Sup. 1874)

Where a complaint shows that one of the plaintiffs sues by a guardian, and the answer alleges that eight years prior to the filing of the complaint, the plaintiffs, being of full age and competent to contract, made a contract, etc., the court will not presume, on demurrer to answer, that the plaintiff suing by guardian was insane or an infant at the time of making the contract set up in answer.—*Moore v. Kerr*, 46 Ind. 468.

[v] (Sup. 1878)

On sustaining a demurrer to insufficient paragraphs of a reply to certain paragraphs of an answer to a complaint containing both sufficient and insufficient paragraphs, it is error to render a final judgment against plaintiff upon his refusing to reply further, thereby leaving untried issues formed by a general denial and an answer of payment.—*Seits v. Sinel*, 62 Ind. 253.

[w] (Sup. 1879)

After a defendant has withdrawn his general denial, after excepting to the court's ruling in sustaining a demurrer for insufficiency to the affirmative paragraphs of his answer, the court may reconsider its previous action and overrule the demurrer, over defendant's exception.—*Ather-ton v. Sugar Creek & P. Turnpike Co.*, 67 Ind. 334.

[x] (Sup. 1885)

The interposition of a defective answer, to which a demurrer is sustained, is a failure to plead over after the overruling of a demurrer to the original answer, within the meaning of Rev. St. 1881, § 345, and the case will thereafter proceed as though no answer had been interposed.—*McKinney v. State*, 101 Ind. 355.

[y] (Sup. 1891)

A trial court may of its own motion during the progress of a case reconsider and reverse a former ruling on a demurrer made by it therein.—*First Nat. Bank of Huntington v. Williams*, 126 Ind. 423, 26 N. E. 75.

[yy] (App. 1892)

A judgment rendered on a demurrer to plaintiff's amended complaint, in the words "the court renders judgment for the defendant," etc., is sufficient in form.—*City of La Porte v. Organ*, 5 Ind. App. 369, 32 N. E. 342.

[z] (App. 1894)

Rev. St. 1894, § 379, providing for liberality in the construction of pleadings, does not apply to a demurrer.—*Merrill v. Pepperdine*, 9 Ind. App. 416, 36 N. E. 921.

[zz] (App. 1895)

On overruling a demurrer, it is error to enter final judgment against demurrant without giving him an opportunity to plead over.—*Chicago & S. E. Ry. Co. v. Adams*, 12 Ind. App. 317, 39 N. E. 877.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 549-566; 12 CENT. DIG. Corp. § 2044.

See, also, 31 Cyc. pp. 345, 346.

§ 219. Operation and effect of decision on demurrer.

As res judicata, see JUDGMENT, §§ 572, 656.

Decision of appellate court as authority in lower court, see COURTS, § 91.

Objections to rulings on demurrer and waiver thereof, see post, §§ 415-418.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 567-583.

See, also, 31 Cyc. pp. 346-357.

§ 221. — Overruling demurrer.

Objections to answer in proceedings for distribution of decedent's estate, see **EXECUTORS AND ADMINISTRATORS**, § 314.

[a] (Sup. 1896)

The overruling of a demurrer to an answer, which relies on the invalidity of an ordinance, is in effect a holding that the ordinance was void.—*City of Shelbyville v. Cleveland, C. & St. L. Ry. Co.*, 44 N. E. 929, 146 Ind. 66.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. § 567.

See, also, 31 Cyc. p. 346.

§ 222. — Pleading over after demurrer overruled.

[a] (Sup. 1894)

A party demurring to a complaint under Rev. St. 1881, § 396 (Rev. St. 1894, § 399), seeking relief from a judgment, is not, on its being overruled, precluded thereby, but may be allowed to file counter affidavits.—*Suin v. Deschamp*, 138 Ind. 502, 38 N. E. 176.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 570-574.

See, also, 31 Cyc. p. 346.

§ 223. — Sustaining demurrer.

[a] (Sup. 1880)

An answer cannot be compelled to a pleading, a demurrer to which appears on the record to stand sustained.—*Middleton v. Miller*, 14 Ind. 537.

[b] (Sup. 1869)

It is a sufficient reason for suppressing portions of a deposition that such portions only tend to prove matters set up in a special answer and cross-complaint, to which a demurrer has properly been sustained.—*Paine v. Lake Erie & L. R. Co.*, 31 Ind. 283.

[c] (Sup. 1873)

Evidence offered in support of an answer which has been held bad on demurrer should be rejected.—*Sim v. Hurst*, 44 Ind. 579.

[d] (Sup. 1891)

Where a paragraph of the reply is subject to demurrer on the ground that the matters alleged therein are provable under general denial in the reply, the ruling of the court in sustaining such a demurrer does not become erroneous because of the subsequent withdrawal of the general denial.—*Baltes v. Bass Foundry & Machine Works*, 28 N. E. 319, 129 Ind. 185.

[e] (App. 1901)

Where neither paragraph of a complaint states facts sufficient to constitute a cause of action, and the court sustained the demurrer to each paragraph without designating the ground thereof, an objection that it was sustained as to both causes, and therefore that if either paragraph would withstand a demurrer for either cause the judgment must be reversed, was untenable.—*Sherfey & Kidd Co. v. Board of*

Com'rs of Clay County, 59 N. E. 186, 26 Ind. App. 66.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 568.

See, also, 31 Cyc. p. 346.

§ 224. — Sustaining demurrer to part of pleading.

[a] (Sup. 1828)

If there be two pleas, each to the whole cause of action, and one on demurrer be adjudged good, the plaintiff can proceed no further.—*Cutler v. Cox*, 2 Blackf. 178, 18 Am. Dec. 152.

[b] (App. 1898)

A judgment cannot be rendered against a defendant on a count to which his demurrer has been sustained.—*Peninsular Stove Co. v. Ellis*, 51 N. E. 105, 20 Ind. App. 491.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 568.

See, also, 31 Cyc. p. 348.

§ 225. — Amendment or further pleading after demurrer sustained.

Affidavit in supplementary proceedings, see **EXECUTION**, § 377.

Demurrer to amended pleading, see post, § 254.
Waiver of error in ruling by amendment, see post, § 417.

[a] (Sup. 1861)

A demurrer was sustained to a complaint as claiming an amount beyond the jurisdiction of the court. Afterwards an act was passed enlarging the jurisdiction. *Held*, that an amendment of the ad damnum was properly allowed.—*Dick v. Niles*, 17 Ind. 239.

[b] (Sup. 1871)

Code, § 53 (2 Gav. & H. Rev. St. p. 81), which provides for the amendment of pleading after a demurrer has been sustained, seems not to be discretionary, but imperative, and, in the absence of sham or frivolous pleading, a party should be allowed to amend.—*Ewing v. Patterson*, 35 Ind. 326.

[c] (Sup. 1880)

Where a demurrer is sustained to a complaint, a "further and second paragraph" of the complaint filed by way of amendment must be treated as an independent pleading, and not as supplementary to the original complaint.—*Francis v. Davis*, 69 Ind. 452.

[d] (Sup. 1881)

A complaint to which a demurrer has been sustained at one term of court cannot be treated as an amended complaint by simply filing exhibits at the next term without also refiling the complaint with the exhibits.—*Heizer v. Kelly*, 73 Ind. 582.

[e] (Sup. 1881)

Plaintiff cannot be allowed to file an amended complaint, after a decision in favor of defendant in an action to set aside a default judgment, on his demurrer to the complaint; the

evidence being agreed to on the submission thereof.—*Slagle v. Bodmer*, 75 Ind. 330.

[f] (App. 1896)

Where a cause of action *ex contractu* has been reversed on appeal, with direction to sustain a demurrer thereto, it is not error to refuse to allow plaintiff to file an amended complaint in tort against one defendant and dismiss the action as to the others, under Rev. St. 1894, § 345 (Rev. St. 1881, § 342), which provides that a party affected by a ruling on demurrer may plead over or amend upon such terms as the court may direct.—*Thomas v. Hawkins*, 13 Ind. App. 318, 40 N. E. 813.

Ordinarily under Rev. St. 1894, § 397, the right to amend the pleading on sustaining a demurrer thereto is absolute, but does not extend to setting up a new cause of action.—*Id.*

[g] (App. 1906)

After the sustaining of a demurrer to a counterclaim, it was not an abuse of discretion to deny to defendants permission to file an amended counterclaim, the legal effect of which was identical with the former; defendants being able to gain any benefits accruing to them under the facts pleaded by excepting to the ruling sustaining the demurrer and standing on the same.—*Siebe v. Heilman Mach. Works*, 77 N. E. 300, 38 Ind. App. 37.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 575-583.

See, also, 31 Cyc. pp. 351-358.

§ 226. — Effect on subsequent pleading.

[a] (Sup. 1874)

A demurrer, filed to a complaint which is subsequently amended, passes out of the record with the original complaint, and is not a demurrer to the amended complaint.—*Toledo, W. & W. Ry. Co. v. Rogers*, 48 Ind. 427.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 569.

See, also, 31 Cyc. pp. 351-358.

§ 227. Failure to demur.

[a] (Sup. 1879)

Where an insufficient answer was filed, the fact that it was not demurred to, and that on trial its allegations were established by evidence, did not entitle defendant to judgment.—*McCloskey v. Indianapolis Manufacturers' & Carpenters' Union*, 67 Ind. 86, 33 Am. Rep. 76.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 402.

See, also, 31 Cyc. pp. 275, 276.

§ 228. Exceptions to pleadings.

Judgment on exceptions as bar to another action, see JUDGMENT, § 572.

To supplemental pleadings, see post, § 284.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 584-590.

See, also, 31 Cyc. pp. 270, 271.

VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

Allowance of amendment as grounds for new trial, see NEW TRIAL, § 18.

Amendment after demurrer sustained, see ante, § 225.

Amendment as to parties, see PARTIES, § 95.

Amendment in lower court pending appeal, see APPEAL AND ERROR, § 440.

Amendment of pleadings in original case in proceedings to review judgment, see JUDGMENT, § 335.

Amendment of written instruments filed with pleading, see post, § 308.

Amendment to show substitution of plaintiff's administrator as party, see ABATEMENT AND REVIVAL, § 75.

Compulsory amendment, see post, § 367.

Effect of amendment on admissibility of depositions, see DEPOSITIONS, § 96.

Effect of amendment on award of costs, see COSTS, § 51.

Effect of amendment on limitation of actions, see LIMITATION OF ACTIONS, § 127.

Ground for continuance, see CONTINUANCE, §§ 14, 30.

In appellate court, see APPEAL AND ERROR, §§ 888, 889, 897.

Incorporation in findings by court of rulings in denying or permitting amendments, see TRIAL, § 393.

In equity, see EQUITY, §§ 266, 268-271, 278-283, 293, 296.

In justices' courts, see JUSTICES OF THE PEACE, § 96.

In lower court after remand by appellate court, see APPEAL AND ERROR, § 1201.

Making pleading more definite and certain, see post, § 367.

Necessity of annexing exhibits to amended pleading, see post, § 307.

Objections to amendments and rulings relating thereto, see post, § 420.

Of indictment or information, see INDICTMENT AND INFORMATION, §§ 155-161.

On trial de novo on appeal from justice's court, see JUSTICES OF THE PEACE, § 174.

Presumptions on appeal or writ of error, see APPEAL AND ERROR, § 918.

Record for purpose of review, see APPEAL AND ERROR, §§ 499, 518.

Refiling pleading after amendment, see post, § 332.

Reswearing jury after amendment, see JURY, § 148.

Review of decisions, see APPEAL AND ERROR, §§ 87, 193, 255, 681, 959, 1041.

Striking out amended or supplemental pleading, see post, § 356.

Waiver of objections to rulings on demurrer by amendment, see post, § 417.

In particular actions or proceedings.

See—

Against executors de son tort. EXECUTORS AND ADMINISTRATORS, § 544.

Amended and supplemental affidavits in attachment. **ATTACHMENT**, § 122.
 Ascertainment and entry of record of unrecorded highway. **HIGHWAYS**, § 15.
 ASSUMPSIT, ACTION OF, § 22.
 Bail bonds. **BAIL**, §§ 33, 89.
 Bastardy proceedings. **BASTARDS**, § 51.
BILLS AND NOTES, § 487.
 Bonds. **BONDS**, § 127.
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 Confirmation or trial of tax title. **TAXATION**, § 809.
DEATH, § 55.
DIVORCE, § 104.
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 Enforcement of mechanic's lien. **MECHANICS' LIENS**, § 276.
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 Of highway. **HIGHWAYS**, § 29.
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INJUNCTION, § 121.
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 Insurance policies. **INSURANCE**, § 643.
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 Recovery of interest. **INTEREST**, § 65.
REPLEVIN, § 68.
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TRESPASS, § 39.
 Trial de novo on appeal from justice's court. **JUSTICES OF THE PEACE**, § 174.

§ 230. Statutory provisions.

Retroactive operation of statutes, see **STATUTES**, § 267.

[a] (Sup. 1857)

The phrase "at any time," in 2 Rev. St. p. 48, § 90, at which a court may exercise its discretion in allowing amendments therein set forth, means at any time before the jury retire to consult upon their verdict.—*Trees v. Eakin*, 9 Ind. 354.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 592.

See, also, 31 Cyc. pp. 361, 362.

§ 232. Amendment on court's own motion.

[a] (App. 1908)

Where allegations in a pleading are so indefinite or so uncertain that the precise nature

of the charge is not apparent, the court may require the pleading to be made more definite and certain by amendments thereto.—*Grass v. Ft. Wayne & Wabash Valley Traction Co.*, 42 Ind. App. 395, 81 N. E. 514.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 593.

See, also, 31 Cyc. pp. 360, 361.

§ 233. Leave of court to amend.

Grant of leave as constituting amendment, see post, § 240.

In action to enforce penalty for violation of municipal ordinance, see **MUNICIPAL CORPORATIONS**, § 633.

Leave of court to file supplemental pleading, see post, § 276.

Motion to strike out pleading filed without leave of court, see post, § 355.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 594, 599–635.

See, also, 31 Cyc. pp. 367–390.

§ 234. — Necessity.

Amendment after demurrer sustained, see ante, § 225.

[a] (Sup. 1856)

Amendments of pleadings can only be properly made by leave of court; and, if made without leave, they may be disregarded on trial.—*Hyatt v. Kirk*, 8 Ind. 178.

[b] (Sup. 1865)

A plaintiff may amend his petition without leave at any time before the answer is filed.—*Farrington v. Hawkins*, 24 Ind. 253.

[c] (Sup. 1833)

A complaint on a note, and to foreclose a mortgage securing it, may be amended at any time before trial, without leave, by withdrawing the portion relating to the mortgage.—*Sayers v. First Nat. Bank of Crawfordsville*, 89 Ind. 230.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 504, 509.

See, also, 31 Cyc. pp. 387, 388.

§ 235. — Authority of court in general.

[a] (Sup. 1896)

Where the court has acquired jurisdiction over the defendant, it has jurisdiction to allow an amended petition to be filed, though the original petition did not state a cause of action.—*Poundstone v. Baldwin*, 145 Ind. 139, 44 N. E. 191.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 600.

See, also, 31 Cyc. p. 367.

§ 236. — Discretion of court.

Review of discretion, see **APPEAL AND ERROR**, § 959.

Statutory provision, see *ante*, § 230.

[a] (*Sup.* 1858)

The court may permit the parties to perfect their pleadings at any time upon the issues formed before the submission of the case to the jury.—*Kerstetter v. Raymond*, 10 Ind. 199.

[aa] It is within the discretion of the court to allow amendments after the evidence has been heard.—(*Sup.* 1858) *Shaw v. Binkard*, 10 Ind. 227; (1892) *Wabash & W. Ry. Co. v. Morgan*, 132 Ind. 430, 31 N. E. 661, 32 N. E. 85.

[aaa] Amendments to the pleadings, after the case is at issue and set for trial, are, under Rev. St. 1881, § 391, within the discretion of the court.—(*Super.* 1872) *Bennett v. Baker*, Wils. 158; (*Sup.* 1883) *Dewey v. State ex rel. McCollum*, 91 Ind. 173; (1884) *Rogers v. State ex rel. Grimes*, 99 Ind. 218.

[b] Allowance or refusal of amendments to the pleadings is in the discretion of the court.—(*Sup.* 1873) *Musselman v. Musselman*, 44 Ind. 106; (1882) *Shropshire v. Kennedy*, 84 Ind. 111; (*App.* 1893) *Peigh v. Huffman*, 6 Ind. App. 638, 34 N. E. 32; (1897) *Bozarth v. McGillicuddy*, 47 N. E. 397, 48 N. E. 1042, 19 Ind. App. 26.

[c] (*Sup.* 1875)

The granting of leave to amend pleadings after the issues have been closed and before trial, and on the trial, is very much within the sound legal discretion of the lower courts, and, where the amendment makes a new issue or adds a new cause of action or ground of defense, should only be granted in a proper case and upon good cause shown by affidavit.—*Burr v. Mendenhall*, 49 Ind. 496.

[d] (*Sup.* 1879)

After a cause has been submitted to the court for trial upon the original paragraphs of the complaint, and after evidence is heard; it is within the discretion of the court to allow plaintiff to amend by filing additional paragraphs of the complaint in order to avoid variance.—*Leib v. Butterick*, 68 Ind. 199.

[dd] (*Sup.* 1879)

In an action for breach of contract it is within the discretion of the court to permit plaintiff to amend his complaint after the trial has commenced by inserting therein an allegation that he has performed the contract on his part.—*Child v. Swain*, 69 Ind. 230.

Under 2 Rev. St. 1876, p. 80, § 94, it is within the discretion of the court to allow a plaintiff to amend his complaint after the trial has begun, or even after it has closed; and the adverse party cannot be heard in the supreme court to complain of the action of the trial court in granting such leave to make such

amendment, where the record fails to show that such party had proved to the satisfaction of the court at the time that he was misled by such amendment, and in what respect he had been misled.—*Id.*

[e] (*Sup.* 1882)

One's right to file additional answers after the issues have been closed is not absolute, but within the discretion of the court.—*Hoffman v. Rothenberger*, 82 Ind. 474.

[ee] (*Sup.* 1882)

A plaintiff may, in the lower court's discretion, be permitted to file an additional paragraph to his complaint after the granting of a new trial.—*Burns v. Barenfield*, 84 Ind. 43.

[eee] (*Sup.* 1887)

Under Rev. St. 1881, § 396, permitting the correction of mistakes in names or descriptions in the discretion of the court, it is not error for the court, over objection, to permit a defendant, after the evidence in chief has been heard, to amend his answer by changing the word "north" to "south" in a description therein.—*Reed v. Cheney*, 111 Ind. 387, 12 N. E. 717.

[f] (*Sup.* 1887)

In a suit to foreclose a mortgage commenced in March, 1883, the decree of foreclosure, entered upon default, was afterwards set aside, and at the March term, 1884, appellant filed an answer to which a reply in denial was filed. After tendering another answer, the appellant on January 2, 1885, being the December term, 1884, tendered a third answer, accompanied by the affidavit of appellant that the notes in suit had been altered, of which fact she had no knowledge until the preceding June term, when her attention was called to the fact by her attorney. At the March term, 1885, one of her attorneys filed an affidavit that he regarded the alteration as material, and had intended to call appellant's attention to it, but forgot to do so during the March term, 1884, by reason of sickness rendering him unable to attend to business; that he again forgot at the June term, 1884, because of sickness in his family; and that his assistant counsel was unfamiliar with the case. *Held*, that the court did not abuse its discretion in refusing to permit such answer to be filed.—*Gardner v. Case*, 111 Ind. 494, 13 N. E. 36.

[ff] Permitting the filing of a new paragraph to a complaint after the jury is sworn and trial begun, where defendant does not request delay, and it does not appear how he was injured, is no cause of reversal, such amendment being within the sound discretion of the court.—(*Sup.* 1888) *Grand Rapids & I. R. Co. v. Ellison*, 18 N. E. 507; (1892) *Adams v. Main*, 3 Ind. App. 232, 29 N. E. 792, 50 Am. St. Rep. 266.

[g] (*Sup.* 1889)

Under Rev. St. 1881, § 391, the granting of permission to file an amended complaint is within the discretion of the court; and where

the record shows no abuse of this discretion there is no error.—*Grand Rapids & I. R. Co. v. Ellison*, 117 Ind. 234, 20 N. E. 135.

[g] (Sup. 1889)

It is in the discretion of the court to permit an amendment of the complaint, after the cause has been submitted on demurrer.—*Miller v. Burton*, 121 Ind. 224, 23 N. E. 84.

[h] (Sup. 1889)

In a suit on a note secured by mortgage, the court did not abuse its discretion in allowing an amendment of the complaint after the cause had been submitted to it for decision, where the amendment was merely the insertion of the words "for their joint use and benefit," after the word "dollars," in the allegation that defendants borrowed of plaintiff \$1,000.—*Jenne v. Burt*, 22 N. E. 256, 121 Ind. 273.

[i] (Sup. 1890)

Where defendant appears after service by publication, the allowance of an amendment of the complaint, setting forth substantially the same facts embraced in the original pleading, and containing no substitution of an independent transaction, will not be disturbed on appeal, where there is no abuse of discretion.—*Nysewander v. Lowman*, 124 Ind. 584, 24 N. E. 355.

Where defendant enters his appearance in a cause in which service was made by publication, the court is thereby given full jurisdiction, so that it is within the discretion of the court to permit the filing of an amended complaint; the complaint as amended relating to the transaction and property embraced in the original pleading.—*Id.*

[ii] (Sup. 1890)

After a demurrer to the evidence in an action for personal injuries had been submitted, and the jury discharged, the court permitted an amendment of the complaint by the insertion of a negative allegation of contributory negligence. *Held*, that the action of the court was proper under Rev. St. 1881, § 396, providing that the court may at any time in its discretion, for the furtherance of justice, allow an amendment which does not substantially change the claim or defense.—*Hartford City Natural Gas & Oil Co. v. Love*, 125 Ind. 275, 25 N. E. 346.

[j] (App. 1891)

Permitting amendments during trial is within the court's discretion.—*Sandford Tool & Fork Co. v. Mullen*, 27 N. E. 448, 1 Ind. App. 204.

[k] (App. 1894)

The action of the court in permitting the filing on its own suggestion of an additional pleading during the trial is discretionary.—*Warden v. Nolan*, 10 Ind. App. 334, 37 N. E. 821.

[l] (App. 1898)

On defendants' answer in replevin, which alleged that defendants did not detain plain-

tiffs' goods, and which was the only answer filed, was the indorsement, "General denial filed." In the opening statement and in the instructions the answer was described as a general denial; and, during the trial, plaintiff asked for several instructions which were not necessary unless the answer was a general denial. *Held*, that under Burns' Rev. St. 1894, §§ 304-309 (Horner's Rev. St. 1897, §§ 391-396), providing that no variance shall be material unless it has misled the adverse party to his prejudice, and that the court may at any time direct any material allegation to be inserted which does not substantially change the claim or defense, it was within the discretion of the court to permit the answer to be amended upon the trial by the insertion of a general denial.—*Smith & Stoughton Corp. v. Byers*, 49 N. E. 177, 20 Ind. App. 51.

[m] (App. 1900)

In replevin the evidence showed that the plaintiff was represented by counsel in a former attachment suit in which he claimed the same property, and that the judgment in such suit was against the nominal plaintiffs, who, in reality, represented the present plaintiff. The trial court allowed the defendant to set up such facts in an additional paragraph in his answer after the close of the evidence. *Held*, that the action of the trial court in allowing such amendment was not an abuse of discretion, nor prejudicial to plaintiff, as the facts could be shown under the general denial.—*Case v. Moorman*, 58 N. E. 85, 25 Ind. App. 293.

[n] (Sup. 1904)

In an action by a parent for the wrongful death of his infant son, in which the complaint alleges the relationship, that the child was 11 years old, healthy and strong, that plaintiff was entitled to his services, care, and custody, and that he was killed by the defendant's negligence, to the damage of plaintiff in the sum of \$10,000, it is not an abuse of discretion (under Burns' Ann. St. 1901, § 397, providing that amendments after answer shall be by leave of court, and section 399, providing that the court may at any time, in its discretion, direct any material allegation to be inserted to conform the pleadings to the facts proved, when the amendment does not substantially change the claim) to permit an amendment, after argument begun, alleging that, by reason of the death of the child, plaintiff was deprived of its services from the time of its death until it would have arrived at 21 years, which would have been of the value of \$10,000; the evidence fully authorizing the averment, and no further evidence being given under it.—*Cleveland, C., C. & St. L. Ry. Co. v. Miles*, 70 N. E. 985, 162 Ind. 646.

[o] (App. 1905)

It is an abuse of discretion to refuse leave to file a paragraph of the answer during the trial on the day after defendant ascertained the facts thereof, using proper diligence.—

Home Ins. Co. of New York v. Overturf, 74 N. E. 47, 35 Ind. App. 361.

[p] (Sup. 1907)

In an action by an employé against a bridge company for injuries received, while helping shear a steel plate, by the falling of a tier of angle irons improperly piled near by, it was not an abuse of discretion conferred by the express provisions of Burns' Ann. St. 1901. § 399, to permit him to amend his complaint so as to conform to proof that a defect in the shears, which rendered it necessary to tilt the plate upward and downward, was on the upper side instead of the lower, since the amendment created no change in the issues, and it appeared that the irons did not fall by being struck by the tilting of the plate.—New Castle Bridge Co. v. Doty, 168 Ind. 259, 79 N. E. 485, transferred from appellate court 37 Ind. App. 84, 76 N. E. 557.

[q] (App. 1908)

The trial court has the statutory right, under Burns' Ann. St. 1908, § 403, to permit plaintiff to amend the complaint after the jury is sworn to try the cause.—Miller v. State ex rel. Hill, 42 Ind. App. 630, 86 N. E. 493.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 601.

See, also, 31 Cyc. pp. 368-373.

§ 237. — Amendment to conform to proofs.

Discretion of court, see ante, § 236.

Filing amended complaint, see post, § 332.

In action for causing death, see DEATH, § 55.

Waiver of objections, see post, § 420.

[a] (Sup. 1849)

A declaration upon a note for \$388, the note offered in evidence being for \$308, may be amended at the trial, under Rev. St. 1843, p. 715, § 240.—Nimmon v. Worthington, 1 Ind. 376, Smith, 226.

[b] (Sup. 1858)

Where damages in assumpsit were laid large enough to cover the debt, and interest up to the writ, but not to verdict, the plaintiff may, under our practice, amend, though he could not in the court above.—Billingsley v. Dean, 11 Ind. 331.

[c] (Sup. 1862)

Variances between instruments sued on and those offered in evidence, where the defendant will not be prejudiced thereby, may be amended on the trial.—Perdue v. Aldridge, 19 Ind. 290.

[d] (Sup. 1863)

Where there is a variance between the instrument sued upon, as it is set forth in the complaint and as it proved on the trial, the complaint is amendable, and at the hearing on the appeal will be taken to have been amended.—Hobbs v. Cowden, 20 Ind. 310.

[e] (Sup. 1863)

After a finding by the court for the plaintiff, an amendment was allowed to make the complaint correspond with the evidence in regard to the time the note sued on was delivered, which was after its date. *Held*, that the amendment was permitted by sections 94-99 of the Code, and should be regarded on appeal as relating back to the time the evidence was given.—Numbers v. Bowser, 29 Ind. 491.

[f] (Sup. 1869)

Where there is an immaterial variance between a copy of a contract filed with the complaint and a copy of the same contract admitted in evidence, the copy may be amended on the trial.—Blossom v. Ball, 32 Ind. 115.

[g] (Sup. 1873)

In an action to recover money alleged to have been received by defendant for real estate sold by him as agent for plaintiff, an error in the complaint in the description of the land sold, not shown to have misled the defendant, may properly be corrected on motion when disclosed by the evidence.—Ferguson v. Ramsey, 41 Ind. 511.

[h] (Sup. 1874)

Where the facts in evidence support some other cause of action than that alleged in the complaint, a motion to amend the complaint "to correspond with the facts" cannot be allowed.—Maxwell v. Day, 45 Ind. 509.

[i] (Sup. 1875)

In an action on a note in Indiana, defendant answered that he was a resident of the District of Columbia, and by the law of that District the action was barred by the statute of limitations, setting out the statute. The statute offered in evidence was a statute of Maryland, adopted by an act of congress, and made applicable to that part of the District of Columbia where the defendant resided. The court excluded the evidence on the ground of variance. *Held*, that defendant should have been allowed to amend, so as to avoid the variance, on his request.—Wright v. Johnson, 50 Ind. 454.

[j] (Sup. 1878)

2 Rev. St. 1876, p. 80, § 94, provides that where a variance between the allegations in a pleading and the proof has misled the adverse party to his prejudice in maintaining his action or defense upon the merits, and it is shown in what respect such party has been misled, the court may order the pleading to be amended upon such terms as may be just. Section 95 declares that, where the variance is not material, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs. Section 96 provides that when, however, the allegation of the claim or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance within sections 94 and 95, but a failure

of proof. *Held*, that an amendment to obviate a failure of proof is not authorized by such statute.—*Cincinnati, H. & D. R. Co. v. Bunnell*, 61 Ind. 183.

[k] (Sup. 1884)

Where, in a suit for specific performance of a contract for the conveyance of land, plaintiff gave positive evidence of an agreement to the effect that when he paid the consideration defendant should make a deed, the complaint failing to allege such an agreement might have been amended on the trial so as to correspond with the proof, for the cause of action would not thereby have been materially changed.—*Drum v. Stevens*, 94 Ind. 181.

[l] (Sup. 1884)

Plaintiff may be allowed to amend his complaint to conform to the evidence where defendant was not misled by the original pleading.—*Smith v. Flack*, 95 Ind. 116.

[m] (App. 1891)

In an action for false imprisonment it is not error to allow plaintiff to amend his complaint to conform to the evidence, when the only change therein relates to the crime on which the alleged imprisonment was based.—*Sandford Tool & Fork Co. v. Mullen*, 1 Ind. App. 204, 27 N. E. 448.

[n] (App. 1891)

Where, in an action of trespass, evidence of acts of trespass committed after the filing of the complaint is offered, and objected to by defendant, and the objection sustained, but afterwards withdrawn, and the evidence admitted, it is not error for the court to permit plaintiff to amend his complaint so as to conform to the evidence.—*Lowrey v. Reef*, 1 Ind. App. 244, 27 N. E. 626.

[o] (App. 1893)

Under Rev. St. 1881, §§ 391, 392, providing that no variance shall be material unless it has misled the adverse party to his prejudice, and that, when the variance is not material, the court may direct the facts to be found according to the evidence, or may order an immediate amendment without costs, it is error for the court, in an action to recover damages for the obstruction of a licensed "tile" ditch, after refusing to allow plaintiffs to amend their complaint by striking out the word "tile" to conform to the proof, to charge that plaintiffs were not entitled to recover unless defendants licensed and obstructed a "tile" ditch.—*Johnson v. McNabb*, 34 N. E. 667, 7 Ind. App. 393.

[p] (App. 1902)

Under Burns' Rev. St. 1901, § 399, authorizing the court, in its discretion, and upon such terms as it may deem proper, for furtherance of justice, to direct any material allegation to be inserted, etc., in order to conform the pleadings to the facts proved, if such change does not substantially change the cause of action, where the evidence in an action for false imprisonment showed that plaintiff was impris-

oned without her consent, but the complaint failed to allege such want of consent, there was no error in allowing the words "without her consent" to be inserted in the complaint after a demurrer thereto had been overruled.—*Efroymson v. Smith*, 63 N. E. 328, 29 Ind. App. 451.

[q] (Sup. 1904)

Where a variance between an allegation in a pleading and the proof is claimed, it must be shown in what respect the adverse party has been misled thereby, so that the court may order the pleading amended on such terms as it thinks just in accordance with Burns' Ann. St. 1901, § 395.—*Hartwell Bros. v. William E. Peck & Co.*, 163 Ind. 357, 71 N. E. 958.

[r] (App. 1907)

A defendant may be permitted to amend its answer after trial so as to have such answer conform to the proof.—*Indianapolis Traction & Terminal Co. v. Formes*, 40 Ind. App. 202, 80 N. E. 872.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 603-619.

See, also, 31 Cyc. p. 371.

§ 238. — Application for leave, and determination thereon in general.

[a] (Sup. 1856)

A party who moves for leave to amend a declaration is not required to present the specific ground on which the motion is based, where the amendments show on their face that they are essential to a full investigation of the cause.—*Ostrander v. Clark*, 8 Ind. 211.

[b] (Sup. 1881)

Where plaintiff was granted leave to amend a complaint generally, he was entitled to change the existing paragraphs or add new ones or both.—*State ex rel. Wright v. Brown*, 80 Ind. 425.

[c] (App. 1909)

Under Act April 23, 1903, § 2 (Acts 1903, p. 339, c. 193), requiring motions to insert new matter or to strike parts of a pleading, etc., to be in writing, an oral motion to amend a complaint by inserting words is properly overruled.—*Nichols v. Central Trust Co.*, 43 Ind. App. 64, 86 N. E. 878.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 602, 620-625.

See, also, 31 Cyc. pp. 373-386.

§ 239. — Conditions on granting leave.

[a] (Sup. 1877)

Under 2 Rev. St. 1876, p. 82, providing that the court may, in its discretion, allow a party to file his pleadings after the time limited therefor, the court may not compel a party who is given leave to file additional pleadings after the issues have been perfected at a prior term to pay the costs that have accrued, before requiring issue to be joined on such additional pleadings.—*Duncan v. Cravens*, 55 Ind. 525.

[b] (App. 1903)

Under Burns' Rev. St. 1901, § 397, providing that a party amending shall pay the costs of the leave to amend, and that, where the trial is not delayed, no other costs shall be taxed, a motion that the amending party be taxed all costs prior to the amendment is too broad.—McCoy v. Board of Trustees of Town of Cloverdale, 67 N. E. 1007, 31 Ind. App. 331.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 626-635.

See, also, 31 Cyc. pp. 377-384.

§ 240. Mode of making amendment.

[a] (Sup. 1881)

Where leave was given to amend a complaint and the amendment was acted on as though it had been made, it ought to be regarded as having been made at the time leave was granted by the court, and the court did not err in permitting it to be done when the omission was discovered after trial.—Hellyer v. Bowser, 76 Ind. 35.

[b] (Sup. 1881)

A pleading may be amended by filing a separate paper, and then the two together will constitute the amended complaint.—Eigenman v. Rockport Building & Loan Ass'n, 79 Ind. 41.

[c] (Sup. 1888)

An amendment effected by filing a separate statement that certain words in the complaint are to be stricken out, and certain others inserted, having been allowed by the court, and treated as valid by defendant, will not be ground for reversal on appeal.—Keister v. Myers, 115 Ind. 312, 17 N. E. 161.

[d] (Sup. 1906)

Where, in an action against a carrier, neither the bill of lading nor a copy thereof was filed, and after demurrer on that ground leave was given plaintiff to attach a copy of the bill, the granting of such leave, which was not taken advantage of, did not amount to an amendment.—Chicago, I. & L. Ry. Co. v. Reyman, 166 Ind. 278, 76 N. E. 970.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 636-641.

See, also, 31 Cyc. pp. 388-389.

§ 241. Form and sufficiency of amended pleading in general.

[a] (Sup. 1859)

It is not error to refuse an amendment which would not aid the applicant's case.—McDaniel v. Graves, 12 Ind. 465.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 642.

§ 242. Amendment of declaration, complaint, petition, or statement.

Necessity of annexing exhibits to amended complaint, see post, § 307.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 608, 611, 616-618, 643-760, 820-822; 29 CENT. DIG. Interest, § 153.

See, also, 31 Cyc. pp. 393-455.

§ 243. — Defects amendable in general.

[a] (Sup. 1847)

Where there is a misjoinder of counts, the defect may be cured by amendment.—Weirick v. Hoover, 8 Blackf. 379.

[b] (App. 1907)

A complaint may be amended where the cause of action is not changed and the defendant is not deprived of any defense which he had to the original action.—Fleming v. City of Anderson, 39 Ind. App. 343, 76 N. E. 266.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 643-651, 820-822.

See, also, 31 Cyc. pp. 434, 435.

§ 244. — Necessity for amendment.

[a] (Sup. 1864)

An amendment of a complaint by leave of the court, pending a trial, if the amendment added nothing to the material averments of the complaint, could not be a fatal error, nor, in such case, could the failure to reswear the jury after such amendment.—Crassen v. Swoveland, 22 Ind. 427.

[b] (Sup. 1876)

While a rule to answer a good complaint was pending, the plaintiffs asked leave to file a second paragraph which did not differ materially from that on file. *Held*, that the refusal of leave to file such additional paragraph was not error.—Gardner v. Jaques, 54 Ind. 566.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 652.

§ 245. — Condition of cause, and time for amendment.

Amendment of plea or answer, see post, § 258. Amendment of replication or reply, see post, § 269.

Amendment to conform to proofs, see ante, § 237.

Conditions on granting leave to amend after extending time for trial, see ante, § 239.

Discretion of court, see ante, § 236.

Filing of supplemental complaint, see post, § 279.

[a] (Sup. 1856)

The declaration in assumpsit contained a count on a special contract for the sale of land, another that defendant was indebted to plaintiff in a certain sum by virtue of an award made pursuant to a submission entered into between the parties and a common count for lands sold. Issues were made under Code of 1843 and trial under Code of 1852. Plain-

tiff proved the award and execution of the submission under seal. He offered the submission in evidence, and an objection was sustained on the ground that, being a sealed instrument, it was not applicable to the form of action. He then moved to amend his declaration by striking out the word "assumpsit." *Held*, that the amendment was not allowable under the old system because leave was not asked until after the commencement of the trial.—*Larsh v. Estep*, 8 Ind. 287.

[b] (Sup. 1857)

Where the plaintiffs were ordered to file an amendment within a certain time, but did not comply therewith, it was *held* that, as there were in the practice no rule days, no default could be entered for failing to file the amendment within the prescribed time, no exceptions having been taken, or motion made to strike off the amendment, but the court would permit it to be filed afterwards, and regard the question of time as waived.—*Smith v. Groverman*, 9 Ind. 304.

[c, d] (Sup. 1858)

It was error to allow an amendment of the complaint, presenting new issues, to be filed after the conclusion of arguments to the jury.—*Kerstetter v. Raymond*, 10 Ind. 199.

[e] (Sup. 1863)

Where the jury has been sworn and part of the evidence heard, it is too late for a party to amend by adding a new cause of action, to be examined and disposed of in the pending trial.—*Hoot v. Spade*, 20 Ind. 326.

[f] (Sup. 1863)

Amendments may be made in the complaint, with the leave of the court, after the trial is begun, if they are only designed to make the complaint more specific, and do not add a new cause of action, so as to injure the defendant, if compelled to proceed.—*Landry's Adm'r v. Durham*, 21 Ind. 232.

[g] (Sup. 1865)

It is error, after the pleadings and evidence in a case are closed, to permit the plaintiff to amend his complaint so as to change the whole character of the case.—*Blasingame v. Blasingame*, 24 Ind. 86.

[h] (Sup. 1874)

A bad complaint cannot be made good by an amendment after verdict.—*Heddens v. Younglove*, 46 Ind. 212.

[i] (Sup. 1874)

In an action for personal injuries, the complaint alleged that plaintiff, by reason of the negligence of the defendant, was bruised, hurt, injured, etc.; that his collar bone was broken, and his shoulder dislocated. *Held*, that it was not error for the court, on the trial, to allow the plaintiff to insert in the complaint another specific allegation that his shoulder blade was broken.—*Ohio & M. Ry. Co. v. Selby*, 47 Ind. 471, 17 Am. Rep. 719.

[j] (Sup. 1879)

A plaintiff may be permitted to make an amendment to his complaint, not changing the issues, after he has introduced his evidence to the jury, and in such case the jury need not be resworn.—*Knowles v. Rexroth*, 67 Ind. 59.

[k] (Sup. 1881)

After default and judgment on a statutory arbitration bond, it is error to permit plaintiff, after the close of that term, to amend his complaint by inserting the amount for which the award was confirmed and judgment thereon rendered.—*Bash v. Van Osdol*, 75 Ind. 186.

[l] (Sup. 1881)

Where the jury has been sworn and the evidence heard, the complaint cannot be amended so as to introduce a new cause of action.—*Record v. Ketcham*, 76 Ind. 482.

[m] (Sup. 1881)

It is error to permit a material amendment after the cause has been submitted to the court upon the evidence.—*Sharpe v. Dillman*, 77 Ind. 280.

[n] (Sup. 1885)

It is not error to permit, after the evidence is in, an amendment merely modifying the terms of the prayer.—*Rettig v. Newman*, 99 Ind. 424.

[o] (Sup. 1889)

In an action to set aside a mortgage as fraudulent, it was not error to allow an amendment to the complaint after the case had been submitted averring that the mortgagor had been allowed to remain in possession and to dispose of a great portion of the mortgaged property, as such amendment did not change the nature of the action.—*Levy v. Chittenden*, 22 N. E. 92, 120 Ind. 37.

[p] (Sup. 1889)

In an action against a husband and wife upon their joint note and mortgage, where the complaint alleges that the consideration for the note was money borrowed by the defendants and that they owned the mortgaged land as tenants by the entirety, an amendment to the complaint showing that the defendants borrowed the money "for their joint use and benefit" may properly be allowed, even after the case has been submitted to the court.—*Jenne v. Burt*, 121 Ind. 275, 22 N. E. 256.

[q] (Sup. 1892)

It is not error to permit plaintiff, after the close of his testimony, to file an amended complaint, where it does not materially change the cause of action, or occasion surprise, or place opposing counsel at a disadvantage.—*Toledo St. L. & K. C. R. Co. v. Stephenson*, 30 N. E. 1082, 131 Ind. 203.

[r] (Sup. 1895)

Where, in an action to set aside a deed, the complaint as originally drafted was defective for failure to aver that the grantor or plaintiffs, as his heirs, prior to the commencement

of his action had disaffirmed the deed, such defect was cured by an amendment filed by leave of court after a motion for a new trial had been overruled and pending a motion in arrest.—*Raymond v. Wathen*, 41 N. E. 815, 142 Ind. 367.

[s] (Sup. 1896)

Demurrer to plaintiff's complaint having been overruled, issue was formed, and upon trial the court found the material facts alleged in the complaint to be true, but sustained a motion in arrest of judgment, and dismissed the suit. *Held* that, upon sustaining a motion in arrest of judgment, plaintiff should have been allowed to amend.—*Bucklen v. Cushman*, 145 Ind. Sup. 51, 44 N. E. 6.

[t] (App. 1901)

Though an amendment to a pleading not changing its legal effect may be allowed after the submission of the cause, it is error to permit, at such time, an amendment changing the issue or making a new one.—*Mathews v. Rund*, 62 N. E. 90, 27 Ind. App. 641.

[u] (App. 1901)

The action of the trial court in permitting an amendment of the pleadings after the commencement of the trial is not a cause for reversal, without a showing that such action prejudiced or surprised the other party, or resulted in changing the issues.—*Citizens' St. R. Co. v. Meath*, 62 N. E. 107, 29 Ind. App. 395.

[v] (App. 1902)

An amendment which changes the nature of a cause of action is not allowable after the trial has been completed, and one test by which to determine if a new cause of action is alleged is to inquire if the same evidence would support both the original and amended complaints.—*Thrall v. Gosnell*, 62 N. E. 462, 28 Ind. App. 174.

[w] (App. 1908)

An amendment to the pleadings may be made after the evidence is heard.—*Parry Mfg. Co. v. Eaton*, 41 Ind. App. 81, 83 N. E. 510.

Where, in an action for injuries to an employé, the complaint alleged that the employer negligently maintained a contrivance, which was described, to keep open the window shutters on his building, with knowledge that the same was dangerous, that the employé, injured by a part of the contrivance falling on him while passing along the building to his work, did not know the facts, and could not by using ordinary care have known them, the allowance, after the close of the evidence, of an amendment alleging that the employé did not know that the contrivance was dangerous, and did not know, and could not have known by using ordinary care, that the employer negligently maintained the contrivance, was not erroneous, the amendment not changing the issues, nor misleading the employer.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 653-675.

See, also, 31 Cyc. pp. 393-407.

§ 246. — Subject-matter and grounds in general.

[a] (Sup. 1831)

Inserting, in a declaration in covenant, an averment that the instrument declared on is under seal, is a substantial amendment.—*Kelly v. Duignan*, 2 Blackf. 420.

[b] (Sup. 1844)

If, on oyer craved of a bond of which profert is made in the declaration, the bond cannot be produced, the declaration, by leave of the court, should be amended by leaving out the profert, and inserting an excuse for not making it.—*Meriam v. State ex rel. Mitchell*, 7 Blackf. 245.

[c] (Sup. 1854)

In a suit to recover damages for injuries sustained by a fall through the sidewalk of a bridge, the plaintiff will be allowed to amend his declaration on the trial by inserting the allegation that he was ignorant that the bridge was out of repair.—*Wayne County Turnpike Co. v. Berry*, 5 Ind. 286.

[d] (Sup. 1873)

Matters which occurred prior to the filing of a complaint must be brought into the suit by amendment.—*Musselman v. Manly*, 42 Ind. 462.

[e] (App. 1908)

Under Burns' Ann. St. 1908, § 403, providing that all amendments, except those as of course, shall be by leave of court, permission to amend a complaint alleging that an oral contract for furnishing material was made in March by alleging that it was made in October, was properly given.—*Miller v. State ex rel. Hill*, 42 Ind. App. 630, 86 N. E. 493.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 676-683.

See, also, 31 Cyc. pp. 365, 366, 407-455.

§ 247. — Matters arising or discovered after original pleading.

[a] (Sup. 1833)

Where a party is admitted as a defendant after the beginning of an action, and the plaintiff does not amend his complaint by inserting the name of such party therein and making proper allegations relative to him, a demurrer by such defendant will be sustained.—*Levi v. Engle*, 91 Ind. 330.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 684, 685.

See, also, 31 Cyc. pp. 391, 392.

§ 248. — New or different cause of action.

Amendment after demurrer sustained, see ante, § 225.

Amendment setting up new or different cause of action, as affecting limitations, see **LIMITATION OF ACTIONS**, § 127.

Amendment to conform to proofs, see ante, § 237.

Condition of cause and time for amendment, see ante, § 245.

New set-off or counterclaim, see post, § 262.

Raising question whether amendment states new cause of action, by motion to strike out, see post, § 356.

[a, b] (Sup. 1865)

No amendment to a declaration, complaint, or petition can be allowed which introduces a new cause of action.—*Kiphart v. Brennemen*, 25 Ind. 152.

[c] (Sup. 1872)

In an action by an administrator against a railroad company, the cause of action as stated in the complaint was the death of the plaintiff's intestate, caused by the wrongful act or omission of the company, without the fault of the deceased; but the particular means or manner of her death were not stated. A demurrer was sustained to the complaint, because it did not appear that the injury producing death was not caused by the contributing fault of the deceased. *Held*, that to amend the complaint so as to allege the facts of the accident more particularly was not stating a new cause of action, liable to objection as not declared upon within the time limited by the statute.—*Jeffersonville, M. & I. R. Co. v. Hendricks*, 41 Ind. 48.

[d] (Sup. 1884)

A relator in an action on a trustee's bond may amend the complaint so as to make the action one against the trustee alone to set aside as fraudulent his final report.—*Boyd v. Caldwell*, 95 Ind. 392.

[e] (Sup. 1894)

In an action by a brakeman against a railroad company for injuries, the original complaint alleged, in the first count, a defect in the engine's cylinder cock; in the second count, a defect in the brake of a car on which plaintiff was when hurt; and in the third, the defects both in the engine and in the brake. *Held*, that an additional count, in which the main allegations of the other three were repeated, and defects in the engine were alleged, did not state a new cause of action.—*Ohio & M. Ry. Co. v. Stein*, 140 Ind. 61, 39 N. E. 246.

[f] (App. 1908)

In an action on a contractor's bond by one who had furnished material and done work for the contractor to recover a certain sum therefor, where the complaint alleged that the oral contract under which the work was done was made in March, an amendment alleging the contract was made in October did not change the cause of action.—*Miller v. State ex rel. Hill*, 42 Ind. App. 630, 86 N. E. 493.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 686-709; 5 CENT. DIG. Assumpsit, § 124.

See, also, 31 Cyc. pp. 409-419; note, 34 Am. Dec. 158; note, 51 Am. St. Rep. 414.

§ 249. — Change of form of action.

[a] (Sup. 1864)

An amendment which changed an action from contract to tort was not allowed by Rev. St. 1843.—*Falkner v. Iams*, 5 Ind. 200.

[b] (Sup. 1860)

A suit in rem, brought under the water craft law, but not within its purview, may be changed by amendment into a suit in personam.—*Coplinger v. The David Gibson*, 14 Ind. 480.

[c] (Sup. 1896)

Where a complaint seeks to rescind a contract on account of fraud, and asks the appointment of a receiver, and the court refuses to appoint a receiver, complainant may file an amended complaint to recover damages on account of the alleged fraud.—*Cohoon v. Fisher*, 44 N. E. 664, 45 N. E. 787, 146 Ind. 583, 36 L. R. A. 193.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 710-729; 1 CENT. DIG. Action on the Case, § 42.

See, also, 31 Cyc. pp. 429-434.

§ 250. — As to relief prayed.

[a] (Sup. 1858)

An amendment reducing the amount demanded to the jurisdiction of the court may be allowed.—*Brown v. Lewis*, 10 Ind. 232; *Harvey v. Ferguson*, Id. 393.

[b] (Sup. 1864)

In an action to recover personal property and damages for the detention thereof, it is not competent for the court, in the progress of the trial, over the objection of the defendant, to permit the plaintiff to amend his complaint so as to claim special damages for expenses incurred in money and time in seeking to recover such property.—*Harris v. Mercer*, 22 Ind. 329.

[c] (Sup. 1881)

Where the original complaint, in a suit by a township trustee against his predecessor on his bond, was only for the recovery of money claimed to be due the civil township, the addition of a paragraph seeking also to recover money alleged to be due the school township *held* to be a proper amendment, and not, in any sense, to amount to a misjoinder of distinct causes of action.—*Strong v. State ex rel. Colvin*, 75 Ind. 440.

[d] (Sup. 1839)

In an action by a purchaser at an execution sale to recover the amount paid, on failure of title to the property, it is not error, after the testimony is closed, to refuse to allow the filing of an amended paragraph to the complaint, the object of which is to set aside the

sheriff's sale, upon the same facts set out in the original complaint, as such an amendment would necessitate new issues, and the making of the execution defendants parties to the action.—*Lewark v. Carter*, 117 Ind. 206, 20 N. E. 119, 10 Am. St. Rep. 40, 3 L. R. A. 440.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 730-733; 29 CENT. DIG. Interest, § 153.

See, also, 31 Cyc. pp. 438-443.

§ 251. — Sufficiency of amendment.

[a] (Sup. 1867)

It is sufficient if the names of the parties to an amended complaint are stated in the title of the cause.—*Lowry v. Dutton*, 28 Ind. 473.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 734, 735.

§ 252. — Operation and effect in general.

As waiver of demurrer to original pleading, see ante, § 212.

Effect of striking out amended pleading, see post, § 360.

Necessity of annexing exhibits to amended complaint, see post, § 307.

Of supplemental pleading, see post, §§ 274, 279.

[a] (Sup. 1865)

A second complaint, complete in itself, and not a mere amendment of the first, supersedes the first, so that it ceases to be part of the record, and no ruling upon it can be assigned for error.—*Kirkpatrick v. Holman*, 25 Ind. 293.

[b] (Sup. 1876)

After a demurrer, for want of sufficient facts, to a complaint consisting of a single paragraph, had been sustained, the plaintiff filed what was styled a second paragraph of the complaint, differing in matter and form from the original only in its prayer for relief. *Held*, that the ruling of the trial court upon the demurrer presented no question on appeal.—*Trisler v. Trisler*, 54 Ind. 172.

[c] Where pleadings are amended, the prior pleadings are to be regarded as abandoned.—(Sup. 1877) *Westerman v. Foster*, 57 Ind. 408; (1882) *State ex rel. Bunnell v. Hay*, 88 Ind. 274; (App. 1894) *Town of Andrews v. Sellers*, 11 Ind. App. 301, 38 N. E. 1101; (Sup. 1896) *Hedrick v. Whitehorn*, 145 Ind. 642, 43 N. E. 942.

[d] (Sup. 1877)

Under an amended complaint, only such relief can be granted as is demanded in the amended complaint. The prayer for relief in the original complaint cannot be considered.—*Westerman v. Foster*, 57 Ind. 408.

[e] (Sup. 1882)

The filing by leave of court of an amended complaint and answer thereto takes the

original complaint and answer out of the record, so as to prevent defendant from complaining on appeal of error in sustaining a demurrer to the first answer.—*Berghoff v. McDonald*, 87 Ind. 549.

[f] (Sup. 1886)

Where a demurrer to a complaint is sustained, and a new complaint is filed, the gravamen of which is the same as the one held bad on demurrer, it will be treated as an amended pleading, and will be regarded as having superseded the original complaint.—*Hunter v. Pfeiffer*, 108 Ind. 197, 9 N. E. 124.

[g] (Sup. 1889)

An amended complaint has relation ordinarily to the commencement of the action, and is regarded as a matter occurring in the continuation of progress of the original cause.—*Chicago, St. L. & P. R. Co. v. Bills*, 20 N. E. 775, 118 Ind. 221.

[h] (Sup. 1892)

Where a demurrer to a paragraph of a complaint is overruled, but plaintiff amends it before judgment by leave of the court, the sufficiency of the original paragraph cannot be considered on appeal.—*Travellers' Ins. Co. v. Martin*, 131 Ind. 155, 30 N. E. 1071.

[i] (App. 1894)

Where a paragraph of a pleading was amended, the amendment superseded and took the place of the original paragraph, and any rule of the court in relation to the sufficiency of the original paragraph was not properly in the record.—*Tague v. Owens*, 38 N. E. 541, 11 Ind. App. 200.

[j] The filing of an amended pleading takes from the record the original pleading.—(Sup. 1897) *Weaver v. Apple*, 147 Ind. 304, 46 N. E. 642; (App. 1897) *Barnes v. Pelham*, 47 N. E. 648, 18 Ind. App. 166; (1897) *City of New Albany v. Conger*, 47 N. E. 852, 18 Ind. App. 230; (1897) *Western Assur. Co. v. McCarty*, 48 N. E. 265, 18 Ind. App. 449.

[k] (App. 1903)

An amended complaint speaks from the time of the filing of the original complaint.—*Kirkham v. Moore*, 65 N. E. 1042, 30 Ind. App. 549.

[l] (App. 1903)

Where, in an action for rent, defendant made no objection to the filing of an amended complaint, but appeared and answered, and the same issue was tendered that would have been tendered by a complaint and supplemental complaint, and the case was tried without objection on the issue thus presented, the action must be treated as having been brought at the time the amended complaint was filed, and it could not be objected that the judgment was had for rents which had not accrued at the time suit was originally brought.—*Pitzele v. Reuping*, 68 N. E. 603, 32 Ind. App. 237.

[m] (App. 1908)

An original complaint is taken out of the record by the filing of an amended complaint.—*Holland v. Hummell*, 43 Ind. App. 358, 87 N. E. 662.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 736-743.

See, also, 31 Cyc. pp. 464-468.

§ 253. — Plea or answer to amended pleading.

[a] (Sup. 1879)

After all the evidence in a case was heard, the plaintiff was allowed to file an additional paragraph to his complaint, and, as no good cause for delay was shown by the defendant, the court required him to plead to said paragraph at that term. *Held*, that there was no error.—*Leib v. Butterick*, 68 Ind. 199.

[b] (Sup. 1890)

An answer to an amended complaint which alleges that the original complaint is filed with the answer as an exhibit, and that by his original complaint plaintiff elected to rescind the contract, does not aver that plaintiff sued for rescission.—*Nyrewander v. Lowman*, 124 Ind. 584, 24 N. E. 355.

[c] (App. 1903)

Where, after a demurrer to a plea in abatement of one defendant has been sustained, he refuses to plead further, the refusal of an offer by other defendants to file an answer of general denial to an amended complaint for and on behalf of such defendant was not error.—*Diamond Flint Glass Co. v. Boyd*, 66 N. E. 479, 30 Ind. App. 485.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 744-751.

See, also, 31 Cyc. pp. 450-461.

§ 254. — Demurrer to amended pleading.

Effect as withdrawal of answer to original complaint, see post, § 339.

[a] (Sup. 1865)

A demurrer does not lie to an additional paragraph of a complaint filed since the commencement of the suit, and stating a good cause of action which has accrued since such commencement.—*Farrington v. Hawkins*, 24 Ind. 253.

[b] (Sup. 1887)

Where all the parties to an assignment of a note and mortgage filed with the complaint as an exhibit are made plaintiffs in an action thereon, and an amended complaint states a cause of action in favor of all, a demurrer will not lie for a defect of parties, nor for failure of such complaint to state facts sufficient.—*Morningstar v. Cunningham*, 110 Ind. 328, 11 N. E. 503, 59 Am. Rep. 211.

[c] (Sup. 1890)

When an amended complaint is filed, it stands independent of all antecedent proceed-

ings, and all demurrers filed to the original complaint, and, if the defendants desire to test its sufficiency as against a demurrer, it is necessary for them to file a demurrer thereto.—*Harris v. State ex rel. Wright*, 24 N. E. 241, 123 Ind. 272.

[d] (Sup. 1893)

The issues not having been changed by the amendment of a complaint, there was no error in refusing to allow the refile of the demurrer to the complaint.—*Stanton v. Kenrick*, 135 Ind. 382, 35 N. E. 19.

[e] (Sup. 1894)

It is not error to refuse to permit the filing of a demurrer to the complaint following an amendment thereto filed during the trial, where the amendment states no new cause of action, and is not misleading.—*Board of Com'rs of Carroll County v. O'Connor*, 35 N. E. 1006, 37 N. E. 16, 137 Ind. 622.

[f] (Sup. 1899)

Demurrer to the "complaint," filed after filing of an amended complaint, refers thereto.—*Town of Whiting v. Doob*, 52 N. E. 759, 152 Ind. 137.

[g] (App. 1902)

A demurrer to a complaint does not apply thereto after it has been amended.—*Efroymson v. Smith*, 63 N. E. 328, 29 Ind. App. 451.

[h] (App. 1905)

A demurrer to the complaint filed after the filing of the amended complaint will be considered as addressed to the amended complaint.—*City of Vincennes v. Spees*, 74 N. E. 277, 35 Ind. App. 389.

[i] (App. 1908)

Where, after a demurrer to the complaint is sustained, an amended complaint is filed by leave of court, the amended complaint supercedes the original; and a demurrer subsequently filed, though not denominated as a demurrer to the "amended" complaint, is addressed thereto.—*Scott v. Lafayette Gas Co.*, 42 Ind. App. 614, 86 N. E. 495.

[j] (App. 1909)

A demurrer, filed after the amended complaint was filed, must be treated as a demurrer to the amended complaint, though the pleading to which it was addressed is styled the complaint.—*Chicago, I. & L. Ry. Co. v. Stepp*, 88 N. E. 343.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 752-760.

See, also, 31 Cyc. pp. 461-464.

§ 255. Amendment of plea or answer.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 761-807.

See, also, 31 Cyc. pp. 422-428.

§ 256. — Defects amendable in general.**[a] (Sup. 1872)**

Under the liberal power to amend pleadings granted by the Code (2 Gav. & H. St. p. 117, § 97), when application is made, before the commencement of a trial, to amend the answer, upon affidavit that it does not truly set out the defense intended, a denial of the motion is error.—*Koons v. Price*, 40 Ind. 164.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 761-763.

See, also, 31 Cyc. p. 422.

§ 258. — Condition of cause, and time for amendment.

Discretion of court, see ante, § 236.

[a] (Sup. 1849)

A court has no power, after judgment, to alter the plea of a defendant setting out a bond on oyer so as to make the plea correspond with the bond, without the consent of the defendant.—*Randal v. State ex rel. Massy*, 1 Ind. 395, *Smith*, 260.

[b] (Sup. 1859)

After the hearing of evidence has begun, new issues cannot be made by amendment of the answer, except on cause shown; and, if they are permitted, the jury must be resworn to try them.—*Kerschbaugher v. Slusser*, 12 Ind. 453.

[c] (Sup. 1863)

Where the jury has been sworn, and a part of the evidence heard, it is too late for a party to amend by adding a new defense to be examined and disposed of in the pending trial.—*Hoot v. Spade*, 20 Ind. 326.

[d] (Sup. 1863)

It is too late after verdict to materially amend the pleadings in a cause.—*Aiken v. Bruen*, 21 Ind. 137.

[e] (Sup. 1865)

No material amendment can be allowed to an answer after the cause has been submitted to the jury.—*Holcraft v. King*, 25 Ind. 352.

No material amendment can be allowed to an answer after a finding has been announced by the court.—*Id.*

[f] (Sup. 1872)

Leave to amend an answer and to file additional paragraphs should be granted when asked before the beginning of the trial, if it appears from affidavit that the answer filed does not truly set out the facts relied on in defense.—*Koons v. Price*, 40 Ind. 164.

[g] (Sup. 1874)

It is not reversible error to allow an amendment of a pleading after verdict, where no change is made in the legal effect of the pleading.—*Maxwell v. Day*, 45 Ind. 509.

[h] (Sup. 1878)

Where issue has been joined for over two years, a motion by defendant, when the cause is called for trial, for leave to file a plea of non est factum, is properly denied on the ground of negligence.—*McMakin v. Weston*, 64 Ind. 270.

[i] (Sup. 1883)

It is not error to refuse permission to a defendant to amend, after the issues are closed, by pleading an additional defense, which, if true, must have been known before.—*Sayers v. First Nat. Bank of Crawfordsville*, 89 Ind. 230.

[j] (App. 1910)

In an action to restrain defendants from interfering with plaintiff telephone company's maintenance of a stub pole and anchor in the street in front of defendants' premises and for damages, where plaintiff alleged the necessity for the pole and anchor and defendants' refusal to allow its erection, to which complaint defendants demurred for want of facts, and the demurrer was overruled, after part of the evidence was heard, it was not error to allow defendants to file a second paragraph of the answer alleging that the pole and anchor were erected in front of their premises without authority, against their will, and to their damage, for which they had received no compensation.—*New Long Distance Telephone Co. v. White*, 90 N. E. 1038.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 765-782.

See, also, 31 Cyc. pp. 424-427.

§ 259. — Subject-matter and grounds in general.**[a] (Sup. 1840)**

Where issue was joined on the general issue pleaded, the court refused, at a subsequent term, to allow two special pleas to be filed on the affidavit of counsel that the general issue was filed merely to save a default, and that he believed the case could not be fairly tried on its merits unless the special pleas, or one of them, were allowed. *Held*, that the refusal was correct.—*Bequette v. Lasselle*, 5 Blackf. 443.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 783-792.

See, also, 31 Cyc. p. 422.

§ 262. — New set-off or counterclaim.**[a] (Sup. 1881)**

A counterclaim was pleaded jointly by two defendants, and, after the dismissal of the suit, the counterclaim was dismissed as to one of the defendants, and then the remaining defendant was permitted to amend the counterclaim by striking out the name of the dismissed defendant and all the allegations of the title in him. The matter to be tried and determined remained after the amendment substantially the same as before. *Held*, that there

was no substantial error in permitting the amendment of the counterclaim, or in failing to have the jury re-sworn.—*Record v. Ketcham*, 76 Ind. 482.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 801.

See, also, 31 Cyc. pp. 427, 428.

§ 263. — Sufficiency of amendment.

[a] (Sup. 1887)

There is no available error in the refusal of the court to permit the filing of additional answers, where the facts therein set up constitute no defense to the action.—*Gardner v. Case*, 111 Ind. 494, 13 N. E. 36.

[b] (App. 1909)

Where additional paragraphs submitted failed to present a complete defense to either paragraph of the complaint, the court properly refused to reopen the issues and permit them to be filed.—*Heritage v. State ex rel. Crim*, 43 Ind. App. 595, 88 N. E. 114.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 802.

§ 264. — Operation and effect in general.

[a] Where a pleading is amended, it is superseded by the pleading as amended, and forms no part of the record.—(Sup. 1861) *Downs v. Downs*, 17 Ind. 95; (1871) *Byers v. Hickman*, 36 Ind. 359; (1874) *Specht v. Williamson*, 46 Ind. 599; (1874) *Debreuil v. Davis*, 48 Ind. 396; (1879) *Britz v. Johnson*, 65 Ind. 561; (1896) *Aydelott v. Collings*, 144 Ind. 602, 43 N. E. 867.

[b] (Sup. 1874)

An amended answer supersedes the original, and the latter ceases to be a part of the record.—*Patterson v. Lord*, 47 Ind. 203.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 803-805.

See, also, 31 Cyc. pp. 464-468.

§ 265. — Replication or reply to amended pleading.

[a] (Sup. 1859)

Where, after issue was formed on an answer, a new paragraph was added to the answer which merely repeated the allegations already made, it was not necessary to take issue on the new paragraph.—*Frear v. Bryan*, 12 Ind. 343.

[b] (Sup. 1861)

An answer was amended during the impaneling of the jury, but not brought to the notice of the court or of the opposite party until the evidence had been heard. *Held*, that plaintiff was properly allowed to file a reply.—*Brown v. Shearon*, 17 Ind. 239.

[c] (Sup. 1862)

Under the Code there is no implied denial to an answer; and a general denial filed to a

first answer is not a response to a new and substantive defense afterwards set up in an additional answer.—*Swihart v. Cline*, 19 Ind. 264.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 806.

See, also, 31 Cyc. pp. 459-461.

§ 266. — Demurrer to amended pleading.

Matter in abatement, see ante, § 106.

[a] (App. 1892)

A general demurrer to the "amended second paragraph of defendant's answer for the reason that the same does not state facts sufficient to constitute a good defense to plaintiff's complaint" is not objectionable on the ground that "complaint" is used instead of the words "cause of action."—*Foster v. Daily*, 3 Ind. App. 530, 30 N. E. 4.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 807.

See, also, 31 Cyc. pp. 461-464.

§ 267. Amendment of cross-complaint.

[a] (Sup. 1871)

Leave to amend should be granted, under a cross-complaint, with the same freedom as in ordinary actions.—*Ewing v. Patterson*, 35 Ind. 326.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 808.

See, also, 31 Cyc. pp. 427, 428.

§ 269. Amendment of replication or reply and of subsequent pleadings.

[a] (Sup. 1851)

After verdict a plaintiff will not be allowed to amend his replication, or file an additional one.—*Redman v. Taylor*, 3 Ind. 144.

[b] (App. 1894)

Where, after a demurrer to a reply has been overruled, an amended reply is filed, defendant must demur to the amended reply in order to question its sufficiency.—*Tague v. Owens*, 11 Ind. App. 200, 38 N. E. 541.

[c] (App. 1909)

Amendment of the reply to set up that the mortgage after the alteration therein, pleaded by the answer as a material alteration, conformed to the agreement of the parties did not change the issue; this matter being admissible under the general issue in the reply.—*Basey v. McKinney*, 43 Ind. App. 422, 87 N. E. 693.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 811-815.

See, also, 31 Cyc. pp. 456, 457.

§ 271. Amendment as to signature or verification.**[a] (Sup. 1859)**

The failure to subscribe the complaint is a merely formal error, which may be amended.—*Harris v. Osenback*, 13 Ind. 445.

[b] (Sup. 1838)

The failure of a party, or his attorney, to sign a complaint is a mere clerical defect, and may be amended on motion, which is entitled to precedence over a motion to reject the pleading for want of a signature. A motion to quash the summons is not an appropriate means of reaching the defect.—*Sims v. Dame*, 113 Ind. 127, 15 N. E. 217.

[c] (Sup. 1866)

Though a petition is not insufficient because not signed by the full Christian name of petitioners, they may be required to amend by proper signatures if the question is raised in the proper manner and in due time.—*Good v. Burk*, 167 Ind. 462, 77 N. E. 1080; *Darby v. Anderson*, 167 Ind. 707, 77 N. E. 1083.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. § 819.

See, also, 31 Cyc. p. 546.

§ 272. Plea puis darrein continuance.

Review of decisions involving discretion of court, see APPEAL AND ERROR. § 960.

[a] A plea puis darrein continuance operates as a waiver of all preceding pleas.—(Sup. 1842) *Scott v. Brokaw*, 6 Blackf. 241; (1847) *Prather v. Ruddell*, 8 Blackf. 393

[b] (Sup. 1847)

A plea puis darrein continuance is bad where there is a want of precision and fullness in its statements, as such plea requires the highest degree of certainty.—*Prather v. Ruddell*, 8 Blackf. 393.

[c] (Sup. 1834)

Where one of two joint makers of a note obtained judgment in his favor on the ground that he was simply a surety, and had been released by an extension of time, which judgment was reversed on appeal, he could not, on a new trial, plead puis darrein continuance, that a judgment had been taken against his codefendant, which was still in force.—*Lawrence v. Sample*, 97 Ind. 53.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 823-831.

See, also, 31 Cyc. pp. 493, 494.

§ 273. Supplemental pleading.

Further pleadings or new pleadings in appellate court, see APPEAL AND ERROR, §§ 890, 897; JUSTICES OF THE PEACE, § 174. In equity, see Equity, §§ 296, 302.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 832-850.

See, also, 31 Cyc. pp. 499-511.

§ 274. — Nature and office.**[a] (Sup. 1873)**

A supplemental complaint is not a substitute for the original complaint. It is a further complaint, and assumes that the original complaint is to stand. It must consist of facts which have arisen since the filing of the original complaint. Whether filed before or after answer, leave of court must be obtained, and it must show on its face that it is supplemental and relates to matters which have accrued subsequent to the commencement of the action.—*Musselman v. Manly*, 42 Ind. 462.

[b] (Sup. 1874)

A complaint or paragraph of complaint, alleging that since a former trial certain notes constituting the foundation of the suit have been lost, is not a supplemental complaint and is a nullity.—*Shirts v. Irons*, 47 Ind. 445.

[c] (Sup. 1834)

The office of a supplemental complaint is to bring on the record such new facts as have occurred since the filing of the original complaint, in order that the court may grant the proper relief on the facts existing at the time of the final decree.—*Davis v. Krug*, 95 Ind. 1.

[d] (Sup. 1838)

A new complaint filed in an action, which sets up no new cause of action and no new matter involving the statute of frauds, relates back to the time of the filing of the original complaint, and becomes simply an amended complaint, taking the place of the one first filed, and performing the office which the original complaint was designed to perform.—*Fleenor v. Taggart*, 18 N. E. 606, 116 Ind. 189.

[e] (Sup. 1897)

A supplemental complaint is not an amendment to the complaint, its office being to bring forward a matter proper to be litigated along with the matter contained in the original complaint that has occurred since the commencement of the action, and it assumes that the original complaint is to stand as it originally stood, and hence omissions or defects in the original complaint cannot be supplied by supplemental complaint.—*Chapman v. Jones*, 47 N. E. 1065, 49 N. E. 347, 149 Ind. 434.

[f] (App. 1910)

A supplemental complaint is not an amendment to the complaint; its office being to bring forward a matter proper to be litigated with the matters contained in the original complaint that has accrued since the commencement of the action, and the original and the supplemental complaint together constituting plaintiff's cause of action.—*Niagara Oil Co. v. Jackson*, 91 N. E. 825.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 832.

See, also, 31 Cyc. p. 499.

§ 276. — Leave of court.**[a] (Sup. 1867)**

Technically, leave is necessary to the filing of a supplemental complaint, but where the pleading is filed the failure first to obtain leave is not available error.—*Martin v. Noble*, 29 Ind. 216.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 833, 835.

See, also, 31 Cyc. pp. 500, 501.

§ 279. — Supplemental complaint, petition, or statement.

Necessity for verification, see post, § 290.

Review of decisions, see APPEAL AND ERROR, § 950.

[a] (Sup. 1879)

Where the original complaint setting up a title to lands based on a title bond makes such bond a part thereof, an amended and supplemental pleading need not set out the title bond or a copy thereof, where it makes express reference to the original pleading and the title bond set out therein.—*Earle v. Peterson*, 67 Ind. 503.

[b] (Sup. 1883)

Omissions or defects in an original complaint cannot be remedied by a supplemental complaint, the office of which is to avail of matters occurring since the institution of the suit.—*Dillman v. Dillman*, 90 Ind. 585.

[c, d] (Sup. 1883)

A supplemental complaint may be filed during trial in the discretion of the court.—*Kimble v. Seal*, 92 Ind. 276.

[e] (Sup. 1892)

In supplementary proceedings a decree was made directing a bank to pay to the sheriff certain money deposited with it in the name of P. This decree was reversed on appeal. Plaintiff filed an amended complaint, on which defendant and P. joined issue. After the evidence was introduced, and while the court was holding the cause under advisement, plaintiff obtained leave to file a supplemental complaint making K. a party defendant. This complaint alleged that before such appeal the sheriff received from the bank the money deposited in P.'s name; that he turned such money over to his successor, who turned it over to his successor, K., who, without plaintiff's knowledge, and without order from the court, paid the same over to P., taking an indemnifying bond, of all of which plaintiff had no knowledge until the day before the trial. *Held*, that the supplemental complaint was properly allowed, under Rev. St. 1881, § 399, which provides that the court may, on motion, allow supplemental pleadings, showing facts which occurred after the former pleadings were filed.—*Pouder v. Tate*, 132 Ind. 327, 30 N. E. 880.

[f] (Sup. 1893)

Under Rev. St. 1881, § 399, which authorizes the court to allow supplemental pleadings

where a complaint alleges that defendant is threatening to enter on plaintiff's property, and asks that he be enjoined, it is not error to permit a supplemental complaint to be filed, averring that since the filing of the first complaint defendant has entered on the premises, and asking for possession and damages.—*Richwine v. Presbyterian Church of Noblesville*, 135 Ind. 80, 34 N. E. 737.

[g] (Sup. 1896)

Where plaintiff's cause of action is stated in a complaint and supplemental complaint, both pleadings will be considered as together constituting the complaint.—*Big Creek Stone Co. v. Seward*, 144 Ind. 203, 42 N. E. 464, 43 N. E. 5.

[h] (Sup. 1897)

Where, at the time of the filing of a supplemental complaint, there was no complaint on file, but it was out on demurrer, the supplemental complaint could not be the foundation of an action.—*Ellis v. City of Indianapolis*, 148 Ind. 70, 47 N. E. 218.

[i] (Sup. 1897)

Under Rev. St. 1894, § 402 (Rev. St. 1881, § 399; Civ. Code, § 138), providing that "the court may on motion allow supplemental pleadings, showing facts which occurred after the former pleadings were filed," a supplemental complaint cannot be employed to set up a right of action which did not exist when the original complaint was filed.—*Barker v. Prizer*, 48 N. E. 4, 150 Ind. 4.

[j] (Sup. 1906)

Plaintiff should be permitted to file a supplemental complaint, where it would avoid the bringing of another action.—*Schmoe v. Cotton*, 167 Ind. 364, 79 N. E. 184.

Where, in an action for damages for a deprivation of lateral support, defendants continued their excavations, resulting in further damage, after the complaint was filed, it was not an abuse of the trial court's discretion to permit the filing of a supplemental complaint covering such additional damages.—*Id.*

Permitting the filing of a supplementary complaint is in the discretion of the court.—*Id.*

[k] (App. 1910)

Where a complaint for nuisance set up a continuing offense, and before trial a supplemental complaint was filed, as authorized by Burns' Ann. St. 1908, § 408, showing the continuance of the nuisance up to the filing thereof, the court properly permitted a recovery of damages sustained up to the time of filing such supplemental complaint.—*Niagara Oil Co. v. Jackson*, 91 N. E. 825.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 836-841.

See, also, 31 Cyc. pp. 502-505.

§ 283. — Answer or reply to supplemental pleading.

[a] (Sup. 1883)

Where defendant fails to answer a supplemental complaint which plaintiff was allowed to file on the trial, he cannot complain that issue was not joined thereon.—*Kimble v. Seal*, 92 Ind. 276.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 848, 849.

See, also, 31 Cyc. pp. 510, 511.

§ 284. — Demurrer or exception to supplemental pleading.

[a] A demurrer will not lie to a supplemental complaint.—(Sup. 1883) *Morey v. Ball*, 90 Ind. 450; (1892) *Lewis v. Rowland*, 131 Ind. 37, 30 N. E. 796.

[b] (Sup. 1884)

A supplemental complaint is not demurrable; it being a part of the original complaint.—*Derry v. Derry*, 98 Ind. 319.

[c] (Sup. 1887)

Plaintiff filed a supplemental complaint setting up matters that had arisen since filing his original complaint. Afterwards defendant filed two demurrers, one to the complaint, and one to the supplemental complaint. *Held* that, under the rule of practice in Indiana that a demurrer will not lie to part of a paragraph of a complaint or other pleading, the demurrer to the supplemental complaint should be disregarded.—*Farris v. Jones*, 112 Ind. 498, 14 N. E. 484.

[d] (Sup. 1889)

Where a supplemental complaint is filed before trial, it is error to entertain separate demurrers to it and to the original complaint, as they together constitute but one complaint.—*Peters v. Banta*, 120 Ind. 416, 22 N. E. 95, 23 N. E. 84.

[e] (Sup. 1893)

A supplemental answer, which sets up a distinct and independent defense, may be searched by a demurrer.—*Eckert v. Rinkley*, 134 Ind. 614, 33 N. E. 619, 34 N. E. 441.

[f] (Sup. 1907)

A demurrer to a supplemental answer alone raises no question, as such answer constitutes only a part of the original defense.—*State ex rel. Julian v. Board of Metropolitan Police Com'rs of City of Logansport*, 170 Ind. 133, 83 N. E. 83.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 850.

See, also, 31 Cyc. p. 511.

§ 285. Further, additional or substituted pleading.

Further or additional bill of particulars, see post, § 326.

Striking out, see post, § 356.

Substitution for lost pleadings, see post, § 340.
Waiver of objections to proceeding on original complaint on withdrawal of substituted complaint, see post, § 406.

[a] (Sup. 1872)

The filing of a substituted complaint disposes of the original complaint.—*Yancy v. Tetter*, 39 Ind. 305.

[b] (Sup. 1897)

A substituted pleading cannot be filed without an order of court.—*Davis v. Talbot*, 47 N. E. 829, 149 Ind. 80.

[c] (App. 1904)

The filing of additional pleadings is largely within the discretion of the trial court; but, when the justice of the case clearly requires that leave should be granted, it is error to refuse.—*Watson v. Adams*, 69 N. E. 696, 32 Ind. App. 281.

[d] (App. 1905)

In an action on a fire policy, defendant learned for the first time from plaintiff's own testimony that he had at the time of his application other insurance which he did not disclose, either in the application, proofs of loss, or in his examination under the statute before trial. The policy provided that it should be void if the insured had other insurance not consented to in writing. At noon on the day following that on which defendant first learned of the additional insurance, it offered to file an additional answer setting up the newly discovered fact. *Held*, that defendant used sufficient diligence in presenting its amended pleading.—*Home Ins. Co. of New York v. Overturf*, 74 N. E. 47, 35 Ind. App. 361.

FOR CASES FROM OTHER STATES,

See 31 Cyc. pp. 512-524.

§ 286. Repleader.

[a] (Sup. 1843)

The party committing the first fault in pleading is not entitled to a repleader, though the verdict against him be on an immaterial issue.—*Andre v. Johnson*, 6 Blackf. 375.

[b] (Sup. 1846)

A repleader will not be awarded in favor of him who commits the first fault in pleading.—*Conard v. Dowling*, 8 Blackf. 38.

[c] (Sup. 1849)

A repleader will not be awarded to a party who has committed the first fault in pleading, if the issue has been found against him; but if found in his favor he may have a repleader.—*Gorham v. Reeves*, 1 Ind. 421, Smith, 239.

So where trial is had on immaterial issues only, and verdict is for plaintiff, a repleader may be granted at his instance, though it appears that he committed the first fault in pleading.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 851, 852.

See, also, 31 Cyc. pp. 511, 512.

VII. SIGNATURE AND VERIFICATION.

Aider by verdict or judgment of pleading defective for want of verification, see post, § 432.

Amendment, see ante, § 271.

Defect in verification or signature as objection reached by general demurrer, see ante, § 205.

Motions to strike out pleadings for want of, see post, § 355.

Of motion to strike matters from pleading, see post, § 360.

Review of questions as dependent on objections in lower court, see APPEAL AND ERROR, § 192.

Verification of complaint or petition for injunction, see INJUNCTION, § 122.

Waiver of objections to want or insufficiency of signature or verification, see post, § 422.

Want of verification as ground for judgment on the pleadings, see post, § 347.

In particular actions or proceedings.

See—

BILLS AND NOTES, § 485.

By or against executors and administrators. EXECUTORS AND ADMINISTRATORS, § 443.

Claims to property levied on. EXECUTION, § 192.

Contest of will. WILLS, § 281.

DIVORCE, § 105.

Equitable relief against judgment. JUDGMENT, § 460.

Penalty for violation of municipal ordinance. MUNICIPAL CORPORATIONS, § 633.

Supplementary proceedings. EXECUTION, § 377.

§ 287. Signature of party.

[a] (Sup. 1856)

Every pleading in a court of record should be signed by the party or his attorney.—Riley v. Murray, 8 Ind. 354.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 853, 856; 38 CENT. DIG. Partit. § 174; 38 CENT. DIG. Partners. § 415.

See, also, 31 Cyc. p. 525, 14 Cyc. p. 677.

§ 288. Signature and certificate of counsel.

Failure to sign as ground for demurrer, see ante, § 192.

[a] (Sup. 1882)

An indorsement of a return day on a complaint, signed "C. & K., for Plff.," they being the attorneys of record for plaintiff, is a sufficient signature as plaintiff's attorneys.—Nave v. First Nat. Bank of Lebanon, 87 Ind. 204.

[b] (Sup. 1890)

An amendment to a complaint appeared below the signatures of counsel, as originally subscribed to the complaint, but after making

the amendment counsel again subscribed the complaint under the amendment. *Held*, that an objection that the amendment formed no part of the complaint was without merit.—Nicodemus v. Simons, 121 Ind. 564, 23 N. E. 521.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 854, 855, 857, 858; 1 CENT. DIG. Abate. & R. § 23; 41 CENT. DIG. Quo. W. § 59.

See, also, 31 Cyc. p. 525, 14 Cyc. p. 297.

§ 289. Necessity for verification and effect of omission.

Contest of claims against decedents' estates, see EXECUTORS AND ADMINISTRATORS, § 251.

Failure to verify as ground for demurrer, see ante, § 192.

Ground for review of judgment, see JUDGMENT, § 335.

In action on insurance policy, see INSURANCE, § 641.

In action to enforce penalty for violation of municipal ordinance, see MUNICIPAL CORPORATIONS, § 633.

Motions to strike out pleadings for want of verification, see post, § 355.

Petition for removal of administrator, see EXECUTORS AND ADMINISTRATORS, § 35.

Petition for sale of decedent's property, see EXECUTORS AND ADMINISTRATORS, § 336.

Verification of motion to strike out matter from pleading, see post, § 360.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 859-886½; 38 CENT. DIG. Partit. § 174.

See, also, 31 Cyc. pp. 524-537.

§ 290. — In general.

See ASSUMPSIT, ACTION OF, § 20; ATTACHMENT, § 211.

[a] (Sup. 1836)

To an action on an award the defendant pleaded that there was no such award as alleged. *Held*, that, by the statute, the plea should be sworn to.—Dickerson v. Tyner, 4 Blackf. 253.

[b] (Sup. 1876)

An answer of general denial of the allegations of the complaint and affidavit in an attachment proceeding need not be sworn to.—McGuirk v. Cummings, 54 Ind. 246.

[c] (Sup. 1882)

Where, in a suit against executors for taxes, they answer that all taxes due have been paid, no verification of the answer is necessary.—McDougal v. City of Brazil, 83 Ind. 211.

[d] (Sup. 1883)

A supplemental complaint filed during the trial need not be verified.—Kimble v. Seal, 92 Ind. 276.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

[e] (Sup. 1886)

An answer in abatement must be verified. —*Moore v. Harmon*, 41 N. E. 599, 142 Ind. 555.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 859-863, 886½; 38 CENT. DIG. Partit. § 174.

See, also, 31 Cyc. pp. 524, 526.

§ 291. — Actions or pleadings based on written instruments.

Continuance or alteration of existing law by revision or codification, see STATUTES, § 147.

[a] Under the statute (St. 1817, p. 27), nil debet or non assumpsit may be pleaded, either with or without oath. If the plea be sworn to, the execution of the instrument declared on must be proved; otherwise not.—(Sup. 1820) *Bates v. Hunt*, 1 Blackf. 67; (1821) *Scribner v. Bullitt*, Id. 112.

[b] (Sup. 1822)

To an action of debt, the defendant pleaded a release, which he averred to have been lost and destroyed by accident. The plaintiff replied by denying this averment in the plea, and protesting that he had not released. *Held*, that the replication was good without being sworn to; the statute which requires an affidavit, where the execution of a writing is denied, not being applicable to the case.—*Clark v. Faulkner*, 1 Blackf. 218.

[c] (Sup. 1834)

It is not necessary, in an action on a bond conditioned for the performance of an award, that a plea in bar admitting the execution of the bond but denying that any award had been made should be verified by affidavit.—*Titus v. Scantling*, 3 Blackf. 372.

[d] The plea of non est factum must be sworn to.—(Sup. 1840) *Barber v. Summers*, 5 Blackf. 339; (1840) *Ferrand v. Walker*, Id. 424; (1846) *Parker v. State ex rel. Town*, 8 Blackf. 292.

[e] (Sup. 1842)

The execution of a bond sued on need not be proved, unless defendant make affidavit of the truth of his plea.—*Wilson v. Merkle*, 6 Blackf. 118.

[f] (Sup. 1844)

In a suit, brought for money collected by a justice on a judgment rendered by him, and alleged to have been assigned to the relator, it was *held* that a plea denying the assignment should be sworn to.—*Hooker v. State*, 7 Blackf. 272.

[g] (Sup. 1854)

A denial of the execution of a release under seal, by way of reply, is not invalid, because the replication is not verified by oath, as required by Rev. St. 1843, c. 40, § 216, though the failure to verify would excuse proof of the execution of the release.—*Buchanan v. Port*, 5 Ind. 264.

[h] (Sup. 1855)

The execution of a written instrument sued on and referred to in the complaint cannot be called in question, where not denied, either by affidavit before trial or by pleading under oath, as required by 2 Rev. St. p. 44, § 80, notwithstanding 2 Rev. St. p. 44, § 75, and page 205, § 785, provide that pleadings put in under oath shall not have more weight or impose higher proof on the opposite party, as those sections do not apply to written instruments, and besides section 75 has been so amended by Laws 1853, p. 101, as to except section 80, in terms, from its provisions, and section 785 is in the identical words of section 75.—*Unthank v. Henry County Turnpike Co.*, 6 Ind. 125.

[i] (Sup. 1856)

2 Rev. St. 1852, p. 44, § 80, providing that a written instrument sued on may be read in evidence where its execution is not denied under oath, applies only where the writing purports to have been executed by an actual party to the instrument.—*Riser v. Snoddy*, 7 Ind. 442, 65 Am. Dec. 740.

[j] (Sup. 1858)

A plea not sworn to, denying the execution of an instrument, is not invalid, though it will excuse proof of the execution.—*Magee v. Sanderson*, 10 Ind. 261.

[k] (Sup. 1858)

In an action on a written conditional subscription of stock, a copy of the subscription was filed with the complaint. No verified answer was filed. *Held*, that the subscription was admissible under the pleadings.—*Evansville, I. & C. Straight Line R. Co. v. Tressler*, 10 Ind. 548.

[l] (Sup. 1858)

Rev. St. 1843, p. 711, § 217, provides for denying under oath that assignments were made before suit was commenced, and that pleadings, by way of denial, unless verified, shall not impose the necessity of proof. *Held*, that said section does not require a denial that the assignment of a note was made at the date thereof to be specially pleaded under oath.—*Rich v. Sovacool*, 11 Ind. 148.

[m] Rev. St. 1843, c. 40, § 216, providing that any pleading, denying or requiring proof of the execution or assignment of any instrument of writing, which is the foundation of the suit, and is specially set forth in the declaration, shall not impose the necessity of such proof, unless verified by oath, is continued in force by 2 Rev. St. p. 224, § 802, providing that "the laws and usages of this state relative to pleadings and practice in civil actions and proceedings, not inconsistent herewith, and as far as the same may operate in aid hereof, or to supply any omitted case, are hereby continued in force."—(Sup. 1859) *Patterson v. Crawford*, 12 Ind. 241; (1859) *Berry v. Bolan*, 13 Ind. 259; (1873) *Belton v. Smith*, 45 Ind. 291.

[a] (Sup. 1839)

To a complaint containing two counts, one on a note and the other on an account stated, the defendant answered that the note was given in payment of the account, and also alleged an alteration of the note, which last part of the answer was not verified by oath. *Held*, that the answer alleged sufficiently a bar to the suit on the account.—*Collins v. Makepeace*, 13 Ind. 448.

[o] (Sup. 1860)

Under our present practice the execution of writings may be denied without a verification of the denial by oath.—*McNeer v. Dipboy*, 14 Ind. 18.

[p] (Sup. 1860)

Plea of a written release and loss thereof. Reply in denial not sworn to. *Held* that, even if the reply admitted the execution, it well traversed all the other material averments, and was good.—*Hill v. Jones*, 14 Ind. 389.

[q] Under the statute which permits the execution of a written instrument to be called in question only when denied by affidavit or pleading under oath, the plea of non est factum does not put in issue the execution of any written instrument, but only its existence, unless verified by oath.—(Sup. 1861) *Moorman v. Barton*, 16 Ind. 206; (1862) *Evans v. Southern Turnpike Co.*, 18 Ind. 101.

[r] (Sup. 1861)

In a suit on a subscription for stock, evidence tending to deny the execution of the subscription is not admissible, when there has been no plea verified by oath, denying such execution.—*Denny v. Northwestern Christian University*, 16 Ind. 220.

[s] (Sup. 1861)

Where, in an action on a note, defendant answers by a general denial, unverified by affidavit, he admits the execution of the note as copied in the complaint, and cannot put in evidence an alteration of the note.—*Moorman v. Barton*, 16 Ind. 206.

A plea setting up an unauthorized alteration of a note sued upon, not verified by affidavit, is equivalent to a general denial only, under which evidence as to the alteration is inadmissible.—*Id.*

[u] (Sup. 1864)

A failure to deny, under oath, the execution of an instrument that does not show an apparent execution on its face, is not an admission of its execution.—*Peoria Marine & Fire Ins. Co. v. Walser*, 22 Ind. 73.

[t] (Sup. 1869)

An answer of general denial, unverified, does not, under the Code, render evidence of facts set up in abatement admissible.—*Stebbins v. Goldthwait*, 31 Ind. 159.

An answer of general denial, unverified, does not, under the Code, require plaintiff to

prove the genuineness of an indorsement shown by the complaint.—*Id.*

[tt] (Sup. 1874)

When 2 Gav. & H. St. p. 105, § 80, requiring an answer to be sworn to in order to dispense with proof of the execution of a written instrument, was enacted, the law did not permit parties to actions to be witnesses in their own behalf; and hence it was not affected by an enactment modifying the competency of affiant to be a witness on the trial.—*Hunter v. Probst*, 47 Ind. 359.

[u] (Sup. 1874)

A chattel mortgage alleged to have been made by a married woman and her husband, which is set out as an exhibit in a complaint for its foreclosure, and which is not denied under oath, may be read in evidence against the wife, without its execution having been proved.—*Keller v. Boatman*, 49 Ind. 104.

[uu] (Sup. 1877)

In an action on a bond, defendant's failure to put in issue the execution thereof by a pleading under oath, or by affidavit denying its execution, does not dispense with the necessity of producing the bond in evidence.—*Boden v. Dill*, 58 Ind. 273.

[v] (Sup. 1878)

2 Rev. St. 1876, p. 73, § 78, provides that, "when any pleading is founded on a written instrument or on account, the original, or a copy thereof, must be filed with the pleading." *Held*, that where, in an action to enforce an assessment of benefits or damages arising from the construction of a ditch authorized by Act March 11, 1867, an assessment, which is the cause of action, is filed thereunder as an exhibit, whether it became a part of the complaint or not, it was necessary that it should be produced in evidence on the trial, or an authorized substitute therefor; the general issue being pleaded, though not verified.—*Gossett v. Tolen*, 61 Ind. 388.

[vv] (Sup. 1880)

In a suit by an assignee of the receiver of a railway company, on a written agreement by several persons that each will pay a stated sum to the company or assignee on the completion of a certain depot, the receiver's authority to make the assignment can be put in issue only by a denial under oath.—*Vannoy v. Duprez*, 72 Ind. 26.

[w] (Sup. 1882)

In an action on a bond, an answer showing that the bond had been signed by the surety on Sunday and by him delivered to the principal, who delivered the bond to the obligee on a secular day, is insufficient unless verified, since it simply tends to show a nondelivery of the bond, thereby questioning its execution.—*City of Evansville v. Morris*, 87 Ind. 269, 44 Am. Rep. 703.

[vv] (Sup. 1889)

A failure to deny the execution of an instrument, which is properly set out as the foundation of the action by pleading under oath, is so far an admission of execution as to preclude further controversy in relation thereto.—*Phoenix Ins. Co. v. Rowe*, 20 N. E. 122, 117 Ind. 202.

[x] (Sup. 1890)

A written release of the cause of action having been pleaded in defense, a reply that it was given while plaintiff was mentally incapable of transacting business need not be verified, under the statute requiring a denial of the execution of a written instrument to be made under oath.—*Louisville, N. A. & C. Ry. Co. v. Faylor*, 126 Ind. 126, 25 N. E. 869.

[xx] (App. 1897)

The execution of a mortgage, not denied by plea under oath, is not in issue.—*Tulley v. Citizens' State Bank*, 47 N. E. 850, 18 Ind. App. 240.

[y] (Sup. 1899)

Under *Burns' Rev. St. 1894*, § 367 (*Horner's Rev. St. 1897*, § 364), providing that, where a pleading referring to a written instrument is not denied by a pleading under oath or by an affidavit, such instrument may be read in evidence, without proving its execution, a deed referred to in the complaint cannot be attacked, because not authorized by the directors and stockholders of the grantor company, by an answer not under oath or supported by an affidavit.—*Allen v. Studebaker Bros. Mfg. Co.*, 53 N. E. 422, 152 Ind. 406.

[yy] (Sup. 1903)

Burns' Rev. St. 1901, § 486 (*Horner's Rev. St. 1901*, § 478), provides that if either party, before trial, allows the other an inspection of any writing material to the action, with notice that he intends to read the same as evidence, it may be so read without proof of genuineness or execution, unless denied by affidavit before trial. *Held* that, where the statute has been complied with, an assignment of a claim sued on may be read in evidence, without proof of its execution, though it was not the foundation of the action.—*Boseker v. Chamberlain*, 66 N. E. 448, 160 Ind. 114.

[z] (App. 1906)

Where a paragraph of a complaint alleged the execution of a contract of defendant city for plaintiff's services as janitor, and the answer consisted of a general denial, not sworn to, the execution of the contract was conclusively admitted, but the city was not concluded as to the amount of damages recoverable.—*Van Camp v. City of Huntington*, 39 Ind. App. 28, 78 N. E. 1057.

[zz] (App. 1907)

An unverified answer, denying that defendants made any other or different contract than that set up therein, raises no issue as to the execution of the written contract set up

in the complaint.—*Sullivan Machinery Co. v. Breeden*, 40 Ind. App. 631, 82 N. E. 107.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 864-879.

See, also, 31 Cyc. pp. 529-534.

§ 293. — Dilatory defenses and matter in abatement.

In attachment, see ATTACHMENT, § 255.

[a] (Sup. 1848)

To an action of debt commenced by a writ of domestic attachment, the defendant pleaded *actio non*, because he was, at the time of suing out the attachment, a married man, that he and his wife were then bona fide residents of said county, and had for a long time been so, up to the time of issue of said writ. *Held*, that the plea was bad in abatement, because not sworn to.—*Smith v. Moore*, 1 Ind. 228, *Smith*, 154.

[b] (Sup. 1858)

Under our former practice, pleas in abatement were required to be sworn to; but, *quære*, whether the present Code has not abolished all distinctions, so far as pleading is concerned, between matter in abatement and matter in bar.—*Garrison v. Clark*, 11 Ind. 369.

[c] (Sup. 1867)

Code 1843, c. 40, art. 8, § 200, requires that pleas in abatement shall be verified. Code 1852, § 802 (2 Gav. & H. St. § 336), declares that "all laws inconsistent with the provisions of this act are hereby repealed, but the repeal shall not operate or revive any former act," and that "the laws and usages * * * relative to pleadings and practice in civil actions and proceedings, not inconsistent herewith, and as far as the same may operate in aid thereof, or to supply any omitted case, are hereby continued in force." *Held* that, as the later Code contained no direct provision in reference to such pleas, it was an "omitted case," within section 802, by which section 200 of the Code of 1843 was continued in force.—*Indianapolis, P. & C. Ry. Co. v. Summers*, 28 Ind. 521.

[d] A plea or answer in abatement must be verified.—(Sup. 1868) *Knoefel v. Williams*, 30 Ind. 1; (1873) *Dawson v. Vaughan*, 42 Ind. 395.

[e] (Sup. 1870)

In a suit against the board of county commissioners for medical services rendered by the plaintiff to the poor of a certain township upon the employment of the township trustee, the answer set up the fact that plaintiff has presented said claim to said board for allowance, and has appealed from the decision of the board thereon, and that the appeal is still pending. *Held*, that such an answer, and also an answer that said claim has been presented by the plaintiff to said board for allowance and is still pending before the board, are answers in abatement, and must be verified by affidavit.—*Commissioners of Morgan County*

v. Holman, 34 Ind. 256; Board of Com'rs of Morgan County v. Tarleton, Id. 379.

[f] (Sup. 1873)

A plea in abatement is bad if not sworn to.—Beeson v. Howard, 44 Ind. 413.

[g] (Sup. 1881)

The pendency of another suit for the same cause is available only by a duly verified answer in abatement.—Lorch v. Aultman, 75 Ind. 162.

[h] (Sup. 1887)

Under Rev. St. 1881, § 365, providing that pleas in abatement must be verified, a plea in an action to foreclose a mortgage, setting up an agreement to extend the time of payment of the first note, without a verification, may be properly stricken out; being a plea in abatement of the action.—Moore v. Sargent, 112 Ind. 484, 14 N. E. 466.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. §§ 882-884.

See, also, 31 Cyc. pp. 527, 528.

§ 295. Persons who may verify pleading.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. §§ 887-890; 41 CENT. DIG. Quo W. § 59.

See, also, 31 Cyc. pp. 537, 538.

§ 296. — In general.

[a] (Sup. 1871)

The statute requiring the verification of pleadings does not apply to infants. A verification by the next friend is sufficient.—Turner v. Cook, 36 Ind. 129.

[b] (Sup. 1890)

Rev. St. 1881, § 364, provides that, "where a pleading is founded on a written instrument. * * * such instrument * * * may be read in evidence on the trial of the cause without proving its execution, unless its execution be denied under oath; * * * but executors, administrators, or guardians need not deny the execution of an instrument," etc. *Held*, that the construction of this statute, requiring all parties to an instrument which is the foundation of a pleading to verify a plea denying its execution in order to require proof thereof, should not be extended to heirs or other persons not parties to the instrument.—Swales v. Grubbs, 126 Ind. 106, 25 N. E. 877.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. § 887.

See, also, 31 Cyc. p. 537.

§ 299. Time for verification.

[a] (Sup. 1870)

Where a plea in abatement had been stricken out for want of verification by affidavit after the jury had been sworn to try the cause, but before any further step had been taken, *held*, that it was too late for the defendant to ask leave to supply the verification.—Wilson v. Poole, 33 Ind. 443.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. § 891.

See, also, 31 Cyc. p. 540.

§ 300. Sufficiency of verification.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. §§ 318, 892-906;

38 CENT. DIG. Partners. § 415; 41 CENT.

DIG. Quo W. § 59.

See, also, 31 Cyc. pp. 541-545.

§ 301. — In general.

[a] (Sup. 1840)

It is not necessary that the affidavit attached to a plea in abatement should be entitled of the term at which it was filed.—Haines v. Gurley, 5 Blackf. 269.

[b] (Sup. 1840)

An affidavit to support a plea must be direct and positive. If made as the deponent "believes," merely, it is uncertain and insufficient.—Adamson v. Wood, 5 Blackf. 448.

[c] (Sup. 1854)

The oath or affirmation in denial of an assignment of a mortgage should be that the party has reason to believe, and does verily believe, that such assignment was not made.—Brown v. Woodbury, 5 Ind. 254.

[d] (Sup. 1880)

The fact that the complaint in a will contest was sworn to by one of the contestants who subsequently dismissed did not affect the sufficiency of the complaint as to the remaining contestants.—Kinnaman v. Kinnaman, 71 Ind. 417.

[e] (Sup. 1882)

An attorney who is a notary public may administer an oath to his client in the verification of a pleading.—Yeagley v. Webb, 86 Ind. 424.

[f] (App. 1897)

An answer verified on information and belief is equivalent to one sworn to in absolute terms.—Deering Harvester Co. v. Peugh, 45 N. E. 808, 17 Ind. App. 400.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. §§ 318, 892-897, 904-906; 38 CENT. DIG. Partners. § 415;

41 CENT. DIG. Quo W. § 59.

See, also, 31 Cyc. p. 541.

VIII. PROFERT, OYER, AND EXHIBITS.

Aider by verdict or judgment, see post, §§ 433-435.

In justices' courts, see JUSTICES OF THE PEACE, § 97.

In pleading former adjudication, see JUDGMENT, § 949.

Motions to strike out, see post, § 360.

Necessity of introduction in evidence of papers annexed to pleadings, see TRIAL, § 34.

Necessity of making writ exhibit to complaint to enjoin execution, see **EXECUTION**, § 172.
 Objections and waiver thereof, see post, § 423.
 Profert and oyer of letters testamentary or of administration, see **EXECUTORS AND ADMINISTRATORS**, § 445.
 Record for purpose of review, see **APPEAL AND ERROR**, §§ 518, 616.
 Will as exhibit in action for legacy, see **EXECUTORS AND ADMINISTRATORS**, § 443.

In particular actions or proceedings.

See—

Allowance to widow. **EXECUTORS AND ADMINISTRATORS**, § 194.
BILLS AND NOTES, § 488.
 Bonds of executors or administrators. **EXECUTORS AND ADMINISTRATORS**, § 537 (8).
 Breach of covenant. **COVENANTS**, § 114.
 Claims against decedent's estate. **EXECUTORS AND ADMINISTRATORS**, § 227.
 Enforcement of mechanic's lien. **MECHANICS' LIENS**, § 271.
 Equitable relief against judgment. **JUDGMENT**, § 460.
 Foreclosure of mortgage. **BUILDING AND LOAN ASSOCIATIONS**, § 39.
 Insurance policy. **INSURANCE**, §§ 631, 640.
 Judgments. **JUDGMENT**, §§ 913, 914, 938.
 Lost instruments, § 22.
 Restraining justice's judgment. **JUSTICES OF THE PEACE**, § 128.
 Review of judgment. **JUDGMENT**, § 335.
 Supplementary proceeding. **EXECUTION**, § 387.

§ 305. Profert.

Amendment by omitting, see ante, § 246.
 In actions on foreign judgments, see **JUDGMENT**, § 938.
 Of record in action on judgment, see **JUDGMENT**, § 913.

[a] (**Sup.** 1822)

In actions on instruments not under seal, profert is never made; but, after the defendant's appearance in such cases, the court, if required, will make an order that the writing be produced for the defendant's inspection, that a copy be furnished him, and that in the meantime all proceedings be stayed.—*Pumphrey v. Coleman*, 1 Blackf. 190.

[b] (**Sup.** 1843)

In debt on a clerk's official bond, the breach assigned being the not paying over of money received by him on a judgment which has been assigned to the plaintiff, it is not necessary, in the declaration, to make profert of the assignment.—*State ex rel. Johnson v. Stewart*, 7 Blackf. 9.

[c] (**Sup.** 1877)

In an action for use and occupation, an answer that the plaintiff had assigned the cause of action for the benefit of his creditors by deed, which the assignee still held at the commencement of the action, was insufficient without profert of a copy of the deed or ex-

cuse for the omission.—*Ross v. Boswell*, 60 Ind. 235.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 910-917.

See, also, 31 Cyc. pp. 547-554; note, 1 L. R. A. (N. S.) 777.

§ 306. Oyer.

Effect of scope of inquiry and matters considered on demurrer, see ante, § 216.
 In action on judgment, see **JUDGMENT**, § 913.
 Objection and waiver thereof, see post, § 423.

[a] To deny oyer where it ought to be granted is error.—(*Sup.* 1821) *Osborne v. Reed*, 1 Blackf. 126; (1830) *State v. Hicks*, 2 Blackf. 336, 20 Am. Dec. 118.

[b] (**Sup.** 1821)

A defendant who craves oyer of a deed declared on has a right on oyer to a copy of every part of the obligation, even to the attestation and names of the witnesses, if required.—*Osborne v. Reed*, 1 Blackf. 126.

[c] (**Sup.** 1822)

If an obligation for the payment of money be set out in the declaration, without any day of payment being specified, it must be considered as payable immediately; and if the obligation read on oyer be payable on a day subsequent to its date, the variance is fatal on general demurrer.—*Osborne v. Fulton*, 1 Blackf. 233.

[d] (**Sup.** 1823)

If defendant demand oyer of a deed referred to in the declaration, without being entitled to it, and it be granted, the deed becomes a part of the declaration.—*Deming v. Bullitt*, 1 Blackf. 241.

[e] (**Sup.** 1827)

Oyer cannot be demanded of a record.—*Capp v. Gilman*, 2 Blackf. 45.

[f] (**Sup.** 1830)

It is not error to grant oyer where it ought to be denied.—*State v. Hicks*, 2 Blackf. 336, 20 Am. Dec. 118.

[g] (**Sup.** 1837)

A party who has obtained oyer of a specialty may waive the benefit of it if he please; but, if he professedly set it out on the record, he is bound to recite it truly and entire.—*Rudisill v. Sill*, 4 Blackf. 282.

[h] (**Sup.** 1837)

Covenant on a lease of a tavern with certain articles for housekeeping. Among the articles specified in the declaration are three termed "to was-pans" and "one pair of waffle." The lease produced on oyer mentions the same articles with those set out in the declaration, but describes the three above named as "two wash-pans" and "one pair of waffle-irons." The lease produced showed also that several words in it (which were in the declaration) had been crossed with a pen, but in such a man-

ner as to leave them legible. The declaration did not profess to set out the lease in hæc verba. *Held*, that a demurrer for the variance could not be sustained.—*Lynch v. Wilson*, 4 Blackf. 288.

[i] (Sup. 1841)

If a defendant sued as the obligor of a bond do not appear to be a party to the bond shown on oyer, a demurrer to the declaration must, of course, be sustained.—*Wells v. Jackson*, 6 Blackf. 40.

[j] (Sup. 1841)

If a bond sued on be described in the declaration as joint and several, and the bond produced on oyer be joint only, the variance is fatal.—*Sherry v. Foresman*, 6 Blackf. 56.

[k] (Sup. 1842)

The declaration stated the condition of a bond to be delivery of goods on the 20th of June, 1840, at the farm of A. The condition of the bond, as shown on oyer, was delivery of goods on the 2d of June, 1840, at the house of A. *Held*, on general demurrer, that the variance was fatal.—*McKay v. Craig*, 6 Blackf. 168.

[l] (Sup. 1842)

Oyer of the writ, if in any case demandable, cannot be craved after the day on which the cause is first set for trial.—*Layman v. Waynick*, 6 Blackf. 189.

[m] (Sup. 1843)

Where a bond was described in the declaration as payable to B., treasurer of H. county, and appeared on oyer to be payable to B., treasurer of H. county, or his successors in office, the variance was *held* immaterial.—*Boles v. McCarty*, 6 Blackf. 427.

[n] (Sup. 1843)

The declaration alleged the condition to be for the payment of a certain sum of money on a certain day. The condition, as shown on oyer, was for the payment of the money out of the profits of certain real estate. *Held*, that the variance was fatal.—*Irish v. Irish*, 6 Blackf. 438.

[o] (Sup. 1843)

A bond sued on was described in the declaration as payable to "the president and trustees of the town of Fort Wayne." The bond shown on oyer was payable to "the president and trustees of the Fort Wayne Corporation." *Held*, that the variance was fatal.—*Town of Ft. Wayne v. Jackson*, 7 Blackf. 36.

[p] A defendant cannot take advantage of a variance between the writ and declaration until he has obtained oyer of the writ.—(Sup. 1844) *Nichols v. Smalley*, 7 Blackf. 200; (1850) *Evans v. Morton*, 2 Ind. 244.

[q] (Sup. 1844)

A plea relying on nonperformance of a bond, in order to show want of consideration, was *held* to be bad, the bond appearing on oyer

to be different from that described in the plea.—*McDorman v. Jellison*, 7 Blackf. 304.

[r] (Sup. 1845)

In a suit on a note by an indorsee, the note and indorsement, if oyer of them has been asked and given, are a part of the declaration.—*Chapman v. Harper*, 7 Blackf. 333.

[s] (Sup. 1845)

If a defendant, having craved and obtained oyer of an instrument declared on, demur to the declaration without spreading the instrument on the record, the demurrer stands as if oyer had not been craved.—*Daniels v. Richie*, 7 Blackf. 391.

[t] (Sup. 1845)

A variance between the bond and the declaration as to the date of the instrument is fatal.—*Comparet v. State*, 7 Blackf. 553.

[u] (Sup. 1845)

In debt on a sheriff's bond, the defendants are not entitled to oyer of the approval of the bond by the judges; such approval being no part of the bond.—*Clark v. State*, 7 Blackf. 570.

[v] (Sup. 1847)

In debt against A., administrator of B., on a bond alleged in the declaration to have been executed by B., together with C., D., E., and F., the declaration showed the bond to be joint, but it did not show that F. had sealed the bond, or that he was living. *Held*, that the declaration was not objectionable on the ground of variance.—*Legate v. Marr*, 8 Blackf. 404.

[w] (Sup. 1855)

If oyer of an unsealed instrument be given without objection when demanded, it becomes a part of the record.—*Russell v. Drummond*, 6 Ind. 216.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 918-929.

See, also, 31 Cyc. p. 547; note, 1 L. R. A. (N. S.) 777.

§ 307. Exhibits annexed to pleading.

Failure to attach exhibit to pleadings as ground for demurrer, see ante, § 193.

Grant of leave to amend by annexing exhibit as constituting amendment, see ante, § 240.

In actions for conversion of or injury to mortgaged property, see CHATTEL MORTGAGES, §§ 176, 177.

In actions for insurance premium, see INSURANCE, § 188.

In actions for partition, see PARTITION, § 61.

In actions on insurance policies, see INSURANCE, § 631.

In actions on judgments, see JUDGMENT, § 913.

In actions to enforce assessment for public improvements, see MUNICIPAL CORPORATIONS, § 567.

In action to enforce penalty for violation of municipal ordinance, see **MUNICIPAL CORPORATIONS**, § 633.

In suits to foreclose mortgage, see **CHATTEL MORTGAGES**, § 277.

In will contest, see **WILLS**, § 281.

Judgments, see **JUDGMENT**, § 949.

Necessity of setting out in pleading or filing copy, see *ante*, § 32.

[a] (**Sup.** 1860)

In a suit against a bank upon its notes, after nonpayment on demand, the notes, or one of each denomination, or a copy of them, must be annexed to the petition.—*Conwell v. Hill*, 14 Ind. 131, 286.

[b] (**Sup.** 1864)

In a suit by a surety, against his principal, to recover money paid by him on a judgment against him for the debt of the principal, a transcript of the judgment need not be annexed to the complaint, as the judgment is not the foundation of the action.—*Harker v. Glidewell*, 23 Ind. 219.

[c] (**Sup.** 1864)

An amended complaint to which copies of the instrument sued on are not annexed is insufficient, though such copies were appended to the original complaint.—*McEwen v. Hussey*, 23 Ind. 395.

[d] (**Sup.** 1865)

When an answer is founded on a written instrument, a copy of the instrument must be annexed.—*Seawright v. Coffman*, 24 Ind. 414.

[e] (**Sup.** 1876)

Where in an action for the recovery of the possession of real estate, where the answer by way of counterclaim seeks to have set aside a sale thereof, made to plaintiff by the sheriff under an execution issued on a judgment in favor of plaintiff and against defendant, it being alleged that, before the sale, defendant pointed out and surrendered to the officer holding the execution, personal property to be levied on and sold by him in value sufficient to satisfy the execution, but that the officer, confederating with plaintiff, refused to accept such personal property and without defendant's knowledge or consent levied on the real estate in question, it was not necessary to make an exhibit of the judgment on which the sale was made.—*Gilpin v. Wilson*, 53 Ind. 443.

[f] (**Sup.** 1879)

The rule of practice established by the decisions of this court that, where several paragraphs of a complaint or answer refer to the same written instrument as the foundation of each, one copy of it is sufficient for all the paragraphs, is applicable to the case of a reference by the several paragraphs of an answer to an exhibit attached to the complaint.—*Sidener v. Davis*, 69 Ind. 336.

[g] (**Sup.** 1881)

Instruments which do not constitute the foundation of the action cannot be made a part

of the pleadings by attaching them to such pleadings as exhibits.—*State v. Wenzel*, 77 Ind. 428.

[h] (**Sup.** 1881)

An action to set aside a settlement of the amount due on notes is not based on the notes, and a copy thereof need not be attached to the complaint as exhibits.—*Worley v. Moore*, 77 Ind. 567.

[i] (**Sup.** 1881)

Where a complaint refers to a copy of the bond sued on as "Exhibit A." and there is no exhibit on the record so marked, the complaint will not be held bad if such copy is identified in other ways.—*Wall v. Galvin*, 80 Ind. 447.

[j] (**App.** 1896)

Under Rev. St. 1894, § 365 (Rev. St. 1881, § 362), requiring, in actions on written contracts, the original or a copy to be filed with the complaint, a complaint on a bond failing to set out the bond as an exhibit is demurrable for want of sufficient facts, though it recites a filing of a copy of the bond.—*State ex rel. Myers v. Adams*, 15 Ind. App. 310, 44 N. E. 47.

[k] (**App.** 1896)

However necessary a written instrument may be as evidence in support of plaintiff's suit, it is not a proper exhibit if the action be not founded on the instrument.—*Diggs v. Way*, 51 N. E. 429, 54 N. E. 412, 22 Ind. App. 617.

[l] (**App.** 1899)

The constitution and by-laws need not be attached as an exhibit to the complaint against a building association for refund to pay a withdrawing member; these not being the foundation of the action.—*Huntington County Loan & Savings Ass'n v. Emerick*, 55 N. E. 106, 23 Ind. App. 175.

[m] (**Sup.** 1902)

Under Burns' Rev. St. 1901, § 365 (section 362, Rev. St. 1881; section 362, Horner's Rev. St. 1901) providing that, whenever any pleading is founded on a written instrument or account, the original, or a copy thereof, must be filed with the pleading, it is not necessary that such instrument or copy be actually attached to the pleading; and where a complaint in a suit on attachment bonds described the bonds, and the action in which they were executed, and alleged that a copy of each bond was filed therewith and made a part thereof, the bonds were thereby made a part of the complaint.—*Thompson v. Recht*, 63 N. E. 568, 158 Ind. 302.

[n] (**App.** 1903)

Where a complaint alleging the fraudulent conveyance of property contains no description of the property except by reference to an exhibit, such exhibit cannot be considered in determining the sufficiency of the complaint.—*Smith v. Tate*, 66 N. E. 88, 30 Ind. App. 367.

[c] (App. 1903)

Where the allegations of a pleading covered all the material facts stated in exhibits annexed thereto, it was not error to strike out the exhibits.—*Noah v. German-American Bldg. Ass'n*, 68 N. E. 615, 31 Ind. App. 504.

[d] (App. 1905)

Where the owners of the fee seek to restrain a life tenant and her lessee from removing oil and gas from the land, and the complaint refers to a written agreement between the life tenant and her lessee as being attached to the complaint as an exhibit, such agreement is not a proper exhibit to the complaint, and failure to attach it to the complaint does not affect the sufficiency of the complaint.—*Richmond Natural Gas Co. v. Davenport*, 37 Ind. App. 25, 76 N. E. 525.

[d] (App. 1906)

A check set out as an exhibit in an answer of payment and settlement is a part of such answer.—*Indiana Union Traction Co. v. McKinney*, 39 Ind. App. 86, 78 N. E. 203.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. §§ 930-934; 6 CENT. DIG. Banks, § 820; 24 CENT. DIG. Fraud. Conv. § 759.
See, also, 31 Cyc. pp. 556-565.

§ 308. Written instruments or copies thereof filed with pleading.

Consideration of paper filed with pleading on hearing on demurrer, see ante, § 216.

Copy of account alleged in pleading, see post, § 330.

Cure of omission to file by verdict, see post, § 432.

Failure to file as ground for demurrer, see ante, §§ 192, 193.

In action for cancellation of instrument, see CANCELLATION OF INSTRUMENTS, §§ 37, 38.

In actions by devisees to enjoin waste, see WASTE, § 20.

In actions for penalty for false or fraudulent tax return, see TAXATION, § 845.

In actions for penalty for violation of municipal ordinance, see MUNICIPAL CORPORATIONS, § 633.

In actions on contracts of reinsurance, see INSURANCE, § 686.

In actions on foreign judgment, see JUDGMENT, § 938.

In actions on insurance policy, see INSURANCE, §§ 631, 640, 643.

In actions on judgment, see JUDGMENT, § 913.

In actions on lost instruments, see LOST INSTRUMENTS, § 22.

In actions on mutual benefit certificate, see INSURANCE, § 815.

In actions on notes for premiums, see INSURANCE, § 188.

In actions on recognizance, see RECOGNIZANCES, § 12.

In actions to construe will, see WILLS, § 702.

In actions to enforce legacy charged on land, see WILLS, § 826.

In actions to enforce municipal assessment, see MUNICIPAL CORPORATIONS, § 567.

In actions to establish will, see WILLS, § 279.

In actions to set aside election under will, see WILLS, § 797.

In ejectment, see EJECTMENT, § 62.

In pleading release, see RELEASE, § 46.

In suits for partition, see PARTITION, § 61.

In suits to cancel mortgage, see MORTGAGES, § 311.

In suits to enjoin executors of justice's judgment, see JUSTICES OF THE PEACE, § 135.

In suits to foreclose mechanic's lien, see MECHANICS' LIENS, § 271.

In suits to foreclose mortgages, see MORTGAGES, § 406.

In suits to foreclose vendor's lien, see VENDOR AND PURCHASER, § 280.

Judgments, see JUDGMENT, § 949.

Record of filing, see post, § 335.

Review of questions as dependent on objections in lower court, see APPEAL AND ERROR, § 192.

[a] (Sup. 1855)

If the instrument is set forth in *hæc verba* in the pleading, which is filed, this is a sufficient compliance with 2 Rev. St. 1852, p. 44, providing that, when any pleading is founded on a written instrument, the original or a copy must be filed with the pleading.—*Lamson v. Falls*, 6 Ind. 309.

The statute requirement that, "when any pleading is founded on a written instrument or account, the original or a copy thereof must be filed with the pleading" (2 Rev. St. 1852, p. 44), is not complied with by merely leaving the instrument in the clerk's office when the pleading is filed.—*Id.*

[aa] (Sup. 1857)

A set-off is within the meaning of 2 Rev. St. p. 44, § 78, requiring that, when any pleading is founded on a written instrument or an account, the original, or a copy thereof, must be filed with the pleading.—*Fugit v. Ewing*, 9 Ind. 345.

[aaa] (Sup. 1859)

In a suit on an attachment bond, plaintiff, to prove that the attachment was wrongfully obtained, offered in evidence the record of the suit in which it had been obtained and in which judgment had been rendered against the party obtaining it. The court rejected the record because it had not been filed with the complaint. *Held*, that this was error, as a party is not required to file the evidence by which he expects to prove the allegations of his pleadings.—*Draper v. Vanhorn*, 12 Ind. 352.

[b] The statute providing that a pleading founded on a written instrument must be accompanied by the original, or a copy thereof, is imperative.—(Sup. 1859) *Price v. Grand Rapids, & I. R. Co.*, 13 Ind. 58; (1859) *Kiser*

v. State, Id. 80; (1859) *Hillis v. Wilson*, Id. 146; (1873) *Brown v. State ex rel. Brown*, 44 Ind. 222.

[bb] (Sup. 1859)

Under 2 Rev. St. p. 44, providing that where any pleading is founded on a written instrument, a copy thereof must be filed with the complaint, in a suit against a carrier for failure to deliver goods in time and good condition the complaint should be based on the bill of lading.—*Indianapolis & C. R. Co. v. Remmy*, 13 Ind. 518.

[bbb] When a pleading is founded on a written instrument, the original, or a copy must be filed therewith.—(Sup. 1860) *Little v. Vance*, 14 Ind. 19; (1863) *Nill v. Brooks*, 21 Ind. 178; (1863) *Reveal v. Conner*, Id. 289; (1864) *Pecoria Marine & Fire Ins. Co. v. Walser*, 22 Ind. 73; (1865) *Sayres v. Linkhart*, 25 Ind. 145; (1865) *Coleman v. Hart*, Id. 256; (1865) *Alsop v. Hutchings*, Id. 347; (1873) *King v. Enterprise Ins. Co.*, 45 Ind. 43; (1874) *Strough v. Gear*, 48 Ind. 100; (1875) *Montgomery v. Gorrrell*, 51 Ind. 309; (1891) *Offutt v. Rucker*, 2 Ind. App. 350, 27 N. E. 589.

[c] (Sup. 1860)

In an action on bank notes, where it appeared that they had been protested for non-payment, and that the bank's securities in the hands of the state auditor had been insufficient for their payment, it is no excuse for failure to file the notes or copies thereof that the originals are on file in the auditor's office; non constat, that the plaintiff cannot obtain copies.—*Conwell v. Hill*, 14 Ind. 131, 286.

[cc] (Sup. 1860)

The tax duplicate is not a written instrument within the meaning of section 78 of the Code; and a copy of it need not be filed with a pleading based upon or referring to it.—*Ewing v. Robeson*, 15 Ind. 26.

[ccc] (Sup. 1860)

In an action on an account by the assignee thereof, the complaint must be accompanied by a copy of the assignment.—*Jones v. Dronberger*, 15 Ind. 443.

[cd] (Sup. 1864)

In a suit brought on a written contract for the purchase of land, to recover the purchase-money, in which the complaint alleges a performance by the plaintiff of the contract on his part, and a tender of a conveyance, the deed need not be made a part of the complaint, by filing a copy therewith as an exhibit; the action being founded on the contract, and not on the deed.—*Emmons v. Kiger*, 23 Ind. 483.

[dd] (Sup. 1865)

The complaint in an action to set aside a conveyance of land as fraudulent, and to subject the same to a sale on execution to satisfy a judgment, need not contain a copy of such judgment; the foundation of the action being the fraud alleged and not the judgment.—*Bray v. Hussey*, 24 Ind. 228.

[ddd] (Sup. 1865)

In an action on an injunction bond, a copy of the proceedings and judgment on the application for the injunction need not be filed with the complaint, the action not being founded thereon.—*Winship v. Clendenning*, 24 Ind. 439.

[e] (Sup. 1865)

Writings which are only evidence of the matter pleaded need not be filed.—*Vanschoiack v. Farrow*, 25 Ind. 310.

[ee] (Sup. 1866)

In a suit for a malicious prosecution, in having had the plaintiff arrested upon a writ of ne exeat, it is not requisite that the affidavit upon which the proceeding was founded, the writ, etc., should be filed with the complaint.—*Ammerman v. Crosby*, 26 Ind. 451.

[eee] Setting out an instrument in full in the declaration, petition, or complaint is a sufficient compliance with a statute requiring it or a copy thereof to be filed therewith.—(Sup. 1868) *Adams v. Dale*, 29 Ind. 273; (1889) *Colchen v. Ninde*, 120 Ind. 88, 22 N. E. 94.

[f] (Sup. 1868)

Where land has been conveyed by a deed absolute on its face, but in fact a mortgage, and the grantee has resold for a sum in excess of the debt secured, an action by the mortgagor to recover such excess is not founded on the deed, and no copy thereof need be set out with the complaint.—*Crane v. Buchanan*, 29 Ind. 570.

[ff] (Sup. 1869)

In a suit to restrain the sale of real estate on execution, it is not necessary to file with the complaint a copy of the execution, since the action is not founded on the execution within the meaning of the statute.—*Clegg v. Patterson*, 32 Ind. 135.

[fff] (Sup. 1870)

In a suit on a note, executed by defendant to the husband of plaintiff, the complaint alleged that the husband died testate; that by his will he gave to plaintiff all his estate after the payment of the debts; that the estate had been finally settled by the executor, leaving the note in question as a part of the property bequeathed to her. *Held*, that the complaint was not insufficient because the will or a copy thereof was not filed with it. The action was on the notes, and not on the will. It is the written instrument, or a copy of it, on which the action is brought, that must be filed with the complaint. 2 Gav. & H. St. p. 104, § 78.—*Nelson v. Myers*, 34 Ind. 431.

[g] (Sup. 1872)

A tax duplicate is not a written instrument within the meaning of 2 Gav. & H. St. p. 104, § 78, requiring that when any plea is founded on a written instrument the original or a copy thereof must be filed with the pleading.—*Hazzard v. Heacock*, 39 Ind. 172; *Same v. Southwick*, Id. 178.

[gg] (Sup. 1872)

Where the defense to a suit on a note given for land rests on a breach of a covenant in the deed, a copy of the deed must be filed with the answer.—*Galbreath v. McNeily*, 40 Ind. 231.

[ggg] (Sup. 1872)

In an action on a note secured by a mortgage on a portable sawmill, the answer alleged that the note was given in consideration of the sale of the mill, which sale was made on a written agreement, executed by plaintiff to defendant, warranting it to be in good and complete running order; that there was a breach of such warranty, etc. There was no copy of the written contract filed with the answer. To this there was a reply that the written contract was simply preliminary to an examination of the mill by defendant, and that such examination had been made, and the note thereupon executed, and the written contract surrendered up. A demurrer to this reply was overruled. *Held*, that the reply was good, and that if bad the demurrer should have been sustained to the answer for the failure to file therewith a copy of the written agreement.—*Drook v. Irvine*, 41 Ind. 430.

[h] (Sup. 1873)

In an action on a note, where defendant answered by way of set-off that plaintiff was indebted to him for docket fees due defendant as district attorney for prosecuting and convicting plaintiff in a misdemeanor case, it was unnecessary to file copies of the judgments in which the fees were taxed.—*Law v. Vierling*, 45 Ind. 25.

[hh] (Sup. 1873)

Where the existence of a lease is pleaded as a defense to an action for the purchase money of real estate conveyed to the defendant by warranty deed, the basis of the defense is the covenant of warranty, and not the lease, and the lease need not be filed with and made a part of the answer.—*Strain v. Huff*, 45 Ind. 222.

[hhh] (Sup. 1873)

It is not sufficient to state in a pleading that a writing is filed with it. The writing must be filed, or it will not be available.—*Conwell v. Clifford*, 45 Ind. 392.

[i] (Sup. 1874)

Where a written award is pleaded, although made in a common-law arbitration, a copy of the award must be filed with the pleading.—*Sanford v. Wood*, 49 Ind. 165.

[ii] (Sup. 1874)

The proceedings in a case alleged to have been maliciously prosecuted do not make a part of the complaint, in an action for malicious prosecution, by filing with the complaint a copy of such proceeding.—*Fisher v. Hamilton*, 49 Ind. 341.

[iii] (Sup. 1876)

A complaint against a decedent's estate was founded on an alleged agreement by which the claimant sold certain lands to deceased, in his lifetime, for a certain sum, on condition that the latter should resell such lands, and that whatever he should realize over such sum, deducting expenses therefrom, should be refunded to the claimant. It was alleged that deceased sold the lands for a certain sum, larger than the price paid by him to the claimant, and refused to pay the difference. *Held*, that it was not necessary to file such agreement with the complaint.—*Bryson v. Kelley*, 53 Ind. 486.

[j] One copy will serve for any number of paragraphs in the same pleading.—(Sup. 1876) *Maxwell v. Brooks*, 54 Ind. 98; (1883) *Scotten v. Randolph*, 96 Ind. 581; (1886) *Hochstedler v. Hochstedler*, 108 Ind. 506, 9 N. E. 467; (1892) *Glass v. Murphy*, 4 Ind. App. 530, 30 N. E. 1007, 31 N. E. 545; (1895) *Farr v. Bach*, 13 Ind. App. 125, 41 N. E. 393; (1895) *Milwaukee Mechanics' Ins. Co. v. Stewart*, 13 Ind. App. 640, 42 N. E. 290.

[jj] (Sup. 1877)

In a suit by the assignee of a note, against his assignor, alleging that, in an action on such note, by the assignee, against the maker, the latter had recovered judgment, the complaint need not contain a copy of the pleadings, proceedings, and judgment in such action.—*White v. Webster*, 58 Ind. 233.

[jjj] (Sup. 1878)

An action to recover the amount of, or to enforce the alleged lien of, a ditch assessment, is founded on the assessment, and a copy thereof should be filed as an exhibit with the complaint.—*Jerrell v. Etchison Ditching Ass'n*, 62 Ind. 200.

[jjjj] (Sup. 1878)

A complaint in an action on the bond of the guardian of an habitual drunkard is demurrable if no exhibit of the bond is filed therewith.—*Miller v. State ex rel. Jerauld*, 63 Ind. 219.

[k] (Sup. 1879)

Where a copy of the contract sued on is referred to in the complaint as an "exhibit," a reference to the same in the answer as "a copy of which is filed with the complaint" is sufficient to make such copy an exhibit to the answer, though the word "exhibit" is not used therein.—*Sidener v. Davis*, 69 Ind. 336.

[kk] (Sup. 1880)

A paragraph of a complaint, which counts on a written instrument, and professes to file a copy thereof, is bad, if no copy is filed, though the instrument, without any reference thereto, is set out in another paragraph.—*Petty v. Trustees of Church of Christ in City of Muncie*, 70 Ind. 290.

[kkk] (Sup. 1880)

The practice of filing collateral instruments as exhibits to pleadings is a vicious and cen-

social one, tending to break down good pleading, to encourage indolence in pleading, and breed confusion in judicial proceedings.—*Clodfelter v. Hulett*, 72 Ind. 137.

[kkkk] (Sup. 1881)

Instruments such as conveyances in one's chain of title, which constitute merely evidence in support of his cause of action or defense, need not be filed with his pleadings.—*Ragsdale v. Parrish*, 74 Ind. 191.

[l] (Sup. 1881)

In suit on a note, "payable according to the conditions" in other written instruments, which form a part of the contract, copies of the same, as well as of the note, etc., must be made a part of the complaint.—*Busch v. Columbia City German Building, Loan & Savings Ass'n No. 2*, 75 Ind. 348.

[lll] (Sup. 1881)

In a complaint by a creditor to set aside a fraudulent conveyance, a copy of the deed need not be set out.—*Stout v. Stout*, 77 Ind. 537.

[llll] (Sup. 1882)

In an action to recover the amount of a ditch assessment, the assessment is the foundation of the action, and a copy of it must be made a part of the complaint by being filed therewith, and identified by reference thereto.—*Smith v. Clifford*, 83 Ind. 520.

[lllll] (Sup. 1882)

Where, in pleadings, covenants in mortgages and leases are relied on, the instruments must be set out or copies filed, otherwise the pleadings are defective.—*Ashley v. Foreman*, 85 Ind. 55.

[m] (Sup. 1882)

In an action to set aside a bill of sale as fraudulent against creditors, the bill of sale is not the foundation or cause of action; and consequently it is not necessary to the sufficiency of the complaint that a copy of bill of sales be made an exhibit or filed with the complaint.—*Heckelman v. Rupp*, 85 Ind. 283.

Under a statute requiring instruments or copies thereof to be filed with the pleadings, where the pleadings are founded on such instruments, a deed need not be so filed in a suit to set it aside as fraudulent against creditors. The fraud, not the deed, is the foundation of the action.—*Id.*

[mmm] (Sup. 1882)

In an action to enforce a forfeiture under a separate contract of defeasance made by the grantee in a deed, a copy of the deed need not be made a part of the complaint, the defeasance being a separate instrument.—*Wilson v. Wilson*, 86 Ind. 472.

[mmm] (Sup. 1883)

The failure to file with a pleading founded on a written instrument such instrument or a copy thereof, as required by Rev. St. 1881,

§ 362, is not excused because the original is in the custody of defendant, a town trustee, who refuses to surrender it, as under Id. § 0002, the records and other books of a township trustee must be open for public inspection, and plaintiff should have procured a copy of the instrument.—*Anderson School Tp. v. Thompson*, 92 Ind. 556.

[mmmm] (Sup. 1884)

In an action to recover the statutory penalty for failure to transmit and deliver a message, the message is not the foundation of the action, and is not within the statute requiring written instruments to be filed with the pleading.—*Western Union Tel. Co. v. Meredith*, 95 Ind. 93.

[n] (Sup. 1884)

In a suit to establish a lien on a lot for which plaintiff furnished the purchase money, where a note which defendant's counsel claimed was the foundation of the action was not mentioned in the complaint or alluded to, it cannot be said that such note, if it existed, was the foundation of the claim, and under Rev. St. 1881, § 362, it is only when a pleading is founded on a written instrument that the original or copy thereof must be filed with the pleading.—*Dwenger v. Branigan*, 95 Ind. 221.

[nn] (Sup. 1885)

Under Rev. St. 1881, § 362, where a pleading is founded on a chattel mortgage described therein, it is necessary to its sufficiency that the original chattel mortgage, or a copy thereof, shall be filed with such pleading, or that a sufficient excuse shall be alleged therein for the failure to file therewith such original written instrument or a copy thereof.—*Landon v. White*, 101 Ind. 249.

[nnn] (Sup. 1885)

The contract or a copy thereof must be filed with the complaint in an action on a written contract, and where such contract is in separate parts, all the parts, or copies of all, must be filed.—*Potts v. Hartman*, 101 Ind. 359.

[nnnn] (Sup. 1885)

Where a written instrument is properly made an exhibit with the complaint, it may be referred to in the answer without being filed therewith.—*Grubbs v. Morris*, 103 Ind. 166, 2 N. E. 579.

[o] (Sup. 1886)

It is only an instrument which is the foundation of a pleading that should be made an exhibit, and in actions to collect a drainage assessment the only proper exhibit is a copy of the assessment.—*Pickering v. State*, 106 Ind. 228, 6 N. E. 611.

[oo] (Sup. 1886)

A cross-complaint is to be tried by substantially the same rules as a complaint; and, where it is founded on a written instrument,

it must make the instrument an exhibit except in cases where the complaint sets forth the instrument.—*Wadkins v. Hill*, 106 Ind. 543, 7 N. E. 253.

[ooo] (Sup. 1886)

A resolution adopted by a common council is not a written instrument, within the meaning of Code, § 362, which requires a written copy of the written instrument which is the foundation of the pleading to be filed therewith.—*Over v. City of Greenfield*, 107 Ind. 231, 5 N. E. 872.

[oooo] (Sup. 1886)

In a suit on a note, where the defense is that the plaintiff's assignor had received, on another note transferred to him for that purpose, a sum sufficient to satisfy the note sued on, or that it would have been sufficient if he had not negligently failed to collect it, the note so transferred is not the foundation of the defense, and need not be filed with the answer as an exhibit.—*Watts v. Fletcher*, 107 Ind. 391, 8 N. E. 111.

[p] (Sup. 1889)

Where a written instrument is filed as an exhibit to one paragraph of a complaint, and appropriately designated, it need not be set out with each paragraph, for one exhibit is sufficient for all the paragraphs of the pleading.—*Ledbetter v. Davis*, 22 N. E. 744, 121 Ind. 119.

[pp] (Sup. 1890)

Where it is averred in the complaint that a copy of the instrument declared on is filed therewith and made a part thereof, and an instrument corresponding with the one described in the pleading is found in the transcript in its appropriate place, the pleading will be held sufficient. Where, however, no copy of the instrument appears in the record, the averment that a copy was filed will not make the pleading good.—*Old v. Mohler*, 23 N. E. 967, 122 Ind. 564.

[ppp] (Sup. 1890)

A copy of a written instrument referred to in a cross-complaint need not be filed with the pleading when the cross-complaint refers to a copy already filed with the complaint.—*Isgrigg v. Schooley*, 125 Ind. 94, 25 N. E. 151.

[pppp] A copy of a paper which is not the foundation of the action need not be filed with the complaint.—(Sup. 1890) *Conn v. State ex rel. Stutsman*, 25 N. E. 443, 125 Ind. 514; (App. 1895) *Keller v. Reynolds*, 40 N. E. 76, 290, 12 Ind. App. 383.

[q] (Sup. 1890)

Where an answer in foreclosure proceedings alleges that defendant purchased land in good faith, without notice of the unpaid mortgage, and that a release of such mortgage was entered on the margin of the record thereof, the release is not the foundation of the pleading, within the meaning of the statute requir-

ing a copy of a written instrument, the foundation of a pleading, to be filed with and made a part thereof.—*Bryant v. Richardson*, 126 Ind. 145, 25 N. E. 807.

[qq] (App. 1891)

In suing the purchasers of a railroad on debentures issued by a receiver under the order of the court, and subject to which the road was sold, it is not necessary that the decree authorizing their issuance should be filed with the complaint, or made part thereof.—*Evansville & I. R. Co. v. Frank*, 3 Ind. App. 96, 29 N. E. 419.

[qqq] (App. 1891)

Under Rev. St. 1881, § 362, which provides that a written instrument, or a copy thereof, must be filed with a pleading founded thereon, an action for possession of land and damages for holding over after the expiration of a lease is not founded on the lease, and it need not be filed with the complaint.—*Duffy v. Carman*, 3 Ind. App. 207, 29 N. E. 454.

[r] (Sup. 1892)

Rev. St. 1881, § 362, requiring the original or a copy of a written instrument sued on to be filed with the pleading, is mandatory.—*Blackwell v. Pendergast*, 132 Ind. 550, 32 N. E. 319.

[rr] (Sup. 1892)

An action on a contract which has never been reduced to writing is not within the rule requiring a copy of the contract sued on to be made part of the complaint.—*St. Joseph Hydraulic Co. v. Wilson*, 133 Ind. 465, 33 N. E. 113.

[rrr] (App. 1892)

In an action on a promise to employ plaintiff it is not necessary for him to file as an exhibit a release of a claim by him for injuries which formed the consideration for the promise.—*Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 32 N. E. 802.

[rrrr] (App. 1893)

In an action for the failure of defendant's train to stop at plaintiff's destination, and her ejection at a station further on, it is not necessary for plaintiff to set out a copy of her ticket in the complaint.—*Evansville & R. R. Co. v. Kyte*, 6 Ind. App. 52, 32 N. E. 1134.

[s] (App. 1893)

In an action by a tenant for damages to his growing crops, and for undermining his house, resulting from the removal of gravel from the land, where the defense relied on is payment of such damages assessed to the landlord, under condemnation proceedings, the answer is not bad, on demurrer, for want of a copy of such proceedings.—*Shauver v. Philips*, 7 Ind. App. 12, 32 N. E. 1131, 34 N. E. 450.

[ss] (App. 1893)

Under Rev. St. 1881, § 362, providing that, when any pleading is founded on a written instrument, the original, or a copy thereof, must be filed with the pleading, the complaint

in an action against a railroad company for work and materials furnished under Elliott's Supp. §§ 1077, 1078, in constructing a fence along the line of defendant's right of way and plaintiff's improved land, need not set out a copy of the 30-days notice which the latter section requires the landowner to serve on the company's agent, since such notice is not the foundation of plaintiff's cause of action.—*Chicago & S. E. Ry. Co. v. Ross*, 8 Ind. App. 188, 35 N. E. 290.

[ss] (Supp. 1894)

A deed which has been delivered in escrow pending the fulfillment of the contract of purchase is not the basis of an action to enforce the specific performance of the contract, within the meaning of Rev. St. 1881, § 362, providing that when a pleading is founded on a written instrument, the original or a copy must be filed with the pleading.—*Davis v. Talbot*, 137 Ind. 235, 36 N. E. 1098.

[ssss] (App. 1894)

In an action on a note for the price of a machine, where the answer sets up breaches of a written warranty, and these are besides made the subject of a counterclaim, the writing, after being copied into the record as Exhibit A, and so referred to in the answer, may likewise be so referred to in the counterclaim without recopying.—*Ohio Thresher & Engine Co. v. Hensel*, 9 Ind. App. 328, 36 N. E. 716.

[t] (App. 1894)

A complaint alleged that plaintiffs purchased of defendant certain land, which he conveyed by warranty deed; that the land was in possession of a tenant, but defendant falsely represented to plaintiffs that the tenant had agreed to give them immediate possession; that plaintiffs relied on such representations; and that the failure to give them possession put them to great expense. *Held*, that the action was not for breach of covenants of the deed, but for breach of the extraneous contract to give immediate possession, and the complaint is not demurrable for failure to file a copy of the deed therewith.—*Williams v. Frybarger*, 9 Ind. App. 558, 37 N. E. 302.

[tt] (App. 1894)

The existence merely of a written contract being the fact relied on, no copy of it need be set out in the pleading nor made an exhibit thereto.—*Woodruff v. Board of Com'rs of Noble County*, 10 Ind. App. 179, 37 N. E. 732.

[ttt] (App. 1894)

In an action on a note for the price of a machine, possession by the adverse party of the note, the order for the machine, and the warranty thereof is a sufficient excuse for failure to file copies thereof with the answer and cross complaint.—*Walter A. Wood Mowing & Reaping Mach. Co. v. Irons*, 10 Ind. App. 454, 36 N. E. 862, 37 N. E. 1046.

[tttt] (Supp. 1895)

Under Rev. St. 1894, § 365 (Rev. St. 1881, § 362), providing that, when any pleading is founded on a written instrument or on account, the original or a copy thereof must be filed with the pleading, in an action to dissolve a partnership and for an accounting an answer alleging that plaintiff and defendant had agreed in writing on terms of dissolution and settlement is demurrable, where such contract or a copy is not filed with and made a part of the answer.—*Miller v. Bottenberg*, 144 Ind. 312, 41 N. E. 804.

[u] (App. 1896)

In a pleading founded on a breach of warranty, a written order mentioned as having been given for the purchase of the article warranted, unless it contains the warranty relied on, should not be set out or attached as an exhibit.—*Huber Manuf'g Co. v. Busey*, 16 Ind. App. 410, 43 N. E. 967.

[uu] (App. 1897)

Whenever an action or defense is founded upon a written contract, the original or a copy thereof must be filed with the complaint or answer.—*Western Assur. Co. v. McCarty*, 48 N. E. 265, 18 Ind. App. 449.

[uuu] (App. 1898)

Where a complaint is founded on a lease of which a copy is attached, and the complaint pleads a written assignment of said lease to defendant, it is not necessary to also file a copy of the assignment.—*Hardison v. Mann*, 50 N. E. 899, 20 Ind. App. 404.

[uuuu] (App. 1899)

The specifications according to which a contract is to be performed need not be made an exhibit of a complaint for money due on the contract, when unnecessary for a proper construction of the contract.—*Gilmore v. Ward*, 52 N. E. 810, 22 Ind. App. 106.

[v] (App. 1899)

In an action on an administrator's bond for failure to account, the declaration alleged a contract between the administrator and the deceased whereby the former, an attorney, was to prosecute an action for injuries for the latter, and receive one half the recovery, and it was claimed that defendant failed to account for the other half. *Held*, that the declaration was founded on the bond, and not on the contract, within Horner's Rev. St. 1897, § 362 (Burns' Rev. St. 1894, § 365), requiring a copy of the instrument on which a pleading is founded to be filed with it.—*Harrod v. State*, 55 N. E. 242, 24 Ind. App. 159.

[vv] (Supp. 1900)

Where a complaint was founded on a contract to construct a certain building in consideration of a sum to be paid therefor, the plans and specifications referred to in the contract were not part of the contract, in such sense as to require that they should be filed as exhibits.—*Bird v. St. John's Episcopal Church of Elkhart*, 56 N. E. 129, 154 Ind. 138.

[vvv] (App. 1900)

The complaint in an action for the price of a machine alleged the making and delivery to defendant under its written order, with a description of the machine and attachments, and with prices, time of delivery, and terms. The order also contained the expression, "Feed mechanism in head as described in blue print submitted." A copy of the order and acceptance were filed with the complaint as exhibits. *Held*, that a demurrer to the complaint, directed to the point that the blue print was not filed with the complaint, was properly overruled, since the parties had not made it a part of the contract sued on, and hence it need not be made part of the exhibit to the complaint.—*Buckeye Mfg. Co. v. Woolley Foundry & Machine Works*, 58 N. E. 1069, 26 Ind. App. 7.

[vvvv] (Sup. 1902)

Where a debt, not payable till the death of the creditor, is bequeathed to plaintiff, an action thereon is not founded on the will, so as to require the will, or a copy thereof, to be filed with the complaint, under *Burns' Rev. St. 1901, § 365* (*Rev. St. 1881, § 362*; *Horner's Rev. St. 1901, § 362*), providing that written instruments on which a pleading is based shall be filed therewith.—*Jester v. Gustin*, 63 N. E. 471, 158 Ind. 287.

[v] (Sup. 1902)

The complaint in an action against the assignee of a lease of gas and oil lands for breach of covenant was not defective, in not having the assignment of the lease, or a copy thereof, filed with it, under *Burns' Rev. St. 1901, § 365*, providing that, when any pleading is founded on a written instrument, the original, or a copy thereof, must be filed with the pleading; the action not being founded on the assignment, but on the lease.—*Indiana Natural Gas & Oil Co. v. Hinton*, 64 N. E. 224, 159 Ind. 398.

[vw] (App. 1904)

The notice required to be given a railroad company under *Burns' Rev. St. 1901, § 5324*, providing that the owner of any lands abutting on the right of way of any railroad shall have the right, after giving 30 days' notice in writing, to enter on the right of way and build a fence on the failure of the railroad to comply with the law regarding the fencing of the right of way, is not a proper exhibit to a complaint in an action against the railroad to recover the expense of erecting such fence.—*Evansville & I. R. Co. v. Huffman*, 70 N. E. 173, 32 Ind. App. 425.

[vww] (App. 1904)

Under *Burns' Rev. St. 1901, § 365*, providing that when a pleading is founded on a written instrument the original or a copy must be filed with the pleading, where the instrument sued on is contained in the body of the complaint it need not be appended or otherwise further exhibited.—*Miller v. Wayne International Building & Loan Ass'n*, 70 N. E. 180, 32 Ind. App. 480.

[www] (App. 1904)

Burns' Ann. St. 1901, § 365, providing that where a plea is founded on a written instrument the original or a copy must be filed with the pleading, does not require a railroad, when suing to enjoin the removal of buildings from a strip of land acquired for a right of way by condemnation proceedings, to set out in, or file with, the complaint the instrument of appropriation, as the action is not based on it.—*Stauffer v. Cincinnati, R. & M. R. Co.*, 70 N. E. 543, 33 Ind. App. 356.

[x] (App. 1904)

In an action against a building and loan association to compel satisfaction of a mortgage, wherein defendant filed a cross-complaint demanding foreclosure of the mortgage for the balance alleged to be due thereon, the stock certificate in the association pledged by the plaintiffs to defendant for the loan is not the foundation of defendant's cross-complaint, and hence need not be made an exhibit.—*Coppes v. Union Nat. Sav. & Loan Ass'n*, 69 N. E. 702, 33 Ind. App. 367.

[ix] (Sup. 1906)

In a suit to follow trust funds wrongfully obtained by the principal in an official bond as county auditor, on which the plaintiffs, as sureties, had been compelled to make payment for breaches thereof by the principal, the bond is not the foundation of the plaintiffs' claim, and hence need not be made an exhibit to the complaint.—*Coffinberry v. McClellan*, 73 N. E. 97, 164 Ind. 131.

[xxx] (App. 1906)

Where a defense or cross-action arises out of an instrument sued on, a copy of which has been filed, it is sufficient for the defendant to refer to the exhibit on file without filing a second copy thereof.—*Nichols & Shepard Co. v. Berning*, 76 N. E. 776, 37 Ind. App. 109.

[xxxx] (App. 1906)

A complaint, alleging that plaintiff's husband was indebted on a note upon which plaintiff and defendant's mother were sureties, and that to indemnify them plaintiff mortgaged certain land to them and afterwards made a deed to defendant as further indemnity, which deed was in fact a mortgage and was void by reason of plaintiff being a married woman, was founded upon the issue of suretyship, and not upon the deed; and hence it was not necessary to file a copy of the deed as an exhibit with the complaint.—*Warner v. Jennings*, 76 N. E. 1013, 37 Ind. App. 394.

[xxxxx] (App. 1906)

The itemized statement of account, verified by affidavit, showing the expenses of the construction of a fence on a railroad right of way, which under the provisions of the statute must be presented to the agent of the company when the fence had been completed, does not constitute the foundation of an action for the expense of constructing the fence, so as to require that a copy should be filed with the com-

plaint as an exhibit or be inserted in the body of the pleading.—*Vandalia R. Co. v. Kanarr*, 77 N. E. 1135, 38 Ind. App. 146.

[y] (App. 1908)

An exhibit to a complaint, unattached thereto, which is filed therewith and properly identified in the complaint, may be shown, by a nunc pro tunc entry, to have been so filed therewith; the clerk's file mark and parol testimony substantiating such claim, and no denial being made.—*Cleveland, C., C. & St. L. Ry. Co. v. Porter*, 38 Ind. App. 226, 74 N. E. 260, 76 N. E. 179, judgment affirmed (1908) 28 S. Ct. 647, 210 U. S. 177, 52 L. Ed. 1012.

[yy] (App. 1906)

An action which is based upon a complaint alleging a contract under which complainant was to be furnished gas in his dwelling, and which asks an injunction restraining the threatened disconnection of complainant's service pipe in violation of such contract, to his irreparable injury, etc., is, in substance, an action on the contract so as to require the contract to be made a part of the complaint.—*Elwood Natural Gas & Oil Co. v. Kullman*, 39 Ind. App. 39, 78 N. E. 1056.

[yyy] (App. 1907)

Where a written instrument is not the basis of the action or defense, but only referred to as one among other facts material to the pleading, a copy or exhibit need not be filed with or made a part of the pleading, notwithstanding *Burns' Ann. St. 1901*, § 365, providing that where a pleading is founded on a written instrument the original or copy thereof must be filed with it, etc.—*Vandalia R. Co. v. Fetters*, 40 Ind. App. 615, 82 N. E. 978.

Under *Burns' Ann. St. 1901*, §§ 5323-5325, authorizing an abutting owner to repair a railway right of way fence, after giving 30 days' notice, and providing that he shall present an itemized statement of the expenses and may recover the same, etc., the itemized statement furnished by an abutting owner repairing a railway right of way fence is not the foundation of an action for the expenses, within section 365, providing that when a pleading is founded on a written instrument the original or a copy thereof must be filed with the pleading, but the labor done and materials furnished which have inured to the benefit of the company constitute the foundation of the action.—*Id.*

[yyyy] (App. 1908)

Where the by-laws of a building and loan association are not made a part of either a note or the mortgage securing it, which are given to such association, they are not part of the contract, and hence not a proper exhibit in a complaint in proceedings to foreclose the mortgage.—*Goben v. Home Building, Loan Fund & Savings Ass'n*, 41 Ind. App. 135, 83 N. E. 523.

[z] (App. 1909)

Burns' Ann. St. 1908, § 368, declaring that when any pleading is founded on a written instrument, or an account, the original or a copy thereof must be filed with the pleading, is imperative.—*Berkemeier v. State ex rel. Nolting*, 88 N. E. 634.

[zz] (Sup. 1910)

Where the recovery of a personal judgment against the mortgagor on foreclosure of a chattel mortgage is based either on collateral bonds or the stipulation in the mortgage for the payment of the debt and interest, the bonds, or coupons relied on, or copies thereof, should be filed with the complaint and made a part thereof.—*Leader Pub. Co. v. Grant Trust & Savings Co.*, 91 N. E. 498.

[zzz] (Sup. 1910)

The recorded notice of an intention to claim a lien on corporate property for services under an act in force July 2, 1877 (Acts Sp. Sess. 1877, c. 8; *Burns' Ann. St. 1908*, §§ 8288-8293), being the foundation of an action for the enforcement of the lien, the notice or copy thereof must be filed as an exhibit with the complaint.—*Indiana Sand & Gravel Co. v. Donovan*, 91 N. E. 597.

[zzzz] (App. 1910)

An order of the federal court, directing its receiver of a railroad to restore to the railroad its property in his hands on the agreement that the railroad assume all liabilities and obligations of the receiver and save him harmless against the payment of any liabilities incurred by him, is not a "written instrument," within *Burns' Ann. St. 1908*, § 368, requiring the original or a copy to be filed with the complaint in an action founded on a written instrument.—*Vandalia Ry. Co. v. Keys*, 91 N. E. 173.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 54, 935-941;
4 CENT. DIG. Assign. § 224; 6 CENT.
DIG. Banks, § 820; 17 CENT. DIG.
Drains, § 95; 17 CENT. DIG. Drunk. § 8;
33 CENT. DIG. Mal. Pros. § 103.
See, also, 31 Cyc. pp. 547, 548.

§ 310. Construction, operation and effect in general.

In actions on insurance policies, see *INSURANCE*, § 631.

In actions on judgment, see *JUDGMENT*, § 913.

In actions on lost instruments, see *LOST INSTRUMENTS*, § 22.

In suits for partition, see *PARTITION*, § 61.

Judgments, see *JUDGMENT*, § 949.

[a] Exhibits of instruments on which an action or pleading is founded may be referred to in determining the sufficiency of the pleading.—(Sup. 1858) *Kunkler v. Turnting*, 10 Ind. 418; (1869) *Blossom v. Ball*, 32 Ind. 115; (1872) *Mercer v. Herbert*, 41 Ind. 459; (1879) *Fridle v. Crane*, 68 Ind. 583.

[b] (Sup. 1872)

Exhibits referred to in pleadings, or on which the action or pleadings are founded, form part of the pleadings.—*Mercer v. Herbert*, 41 Ind. 459.

[c] Defects in a complaint or answer cannot be cured by reference to an exhibit, which is not a writing or copy of a writing on which the action or defense is founded.—(Sup. 1873) *Knight v. Flatrock & W. Turnpike Co.*, 45 Ind. 134; (1876) *Watkins v. Brunt*, 53 Ind. 208; (1880) *Bayless v. Glenn*, 72 Ind. 5; (1882) *Mendenhall v. Clugish*, 84 Ind. 94; (1885) *Western Union Tel. Co. v. Ferris*, 103 Ind. 91, 2 N. E. 240; (1885) *Jackson v. State*, 103 Ind. 250, 2 N. E. 742; (1891) *Barnes v. Mowry*, 129 Ind. 568, 28 N. E. 535; (1892) *Armstrong v. Farmers' Nat. Bank of Frankfort*, 130 Ind. 508, 30 N. E. 695; (1892) *Price v. Bayless*, 131 Ind. 437, 31 N. E. 88; (1894) *Bozarth v. Mallett*, 11 Ind. App. 417, 39 N. E. 176.

[cc] (Sup. 1875)

Where copies of records or written instruments, which are not the foundation of a suit or defense, but which may be evidence on the trial, are set out and filed with the pleadings, such copies or the originals cannot be examined for the purpose of aiding or invalidating the pleading.—*Armstrong v. McLaughlin*, 49 Ind. 370.

[d] An exhibit that is not the foundation of an action cannot be considered in determining the sufficiency of a pleading with which it is filed.—(Sup. 1876) *Watkins v. Brunt*, 53 Ind. 208; (1878) *Wilkinson v. City of Peru*, 61 Ind. 1; (1880) *Niles v. Dodge*, 70 Ind. 147; (1881) *Smith v. King*, 81 Ind. 217; (1885) *Huseman v. Sims*, 4 N. E. 42, 104 Ind. 317; (1886) *Huff v. City of Lafayette*, 8 N. E. 701, 108 Ind. 14; (App. 1894) *Dugger v. Hicks*, 36 N. E. 1085, 11 Ind. App. 374; (Sup. 1899) *Indiana Mut. Building & Loan Ass'n v. Plank*, 52 N. E. 991, 152 Ind. 197; (App. 1899) *Drake v. Grout*, 52 N. E. 775, 21 Ind. App. 534; (1904) *Indiana Natural Gas & Oil Co. v. Lee*, 72 N. E. 492, 34 Ind. App. 119; (1905) *Corbin Oil Co. v. Searles*, 75 N. E. 293, 36 Ind. App. 215.

[dd] (Sup. 1877)

A subscription of an insurance company provided that 20 per cent. should be paid when all the stock should be subscribed, the residue "to be assessed only in the event of the 20 per cent. cash fund becoming impaired by losses." *Held*, that a resolution of the board of directors, declaring that such an assessment should be made, was not a written instrument within 2 Rev. St. 1876, p. 73, § 78, requiring a copy to be filed with a pleading founded on such an instrument, and a copy thereof, filed with the complaint, did not bring it before the court.—*Van Riper v. American Cent. Ins. Co.*, 60 Ind. 123.

[e] (Sup. 1878)

The sufficiency of a complaint must be judged by the facts alleged in the body of it, unaided by the exhibits accompanying it.—*Moore v. Cline*, 61 Ind. 113.

[ee] (Sup. 1878)

In an action against a copartner for services rendered, the complaint alleged that such services were rendered at defendant's request and that according to a dissolution agreement, a copy of which was filed with the complaint as an exhibit, defendant was to pay all the partnership debts. *Held*, on a demurrer for defect of parties defendant, in that defendant's copartner was not made a party, the copy of the dissolution agreement was no part of the complaint, and could not be looked to in determining such demurrer.—*Way v. Fravel*, 61 Ind. 162.

[f] (Sup. 1878)

A will on which a claim of title to lands is based is at most merely evidence of the title asserted, and constitutes no part of the pleading setting up such title, though a copy of the will is made a part of the pleading.—*Schori v. Stephens*, 62 Ind. 441.

[ff] (Sup. 1878)

Copies of the minutes of the city council, attached to the complaint in an action by or against the city, form no part of the complaint.—*State ex rel. City of Columbus v. Hauser*, 63 Ind. 155.

In an action on the bond of a city treasurer, the bond itself is the foundation of the suit, and a copy of such bond, filed with the complaint, becomes a part thereof.—*Id.*

In an action on the bond of a city treasurer, copies of city ordinances under which he has received the moneys forming the subject of the action do not become a part of the complaint by being filed therewith.—*Id.*

[g] (Sup. 1878)

In an action by an execution plaintiff on the sheriff's bond for failure to advertise and sell property of defendant, where the answer alleged that the debtor, a resident household-er, had demanded property worth \$300 as exempt, and presented his verified schedule of his property, and that an appraisal thereof showed it to be of less value than \$300, copies of such schedule and appraisal cannot be made part of the answer by attaching them thereto, not being the foundation of the defense.—*State ex rel. Share v. Boyd*, 63 Ind. 428.

[gg] (Sup. 1878)

In an action against the owner of a city lot fronting on a sidewalk, and one who had contracted with him to erect a building thereon, to recover damages for injury caused by leaving open an excavation in the sidewalk, a copy of the contract attached to the answer

of the owner forms no part thereof.—*Ryan v. Curran*, 64 Ind. 345, 31 Am. Rep. 123.

[h] (Sup. 1879)

Where one bank sues another for neglect to collect a note payable at the defendant bank, the note is not the foundation of the action; and hence a copy thereof, made an exhibit to the complaint, forms no part thereof.—*Locke v. Merchants' Nat. Bank*, 66 Ind. 353.

[hh] (Sup. 1879)

Copies of a written contract and specifications filed with an answer, but not constituting the foundation of the defense, do not become a part of the answer.—*Sessengut v. Posey*, 67 Ind. 408, 33 Am. Rep. 98.

[i] (Sup. 1880)

A copy of a written instrument, filed with a complaint, becomes a part thereof without being copied therein, under Code, § 78, only where such instrument is the foundation of the action.—*Cassaday v. American Ins. Co.*, 72 Ind. 95.

[ii] (Sup. 1880)

Where a will referred to in an answer was not the foundation of the pleading, though filed with it, it could not be considered in conjunction with the allegations contained in the body of the pleading.—*Stahl v. Hammontree*, 72 Ind. 103.

[j] Exhibits are a part of the pleading only in cases where they are the originals or copies of the instruments on which the pleading is founded.—(Sup. 1880) *Clodfelter v. Hulett*, 72 Ind. 137; (1886) *Rausch v. Trustees of United Brethren of Christ's Church*, 107 Ind. 1, 8 N. E. 25; (1891) *Dukes v. Cole*, 129 Ind. 137, 28 N. E. 441.

[jj] (Sup. 1881)

Exhibits which do not become part of the pleading by being filed therewith cannot be considered on the question of the sufficiency of the pleading.—*Briscoe v. Johnson*, 73 Ind. 573.

[k] (Sup. 1881)

Where the complaint in an action on a guardian's bond alleged merely that the guardian "executed his bond," and the only showing that the sureties joined in the execution was that the names recited in the copy of the bond filed with the complaint were identical with the names of defendants, or differing only in that the Christian names were not given in full, the complaint is insufficient as against the sureties.—*Fee v. State ex rel. Pleasant*, 74 Ind. 66.

[kk] (Sup. 1881)

A copy of a city ordinance, requiring lot owners to construct sidewalks along their lots, does not become a part of the complaint, in an action by the city against such lot owners to recover for constructing sidewalks, by merely being filed therewith.—*Town of Auburn v. Eldridge*, 77 Ind. 126.

[l] (Sup. 1881)

Deeds filed as exhibits in an action to quiet title cannot be considered in determining the sufficiency of the complaint to which they are attached, not being the foundation of the action.—*Smith v. King*, 81 Ind. 217.

[m] (Sup. 1882)

In an action on a judgment recovered against a drainage company wherein the complaint alleged that when the judgment was rendered the defendants were members of the company, and had been from its organization, the articles of the association by which the company was organized originally and the papers by which it was claimed that the defendants organized it, under Act March 10, 1873, and filed as exhibits to the complaint, may be regarded as a part thereof, and may be considered by the court in passing on the demurrer.—*Trippe v. Huncheon*, 82 Ind. 307.

[n] (Sup. 1884)

Exhibits filed with a complaint which was not the foundation of the action do not become parts of the complaint by being filed with it, and they cannot be examined or considered for the purpose of determining the sufficiency of the complaint on a demurrer thereto alleging insufficiency of the facts.—*Barkley v. Mahon*, 95 Ind. 101.

In an action to set aside a sheriff's sale of certain land, exhibits consisting of the schedule, appraisement, and a will under which the property was claimed cannot be regarded as parts of the complaint, as the action is not founded on them, and it is only where a written instrument is the foundation of the action that a copy thereof filed with the complaint becomes a part of it.—Id.

[o] (Sup. 1884)

The record of a county board in annexation proceedings is not a written instrument which is made a part of a pleading by filing it therewith.—*City of Logansport v. La Rose*, 90 Ind. 117.

[oo] (Sup. 1885)

In an action to recover damages for an unlawful seizure and sale, on execution, of property which had been claimed as exempt from execution, the schedule is not properly a part of the complaint, though filed therewith as an exhibit, for the reason that it is not the foundation of the action.—*Huseman v. Sims*, 104 Ind. 317, 4 N. E. 42.

[ooo] (Sup. 1886)

A resolution adopted by a common council is not a written instrument, within the meaning of Code, § 362, which requires a written copy of the written instrument which is the foundation of the pleading to be filed therewith, and filing a copy of it with an answer does not make it a part thereof.—*Over v. City of Greenfield*, 107 Ind. 231, 5 N. E. 872.

[p] (Sup. 1886)

In construing pleadings, written instruments filed therewith, pursuant to Rev. St. 1881, § 362, must be looked to, and may often control the same.—*Blount v. Rick*, 107 Ind. 238, 5 N. E. 898, 8 N. E. 108.

[pp] (Sup. 1889)

Where, in an action on a note, the answer avers that the consideration of the note was land conveyed by plaintiff to defendant, for which plaintiff's title failed, whereby defendant was evicted, and the deed to defendant is attached as an exhibit, and such deed shows that defendant assumed to pay a mortgage on the land, a reply averring, by referring to the exhibit, that defendant assumed the mortgage, is demurrable, as such exhibit is not part of the record.—*Platt v. Brickley*, 119 Ind. 323, 21 N. E. 906.

[q] (Sup. 1890)

A complaint alleging the execution of a chattel mortgage to plaintiffs, and the wrongful conversion of the property covered thereby, being based, not on the mortgage, but on the conversion, the mortgage is not made a part of the complaint by filing a copy with it.—*Ross v. Menefee*, 125 Ind. 432, 25 N. E. 545.

[qq] (Sup. 1891)

Instruments forming evidence of title are not the foundation of pleadings asserting title, and, if made exhibits, they will be disregarded, and only the allegations of the pleading considered.—*Smith v. Schweigerer*, 28 N. E. 696, 129 Ind. 363.

[r] (App. 1892)

Though each paragraph of a complaint must be independent, yet an allegation in one paragraph that a note sued on was signed as stated in a prior paragraph is immaterial, and will be treated as surplusage, where a copy of the note is filed with the complaint.—*Jaqua v. Woodbury*, 3 Ind. App. 289, 29 N. E. 573.

[rr] (Sup. 1893)

In an action to recover money paid on a judgment for costs embracing alleged illegal fees, the payment of the money, and not the judgment, is the foundation of the action; and the court cannot, for the purpose of supplying defects in the complaint, look to exhibits filed with it, purporting to be transcripts of the fees taxed, with separate columns showing what fees are legal and what are illegal.—*Fuller v. Cox*, 135 Ind. 46, 34 N. E. 822.

[s] (Sup. 1893)

In an action on the bond of a township trustee, to recover money due on a note executed by him without authority, the note, though exhibited with the complaint, cannot be looked to to supply an omitted averment, as the action is on the bond and not on the note.—*State ex rel. Cunningham v. Helms*, 136 Ind. 122, 35 N. E. 893.

[ss] (Sup. 1896)

An abstract of title voluntarily furnished by plaintiff is not a part of the complaint, and its insufficiency does not render the complaint insufficient.—*Hoover v. Weesner*, 147 Ind. 510, 45 N. E. 650, 46 N. E. 905.

[t] (App. 1896)

If an exhibit be unnecessary, it may, if filed with the complaint, be disregarded.—*Clark v. Trueblood*, 44 N. E. 679, 16 Ind. App. 98.

[tt] (App. 1897)

Where the note on which the action is brought is filed with the complaint, as required by Rev. St. 1894, § 365 (Rev. St. 1881, § 362), it becomes a part thereof, and cures uncertainties therein.—*Albany Furniture Co. v. Merchants' Nat. Bank*, 46 N. E. 479, 17 Ind. App. 93.

[u] (Sup. 1898)

A summons filed as an exhibit to a complaint, in an action to set aside a judgment for want of proper service, is not thereby made a part of the complaint, and cannot be considered in determining the sufficiency thereof.—*Fitch v. Byall*, 49 N. E. 455, 149 Ind. 554.

[uu] (App. 1898)

A lease filed as an exhibit with a complaint to recover possession of the leased premises cannot be considered in determining the question as to the sufficiency of the complaint.—*Mann v. Barkley*, 51 N. E. 946, 21 Ind. App. 152.

[v] (App. 1898)

An improper exhibit will not be considered in examining a pleading for the purpose of determining the question as to the sufficiency of the facts stated. Such exhibit cannot supply any averment omitted in the pleading.—*Diggs v. Way*, 51 N. E. 429, 54 N. E. 412, 22 Ind. App. 617.

[vv] (Sup. 1899)

A suit by a building and loan association to foreclose a mortgage, and to enforce a lien on shares of stock of the mortgagor given as collateral security to the mortgage, is not an action on the certificate, within *Burns' Rev. St. 1894, § 365* (*Horner's Rev. St. 1897, § 362*), requiring the filing of a copy of a written instrument with any pleading founded thereon, and hence such certificate, when filed with the complaint, will not be considered in determining the sufficiency of the complaint.—*Indiana Mut. Building & Loan Ass'n v. Plank*, 52 N. E. 991, 152 Ind. 197.

[w] (App. 1900)

An action for the conversion of crops from rented premises not being founded on the lease, the lease, though filed with the complaint as an exhibit, as required by *Horner's Rev. St. 1897, § 362* (*Burns' Rev. St. 1894, § 365*), when a pleading is founded on a written instrument, cannot be regarded as aiding it.—*Allen v. Tonner*, 56 N. E. 250, 24 Ind. App. 121.

[ww] (Sup. 1901)

Where a taxpayer sued to enjoin the collection of taxes on the ground that he had paid all that he was liable for according to an assessment by the state board of tax commissioners, and the complaint showed that the action was not founded on the minutes of the board, the minutes, though filed as an exhibit, could not be considered in determining the sufficiency of the complaint as against a demurrer for want of facts.—*First Nat. Bank v. Greger*, 62 N. E. 21, 157 Ind. 479.

[x] (Sup. 1903)

While exhibits cannot supply the place of necessary allegations in a pleading, they may add to the certainty of averments with which they are properly connected, and thereby relieve the pleading from the defect of uncertainty.—*Deane v. Indiana Macadam & Construction Co.*, 68 N. E. 686, 161 Ind. 371.

[xx] (App. 1905)

Exhibits filed with and made a part of a complaint, on foreclosure of a lien for the repair of a partition fence, showing the steps taken under the statute (*Burns' Ann. St. 1901*, § 6564; *Acts 1897*, p. 184, § 1), culminating in a valid lien, will be regarded as a part thereof.—*Burck v. Davis*, 73 N. E. 192, 35 Ind. App. 648.

[y] (Sup. 1906)

In an action to contest the validity of a probated will, and to probate in its stead a later will, the latter instrument was the foundation of plaintiff's cause of action, and hence, when attached to the complaint as an exhibit, was a part thereof.—*Heaston v. Krieg*, 77 N. E. 805, 167 Ind. 101, 119 Am. St. Rep. 475.

[yy] (Sup. 1908)

A suit for the dissolution of a partnership and an accounting, and for a sale of the partnership property, not being founded on the articles of partnership, even if they were filed with the complaint as an exhibit, they formed no part thereof, and could not be referred to either to sustain or overthrow the complaint or any part thereof.—*Marshall v. Matson*, 171 Ind. 238, 86 N. E. 339.

[z] (App. 1908)

A complaint against a railroad company for wrongfully expelling plaintiff, an employé, from its hospital, is not founded upon a breach of the rules of such company, and such rules attached as an exhibit to the complaint cannot be considered in aid of the complaint.—*Wabash R. Co. v. Reynolds*, 41 Ind. App. 678, 84 N. E. 992.

[zz] (App. 1910)

Under *Burns' Ann. St. 1908*, § 368, requiring the filing of exhibits on which a pleading is founded to be taken as a part of the record when not copied in the pleadings, exhibits are a part of the pleading only when they are the foundation of the action.—*O'Mara v. McCarthy*, 90 N. E. 330.

Instruments which are evidence of title are not the foundation of the action, and so cannot be made exhibits.—*Id.*

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. §§ 944, 946, 947.
See, also, 31 Cyc. pp. 554, 555.

§ 311. Necessity and effect of reference in pleadings to exhibits annexed or filed.

Aider by verdict or judgment, see post, § 433.

In actions to enforce assessment for street improvements, see MUNICIPAL CORPORATIONS, § 567.

In actions to enforce penalty for violation of municipal ordinance, see MUNICIPAL CORPORATIONS, § 633.

[a] (Sup. 1863)

Where a written instrument, which constitutes the cause of action, is filed with, and made a part of, the first paragraph of the complaint, and in the second paragraph thereof it is alleged to be filed with the latter, and is referred to as already on file with the former, the latter will be sufficient.—*Peck v. Hensley*, 21 Ind. 344.

[b] (Sup. 1873)

The complaint in an action to enjoin the collection of a tax for the construction of a gravel road alleged as ground of objection to the tax that the civil engineer appointed to estimate the cost of the road did not make any legal report of the cost of said road as is shown by a copy of the report filed by him, which is made part thereof, and marked "Exhibit A." *Held*, that such pleading was unauthorized, and the court could not be required to refer to documents unnecessarily appended to supply allegations omitted in the pleading.—*Sim v. Hurst*, 44 Ind. 579.

[c] (Sup. 1875)

In an action to recover drainage assessments, when the complaint alleges that the petition for the drain stated that the lands to be drained were in the county, such allegation must be taken as true on demurrer, and the petition for the drain cannot be looked to, although it is filed with the complaint.—*Combs v. Etter*, 49 Ind. 535.

[d] (Sup. 1876)

If, in an ejectment suit, the real estate in controversy be described in an exhibit attached to the complaint as part thereof, that is sufficient, though it be not described in the complaint itself.—*Burk v. Hill*, 55 Ind. 419.

[dd] (Sup. 1879)

The failure of one count of a complaint to set forth a copy of the instrument sued on is not cured by the presence of a copy of such instrument in one of the other counts.—*Pennsylvania Co. v. Holderman*, 69 Ind. 18.

[e] (Sup. 1879)

Where a mutual contract between plaintiff and defendant is the foundation of the complaint, and is properly made an exhibit therein by copy, the same copy, by a proper reference, may also be made an exhibit in a paragraph of the answer.—*Sidener v. Davis*, 69 Ind. 336.

[f] (Sup. 1881)

A declaration on a bond, containing no averment that a copy is filed, but having annexed to it a different instrument, under the heading "Copy of Bond," held bad on demurrer.—*Rogers v. State ex rel. Cox*, 78 Ind. 329.

[g] (Sup. 1881)

Where, in an action on an administrator's bond, a copy of the bond was filed with the first paragraph of the complaint as amended, and was therein properly referred to as "Exhibit A," the second paragraph sufficiently incorporated the bond by referring thereto as "such exhibit" without again setting it out at length.—*State ex rel. Wright v. Brown*, 80 Ind. 425.

[h] (Sup. 1881)

Where a complaint refers to a copy of the bond sued on as "Exhibit A," and there is no exhibit on the record so marked, the complaint will not be held bad if such copy is identified in other ways.—*Wall v. Galvin*, 80 Ind. 447.

[i] (Sup. 1882)

To make a written instrument a part of the complaint with which it or a copy thereof is filed, pursuant to the statute requiring it, where it is the foundation of the action, the complaint must aver that the instrument or a copy thereof is filed with the complaint.—*Smith v. Clifford*, 83 Ind. 520.

[j] (Sup. 1884)

Where, in a suit by an heir against another for contribution, a copy of the will is filed with the complaint as an exhibit, it cannot be regarded as a part thereof where no reference is made in the complaint to such exhibit.—*Cook v. Cook*, 92 Ind. 398, 602.

[k] (Sup. 1884)

An instrument following a pleading referring to it will be presumed to be the one referred to.—*McCormick Harvesting Mach. Co. v. Glidden*, 94 Ind. 447.

[l] (Sup. 1886)

A complaint upon a bond which contains a particular description of such bond, followed by the averment, "A copy of which is filed herewith," sufficiently identifies such copy, where it appears following the complaint in the record.—*Blackburn v. Crowder*, 108 Ind. 238, 9 N. E. 108.

[m] (Sup. 1890)

An exhibit once properly referred to and filed may be referred to in the petition in all of the paragraphs of the pleading.—*Watt v. Pittman*, 25 N. E. 191, 125 Ind. 168.

[n] (Sup. 1891)

In determining the sufficiency of answers in a cause, exhibits filed with the reply cannot be looked to.—*Dukes v. Cole*, 129 Ind. 137, 28 N. E. 441.

[o] (App. 1896)

Under Rev. St. 1894, § 365 (Rev. St. 1881, § 362), requiring, in actions on written contracts, the original or a copy to be filed with the complaint, a complaint on a bond failing to set out the bond as an exhibit is demurrable for want of sufficient facts, though it recites a filing of a copy of the bond.—*State ex rel. Myers v. Adams*, 15 Ind. App. 310, 44 N. E. 47.

[p] (App. 1897)

The pleading must contain some reference to the exhibit filed therewith, that the identity of the exhibit may appear.—*Western Assur. Co. v. McCarty*, 48 N. E. 265, 18 Ind. App. 449.

[q] (App. 1908)

Burns' Ann. St. 1901, § 365, provides that, when any pleading is founded on a written instrument, the original or a copy must be filed with the pleading, which, when not copied into the pleadings, shall be taken as a part of the record. A complaint alleged that defendant railroad company erected and maintained a hospital in 1900, and prior thereto adopted certain "Rules," referred to as Exhibit A; that plaintiff in that year was employed by defendant, and while in its employment in 1903 injured his leg, and was taken to defendant's hospital; that plaintiff had paid a certain sum monthly while in defendant's employment for all medical services he should require while in defendant's service, and defendant undertook to receive plaintiff in its hospital for proper treatment, but its surgeon negligently treated him, and, after an examination which showed that plaintiff was not cured, discharged him from the hospital, causing him great expense for subsequent medical services, etc. Exhibit A recited that defendant's employes agreed to contribute a fund for the maintenance of hospitals, etc., for the use of sick and injured employes, and directed that a certain amount be taken from the pay of each employe, and provided for the amount of benefits to which employes were entitled, etc. Held that, giving the complaint the theory most clearly stated therein, and eliminating conclusions and recitals, the complaint was not founded on the rules referred to, and hence the sufficiency of the pleading must be determined without reference to the exhibit.—*Wabash R. Co. v. Reynolds*, 41 Ind. App. 678, 84 N. E. 992.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 945; 1 CENT.

DIG. Abate. & R. § 205; 17 CENT. DIG.

Drains, § 96.

See, also, 31 Cyc. pp. 558, 559.

§ 312. Variance between pleading and instrument annexed, filed, or referred to.

Between pleading and oyer, see ante, § 306.

Ground for demurrer, see ante, § 192.

In suits for partition, see PARTITION, § 62.

In suits to foreclose mortgages, see MORTGAGES, § 459.

[a] (Sup. 1849)

In debt on a bond, if oyer of the bond is obtained, and it is set out in the defendant's plea, the bond so set out becomes a part of the declaration, and a variance between it and that previously described in the declaration cannot be taken advantage of.—*State ex rel. Lock v. Geddes*, 1 Ind. 577, *Smith*, 290.

[b] In case of a variance between pleadings and exhibits referred to or made a part thereof, or on which the action or pleadings are founded, the exhibits explain or control the pleadings.—(Sup. 1809) *Blossom v. Ball*, 32 Ind. 115; (1874) *Daily v. City of Columbus*, 49 Ind. 169; (1878) *Cotton v. State ex rel. Roberts*, 64 Ind. 573; (1880) *Hurlburt v. State ex rel. Ault*, 71 Ind. 154; (1880) *Liberty Tp. Drainage Ass'n v. Watkins*, 72 Ind. 459; (1880) *Glenn v. Porter*, Id. 525; (1881) *Lentz v. Martin*, 75 Ind. 228; (1885) *Avery v. Dougherty*, 102 Ind. 443, 2 N. E. 123, 52 Am. Rep. 680; (1886) *Blackburn v. Crowder*, 108 Ind. 238, 9 N. E. 108; (1896) *Dunlap v. Eden*, 15 Ind. App. 575, 44 N. E. 560.

[c] (Sup. 1869)

Plaintiff, a widow, brought suit for breach of a contract which she alleged to have been made by herself and husband with defendant, by which, in consideration of certain property conveyed to him, defendant agreed to support plaintiff and her husband during the remainder of their lives. The contract was lost, and the copy set out in the complaint was signed only by plaintiff and defendant. *Held*, that the allegations in the complaint are controlled by the copy, and the complaint is sufficient on demurrer.—*Blossom v. Ball*, 32 Ind. 115.

[d] (Sup. 1876)

In construing and giving effect to a written agreement, attached to and constituting the basis of a pleading, which also alleges the terms of such agreement in detail, the writing itself, and not such allegations, must be considered.—*Naltner v. Tappey*, 55 Ind. 107.

[e] (Sup. 1880)

A complaint on a guardian's bond alleged that the guardian was appointed by the court of common pleas of a certain county, and the copy of the bond filed with it recited that he was appointed by the circuit court of the same county. *Held* to be no material variance.—*Stroup v. State ex rel. Fitch*, 70 Ind. 495.

[f] Where there is a variance between a pleading and the exhibit filed therewith as a part thereof, the exhibit will control.—(Sup. 1880)

City of Elkhart v. Simonton, 71 Ind. 7; (1881) *Watson Coal & Mining Co. v. Casteel*, 73 Ind. 296; (1881) *Parker v. Teas*, 79 Ind. 235; (App. 1891) *Furry v. O'Connor*, 28 N. E. 103, 1 Ind. App. 573; (1894) *Arcana Gas Co. v. Moore*, 36 N. E. 46, 8 Ind. App. 482; (1896) *Supreme Lodge K. of P. v. Edwards*, 41 N. E. 850, 15 Ind. App. 524; (Sup. 1899) *Indiana Mut. Building, etc., Ass'n v. Plank*, 52 N. E. 991, 152 Ind. 197; (1899) *Same v. Condon*, 52 N. E. 1127, 152 Ind. 702; (App. 1899) *Board of Com'rs of Clark County v. Howell*, 52 N. E. 769, 21 Ind. App. 495; (1902) *Union Mut. Building & Loan Ass'n v. Coulter*, 63 N. E. 1124, 28 Ind. App. 698.

[g] In an action on a bond, where a variance exists between the description of the bond and the recitals of a copy filed with the complaint, the copy controls.—(Sup. 1880) *Hurlburt v. State ex rel. Ault*, 71 Ind. 154; (1881) *Lentz v. Martin*, 75 Ind. 228; (1886) *Blackburn v. Crowder*, 108 Ind. 238, 9 N. E. 108.

[h] (Sup. 1880)

Since it is not necessary, in an action on an injunction bond, to file a copy of the record of the injunction suit, when such copy is filed a variance between it and the complaint is immaterial.—*Cress v. Hook*, 73 Ind. 177.

[i] (Sup. 1881)

The averment in a complaint that a certain deed previously tendered by plaintiff conveyed all his title is not limited by a copy of the deed accompanying the pleading, if this is not a proper exhibit.—*Robards v. Marley*, 80 Ind. 185.

[j] (Sup. 1883)

Written instruments are not proper parts of a pleading when they are merely collateral, and recitals in them cannot control averments in the body of the pleading.—*Board of Com'rs of Madison County v. Burford*, 93 Ind. 383.

[k] (Sup. 1897)

Where the allegations in a pleading vary from the provisions of the instrument on which it is founded, the provisions of such instrument control.—*Harrison Building & Deposit Co. v. Lackey*, 48 N. E. 254, 149 Ind. 10.

[l] (App. 1900)

Where a complaint sets out as exhibits a building contract and a bond to secure its performance, and the contract stipulated for the erection of a building on or before April 1, 1897, and the bond was conditioned for the completion of a building on or before March 15, 1897, and the complaint did not allege any mistake or authorized change in the dates, the variance was fatal to the complaint.—*Dougherty v. Wise*, 58 N. E. 267, 25 Ind. App. 398.

[m] (Sup. 1906)

In an action on a written contract, where the allegations of the complaint vary from a written instrument attached as an exhibit, the latter controls.—*Stewart v. Knight & Jillson Co.*, 166 Ind. 498, 76 N. E. 743.

[n] (Sup. 1906)

Where the allegations of a complaint in regard to the instrument sued on and made a part of the complaint vary from the provisions of the instrument it controls on demurrer, and the allegations will be disregarded.—Huber Mfg. Co. v. Wagner, 78 N. E. 329, 167 Ind. 98.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 943, 948.

See, also, 31 Cyc. pp. 563, 564.

IX. BILL OF PARTICULARS AND COPY OF ACCOUNT.

Demurrer to bill of particulars good in part, see post, § 204.

Departure in bill of particulars filed with reply from that filed with complaint, see post, § 180. Effect of statute authorizing, on right to demur, see ante, § 196.

Election between items, see post, § 369.

Evidence admissible under, see post, § 385.

Indefiniteness ground for demurrer, see ante, § 192.

In justices' courts, see JUSTICES OF THE PEACE, § 90.

Motion to make more definite and certain, see post, § 367.

Objections and waiver thereof, see post, § 424.

Objections to evidence on ground of insufficiency of bill of particulars or variance between bill and pleading, see post, § 420.

Permitting jury to take bill of particulars to jury room, see TRIAL, § 307.

Record for purpose of review, see APPEAL AND ERROR, § 518.

Scope and extent of demurrer as affecting, see PLEADING, § 203.

Sufficiency of filing, see post, § 335.

Want of bill as ground of demurrer, see ante, § 192.

In particular actions or proceedings.

See—

Bonds of county officers. COUNTIES, § 101.

Of receivers. RECEIVERS, § 218.

Of township officers. TOWNS, § 33.

By or against religious society. RELIGIOUS SOCIETIES, § 31.

Enforcement of escheat. ESCHEAT, § 8.

Of mechanic's lien. MECHANICS' LIENS, § 271.

Foreclosure of street railroad mortgage. STREET RAILROADS, § 55.

RECOGNIZANCES, § 2.

§ 313. Nature and office of bill of particulars.

[a] (App. 1908)

The office of a bill of particulars which the court may order under Thornton's Ann. Civ. Code, § 135, providing that the court may order a bill of particulars of the claim of either party, is to specify more minutely the claim or defense set up.—Fletcher v. Southern, 41 Ind. App. 550, 84 N. E. 526.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 949.

See, also, 31 Cyc. pp. 565, 566.

§ 314. Causes in which particulars may be required.

[a] (Sup. 1878)

In an action against a corporation for labor performed, no bill of particulars need be filed, under 2 Rev. St. p. 73.—Salem Gravel Road Co. v. Pennington, 62 Ind. 175.

[b] As a general rule, a bill of particulars will not be ordered in an action for tort.—(Sup. 1884) Lemmon v. Moore, 94 Ind. 40; (1891) Roberts v. Vornholt, 26 N. E. 207, 126 Ind. 511.

[c] (Sup. 1890)

In an action for injuries to the person of plaintiff, a motion for a bill of particulars is properly denied.—City of Plymouth v. Fields, 125 Ind. 323, 25 N. E. 346.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 952, 953.

See, also, 31 Cyc. pp. 568, 569.

§ 315. Right to particulars in general.

[a] (Sup. 1822)

Where the declaration is general, the defendant may demand a bill of particulars.—Hanna v. Pegg, 1 Blackf. 181.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 950; 33 CENT.

DIG. Mand. § 367.

See, also, 31 Cyc. pp. 567, 568.

§ 317. Particulars of cause of action.

[a] (Sup. 1878)

In an action on an account stated for work and labor done, it is not necessary to file a bill of particulars with the complaint.—Salem Gravel Road Co. v. Pennington, 62 Ind. 175.

[b] (Sup. 1880)

A complaint alleging that defendant is indebted to plaintiffs in a certain sum, being the difference in value between real estate conveyed by defendant to plaintiffs and a stock of goods sold by plaintiffs to defendant, which difference defendant agreed to pay, need not be accompanied by a bill of particulars.—Sharp v. Radebaugh, 70 Ind. 547.

[c] (Sup. 1881)

A complaint on an account, alleged to have been assigned to plaintiff, for "about eight hundred dollars," without giving a bill of particulars or itemized statement or description of the account, or of the nature of the demand, is bad.—Bay v. Saulspauha, 74 Ind. 397.

[d] (Sup. 1882)

In an action on contract, where the consideration of the agreement is alleged to have been divers sums of money, pieces of property, and accounts, defendant is not entitled to a bill of particulars.—Crane v. Crane, 82 Ind. 459.

[e] (App. 1891)

A count for rent due is not demurrable for want of a bill of particulars where it states the amount and the date it became due, and particularly describes the land out of which it accrued.—*McCoy v. Oldham*, 1 Ind. App. 372, 27 N. E. 647, 50 Am. St. Rep. 208.

[f] (App. 1895)

In a personal injury case, where the complaint alleges that plaintiff expended large sums for medical treatment and nursing, the court's refusal to compel plaintiff to state the items of such expenses is not cause for reversal, when, at the trial, plaintiff abandons that part of his case.—*Romona Oellic Stone Co. v. Tate*, 12 Ind. App. 57, 37 N. E. 1065, 39 N. E. 529.

[g] (App. 1897)

A complaint on an account for goods sold and delivered is bad, unless a bill of particulars is filed with it as an exhibit.—*Townsend v. Cleveland Fire-Proofing Co.*, 47 N. E. 707, 18 Ind. App. 568.

[h] (App. 1899)

A complaint in an action to recover commission for selling land is sufficient, though not accompanied by a bill of particulars, where it is based on one item or transaction which is set out therein.—*Cannon v. Castleman*, 55 N. E. 111, 24 Ind. App. 188.

[i] (App. 1899)

It is not necessary to file a bill of particulars with the complaint upon an account stated.—*McDowell v. North*, 55 N. E. 789, 24 Ind. App. 435.

[j] (Sup. 1904)

Where, in an action for money had and received, defendant desires information as to the special fact relied on, his remedy is a motion for a bill of particulars or to make the complaint more specific.—*Harbaugh v. Tanner*, 71 N. E. 145, 103 Ind. 574.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 954-962; 33 CENT. DIG. Mal. Pros. § 102.

See, also, 31 Cyc. pp. 572-579.

§ 319. Particulars of set-off or counter-claim.

[a] (Sup. 1880)

In an action on notes against one who claimed to be a surety by an indorser who had paid the notes, an answer alleging that plaintiff had been fully paid by moneys which he had received from the estate of the maker, rents from a mill belonging to said estate, and other sources, but not alleging that there was any agreement between plaintiff and the administrator of the estate that plaintiff's alleged indebtedness to the estate should be applied in satisfaction of the notes, and not accompanied by any bill of particulars, could not be upheld as a set-off.—*Johnson v. Breedlove*, 72 Ind. 368.

[b] (Sup. 1889)

A pleading of a set-off will be held bad on demurrer, where, owing to the absence of a bill of particulars, there is nothing to show the nature of the claim pleaded by way of set-off.—*Peden v. Mail*, 118 Ind. 556, 20 N. E. 493.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 970.

See, also, 31 Cyc. p. 576.

§ 323. Application for bill, and proceedings thereon.

[a] (Sup. 1883)

A bill of particulars will not be ordered on a motion to make a pleading more specific.—*Louisville, N. A. & C. Ry. Co. v. Henly*, 88 Ind. 535.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 976-979.

See, also, 31 Cyc. pp. 583-585.

§ 324. Form and requisites of bill.

[a] (Sup. 1874)

In a suit by an attorney for services rendered defendants, a bill of particulars, filed with the complaint, is sufficient where, after the usual formal recital that defendants are indebted to plaintiff, it states: "To legal services rendered in the October term of the Tippecanoe circuit court, in the case of themselves against John Doffin and others, to set aside a fraudulent mortgage, two hundred dollars (\$200)."—*Pierce v. Wilson*, 48 Ind. 298.

[b] (Sup. 1879)

A bill of particulars in an action to recover for goods sold, contained an account for merchandise denominated "paper patterns," with proper dates and amounts, but did not show the number of patterns or any specific description thereof. *Held*, that it sufficiently apprised the defendants of the nature and amount of the claim sued for.—*Leib v. Butterick*, 68 Ind. 190.

[c] (Sup. 1882)

A complaint alleging that defendants are indebted to plaintiff \$400 "for money had and received a bill of particulars of which is filed," etc., and signed "D. W. plff. atty.," immediately followed by a statement headed "Bill of Particulars," showing the defendants by name to the plaintiff by name "Dr. \$400, in money, A. D. 1877," and signed by the plaintiff, is not subject to the objections that such complaint is not signed by plaintiff or by any one acting as his attorney, and that the bill of particulars following the complaint is not marked as an exhibit thereto, and is not sufficiently specific.—*Lee v. Basey*, 85 Ind. 543.

[d] (Sup. 1884)

A complaint for goods sold and delivered and for work and labor was followed in the transcript by a bill of particulars prefaced "bill of particulars of the items of the accompanying complaint." *Held* sufficient to show that the items of the account in the bill of particulars

were between the parties to the suit.—*Hartlep v. Cole*, 94 Ind. 513.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. §§ 980-983, 985.
See, also, 31 Cyc. pp. 587, 588.

§ 326. Further or additional bill.

[a] (Sup. 1886)

Where an indebtedness sued for is not evidenced by a written instrument, and is so particularized or described in the complaint as to indicate with certainty the items and dates of the account on which a recovery is sought, an additional bill of particulars would serve no useful purpose.—*Wagoner v. Wilson*, 8 N. E. 925, 108 Ind. 210.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. §§ 990-992.
See, also, 31 Cyc. pp. 581, 582.

§ 327. Construction and operation of bill in general.

[a] (Sup. 1871)

A bill of particulars filed with a complaint is part thereof.—*Noble v. Burton*, 38 Ind. 206.

[b] (Sup. 1882)

Where a paragraph of a complaint is in the nature of a common count in assumpsit, and is aided by a bill of particulars which supplies the omissions complained of, it is sufficient on demurrer.—*Oliver v. Gorham*, 85 Ind. 598.

[c] (Sup. 1887)

A complaint alleged that "the said defendant is indebted to the plaintiff in the sum of * * *, with interest thereon from the date of the several items of account, the bill of particulars of which is filed herewith, and hereby made a part of the complaint, marked 'Exhibit A.' " The complaint was upon an account stated against the defendant to the plaintiff, "Dr.," and the items were stated after the following manner. "To foreclosing mortgage v. J. M. Hemel;" "To general attention to your business." Held that, considering the complaint and the bill of particulars together, the inference was that the indebtedness charged was for services rendered in foreclosing mortgages, and for general attention to the defendant's business, and the complaint was sufficient under Rev. St. 1881, §§ 338, 376, 658, by which it is only required that the facts should be so stated as to enable a person of common understanding to know what is intended.—*United States Mortgage Co. v. Henderson*, 111 Ind. 24, 12 N. E. 88.

[d] (App. 1891)

A recital in the superscription to a bill of particulars, filed with a paragraph in a complaint for goods sold and delivered, of the goods as "sold to R. F. M., suc'r to S. F.," does not control an averment in the complaint that they were sold to both of such persons, who are defendants, but such statement is surplusage.—*Furry v. O'Connor*, 1 Ind. App. 573, 28 N. E. 103.

[e] (App. 1891)

A complaint alleged that defendant sold plaintiffs some wheat, to be of a certain grade, at a certain price per bushel, with a provision that if on arrival it should not be found by the state inspector to be of that grade, then it should be sold by plaintiffs at market difference on day received, and accounted for accordingly to defendant; that defendant drew on plaintiffs for the amount of the wheat, and plaintiffs paid therefor before its arrival; that on arrival it was rated by the inspector as of a much poorer grade than called for; that plaintiffs thereupon received it as of the grade so rated, and accounted for it to defendant at the highest market price on the day of delivery to them, "as was agreed by plaintiffs and defendant." A bill of particulars annexed to and made part of the complaint showed (1) the amount paid defendant; (2) the amount realized from the sale of said wheat; and (3) the balance claimed by plaintiffs to be owing them on account of overpayment to defendant. Held, on a motion in arrest of judgment for plaintiffs, that the complaint was not open to the objection that it appeared therefrom that plaintiffs, instead of selling the wheat as provided by the contract, kept it themselves.—*Green v. McIntire*, 2 Ind. App. 278, 28 N. E. 555.

[f] (App. 1894)

A complaint failing to state that the debt is due is not made sufficient by filing therewith a bill of particulars containing the abbreviation "Dr.," as such abbreviation does not indicate a matured indebtedness.—*Jaqua v. Shewalter*, 10 Ind. App. 234, 36 N. E. 173, 37 N. E. 1072.

[g] (App. 1910)

The authority conferred by statute to order abstracts of title to be furnished by a party in connection with his claim does not make such abstracts, when furnished, a part of the pleading.—*O'Mara v. McCarthy*, 90 N. E. 330.

[h] (App. 1910)

To cure defects in a pleading, reference may be made to the bill of particulars.—*Wulchner-Stewart Music Co. v. Helft*, 90 N. E. 1033.

A complaint alleging generally that defendant is indebted to plaintiff for commission as salesman, and for expense money advanced for and in behalf of defendant, which is insufficient to inform defendant of the nature of the claim against him, is not cured by a bill of particulars which set out 56 items similar to one as follows: "Vose piano, sold Peter Denkleman, July 11th, '05, Terre Haute, \$5.00."—Id.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. §§ 993, 994.
See, also, 31 Cyc. pp. 570, 571.

§ 328. Variance between pleading and bill.

Reply and bill filed with complaint, see post, § 180.

Variance between pleading and copy of account, see post, § 330.

[a] (Sup. 1877)

If a set-off be pleaded with a bill of particulars of the items, the set-off is good so far as it goes, though the amount of the bill of particulars be less than the amount claimed in the set-off.—*Turner v. Campbell*, 59 Ind. 279.

[b] (Sup. 1889)

In an action for goods sold, a variance between the complaint, which alleges both defendants to be indebted, and the caption of the bill of particulars, showing the goods to have been charged to but one of them, is immaterial.—*Vanoy v. Klein*, 122 Ind. 416, 23 N. E. 526.

[c] The rule that, where the contract or a copy thereof is filed with and made part of the pleading as an exhibit, the contents of the contract control rather than any averments of the complaint which are in conflict with the same, has no application to a bill of particulars.—(App. 1891) *Furry v. O'Connor*, 28 N. E. 103, 1 Ind. App. 573; (1895) *Chapman v. Elgin, J. & E. Ry. Co.*, 30 N. E. 289, 11 Ind. App. 632; (Sup. 1906) *Stewart v. Knight & Jilson Co.*, 166 Ind. 498, 76 N. E. 743.

[d] (App. 1892)

The fact that goods sold on an account are alleged, in an action therefor, to have been sold a certain person, while the caption of the bill of particulars, filed as an exhibit, states the account to have been with another, as agent for the said person, does not constitute such a variance as to render the complaint obnoxious to a demurrer; but the caption may be rejected as surplusage.—*Wellington v. Howard*, 5 Ind. App. 539, 31 N. E. 852.

[e] (App. 1895)

An averment in the complaint that plaintiff performed work for defendant controls a statement in the bill of particulars that plaintiff did not do the work, but was a contractor and sublet it.—*Chapman v. Elgin, J. & E. Ry. Co.* 11 Ind. App. 632, 30 N. E. 289.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 984.

See, also, 31 Cyc. p. 583.

§ 330. Copy of account alleged in pleading.

Aider by verdict or judgment of pleading defective for failure to file, see post, § 432.

[a] (Sup. 1859)

2 Rev. St. p. 44, § 78, providing that, when a pleading is founded on an account, the original or a copy thereof must be filed with the pleading, is imperative.—*Price v. Grand Rapids & I. R. Co.*, 13 Ind. 58; *Kiser v. State*, Id. 80.

[b] (Sup. 1860)

The complaint in an action on an account must be accompanied by a copy of the account.—*Jones v. Dronberger*, 15 Ind. 443.

[c] (Sup. 1870)

Where an answer by way of set-off is based on an account for work and labor and material furnished, an account must be filed.—*Biddle v. Reed*, 33 Ind. 529; Id., 34 Ind. 379.

[d] (Sup. 1886)

Where a copy of an account, which is the foundation of a pleading, is properly filed therewith as an exhibit or bill of particulars, it will cure uncertainties therein.—*Blount v. Rick*, 107 Ind. 238, 5 N. E. 898, 8 N. E. 108

[e] (App. 1894)

In an action by a court stenographer, an account, filed as an exhibit to her complaint, for a certain number of folios of the transcript of a record, at 10 cents per folio, is not an account for goods sold and delivered, but for services rendered; and hence there is no variance between such account and the complaint, which alleges that defendant is indebted to plaintiff for stenographic and transcribing services rendered at his request.—*Arcana Gas Co. v. Moore*, 8 Ind. App. 482, 36 N. E. 46.

[f] (Sup. 1899)

Under *Burns' Rev. St.* 1894, § 341 (*Horner's Rev. St.* 1897, § 338), requiring a pleading founded on an account to have filed with it a copy of the account, a complaint which does not have such copy attached is insufficient.—*Gise v. Cook*, 52 N. E. 454, 152 Ind. 75.

[g] (App. 1906)

A claim by the owner of land adjoining a railroad right of way, shown by an itemized statement presented to the railroad company, under the statute providing that, if the company neglects for 60 days "to pay said account," the owner may bring suit and recover the reasonable value of a fence erected by him along the right of way, is not an account within *Burns' Ann. St.* 1901, § 363, providing that when a pleading is founded on an account the original or a copy must be filed with the pleading.—*Vandalia R. Co. v. Stephens*, 39 Ind. App. 11, 78 N. E. 1055.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 996-1002.

See, also, 31 Cyc. pp. 590, 591.

X. FILING, SERVICE, AND WITHDRAWAL.

Filing as affecting computation of period of limitations, see LIMITATION OF ACTIONS, § 118.

In actions on bills or notes, see BILLS AND NOTES, § 488.

In equity, see EQUITY, § 321.

Presumptions on appeal as to filing, see APPEAL AND ERROR, § 916.

Review of discretion of trial court, see APPEAL AND ERROR, § 956.

Service of pleading with process, see PROCESS, § 66.

§331. Purpose of filing or service in general.

[a] (App. 1902)

The fact that the paragraphs of an answer are insufficient does not justify the court in refusing, of its own motion, to permit the answer to be filed, and thereby deny defendant the opportunity to take issue on the complaint.—Anthony v. Masters, 62 N. E. 505, 28 Ind. App. 239.

FOR CASES FROM OTHER STATES,

See 31 Cyc. p. 591.

§332. Necessity for filing or service.

In justices' courts, see JUSTICES OF THE PEACE, § 91.

[a] (Sup. 1882)

Where a pleading is amended in order to be made more specific or otherwise, there should be a refiling of it as amended with a distinct docket entry of the fact.—Eshelman v. Snyder, 82 Ind. 498.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1003-1010.

See, also, 31 Cyc. p. 592.

§333. Time for filing or service.

Condition of cause and time for amendment, see ante, §§ 245, 258.

Cross-bill in equity, see EQUITY, § 200.

Cross-complaint, see ante, § 140.

Demurrer, see ante, § 199.

Plea or answer, see ante, § 85.

Plea or answer of set-off or counterclaim, see ante, § 140.

Replication or reply and subsequent pleadings, see ante, § 172.

[a] (Sup. 1838)

A party cannot be required to perfect his pleading by a certain day in vacation, but a day during the term at which the cause is called, or during the subsequent term, may be set for that purpose.—Runnion v. Crane, 4 Blackf. 466.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1011, 1012; 22 CENT. DIG. Ex. & Ad. § 1849.

See, also, 31 Cyc. pp. 597, 598.

§335. Requisites and sufficiency of filing.

Sufficiency of filing of written instrument with pleading, see ante, § 308.

[a] (Sup. 1829)

An affidavit by the plaintiff's attorney that he had left the replication on the clerk's table with the papers in the cause, and that it had afterwards come into the deponent's possession by mistake, does not show, with sufficient certainty, that the replication had been properly filed.—Swan v. Rary, 2 Blackf. 291.

[b] (Sup. 1890)

When the clerk fails to make an entry on the order book of the filing of an answer, and the paper is identified by the file mark of the clerk, the omission can be supplied on an application for a nunc pro tunc entry.—Security Co. of Hartford v. Arbuckle, 123 Ind. 518, 24 N. E. 329.

A trial court, having judicial knowledge of the filing of a separate answer in an action when it discovers that the clerk of the court has omitted to make a record thereof, may, on its own motion, order a nunc pro tunc entry.—Id.

[c] (App. 1899)

A statement in the complaint that "a bill of particulars is filed herewith" is not equivalent to such a filing, where required.—Montpelier Light & Water Co. v. Stephenson, 53 N. E. 444, 22 Ind. App. 175.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1015, 1016.

See, also, 31 Cyc. pp. 591, 592.

§337. Operation and effect of filing or service.

[a] (App. 1906)

Under the express provisions of Prac. Act (Acts 1903, p. 339, c. 193) § 3, every pleading offered to be filed, whether received by the court or refused, is a part of the record from the time of the offered filing.—Home Ins. Co. of New York v. Overturf, 74 N. E. 47, 35 Ind. App. 361.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 1025.

See, also, 31 Cyc. p. 592.

§338. Acceptance and return of pleadings.

In replevin, see REPLEVIN, § 57.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1022, 1023.

See, also, 31 Cyc. pp. 596, 597.

§339. Withdrawal or abandonment of pleadings.

Abandonment of demurrer, see ante, § 212.

Competency of abandoned pleadings as admissions, see EVIDENCE, § 208.

Effect of amendment as withdrawal of original pleading, see ante, §§ 252, 264.

Effect of failure to appear, see APPEARANCE, § 29.

Effect of withdrawal of appearance, see APPEARANCE, § 27.

Effect on ruling as to plea in avoidance of matter available under general denial withdrawn, see ante, § 136.

Review of decisions involving discretion of court, see APPEAL AND ERROR, § 960.

Waiver of objections, see post, § 426.

Waiver of objections to proceeding on original complaint on withdrawal of substituted complaint, see post, § 406.

Waiver of objections to rulings, see post, § 416.

[a] (Sup. 1824)

A party has a right to withdraw a demurrer at any time before the judgment on it is recorded, unless the demurrer be frivolous.—*Call v. Ewing*, 1 Blackf. 301.

[b] (Sup. 1841)

Where the circuit court refused to permit the defendant to withdraw one of his pleas after some of the jurors were sworn, where the withdrawing of them would have deprived the plaintiff of the right to open and close the cause to the jury, the supreme court *held* that, admitting they had a supervisory power over the discretion of the court below in such a case, a point not decided, there was no reason for supposing that the discretion in this case had been improperly exercised.—*Sanders v. Johnson*, 6 Blackf. 50, 36 Am. Dec. 564.

[c] (Sup. 1845)

The court may permit the plaintiff to withdraw a demurrer to a plea, and reply to it, after the giving of an opinion against the plea, but before judgment rendered on the demurrer.—*Berry v. McDonald*, 7 Blackf. 371.

[d] (Sup. 1856)

It is discretionary with the circuit court to allow a party at any time before entering into final trial to withdraw a demurrer, and answer the pleading to which it was filed.—*Dunn v. Sparks*, 7 Ind. 490.

[e] (Sup. 1859)

A defendant, who answers and then withdraws his appearance, thereby withdraws his answer also.—*Sloan v. Wittbank*, 12 Ind. 444.

[f] (Sup. 1859)

Whether an offer of the defendant to withdraw a paragraph of his answer, on condition that the evidence applicable to it shall be stricken out, shall be accepted or refused, is within the discretion of the court.—*Burroughs v. Hunt*, 13 Ind. 178.

[g] (Sup. 1863)

The nisi prius courts may, in the exercise of a reasonable discretion, permit amended answers to be filed after previous answers have been withdrawn.—*City of Aurora v. Cobb*, 21 Ind. 492.

[h] (Sup. 1864)

The court, in the exercise of a sound discretion, upon proper cause shown, may allow pleadings in bar to be withdrawn, and pleas in abatement to be filed.—*Patterson v. Mercer*, 23 Ind. 16.

It is not a sufficient reason for allowing pleadings in bar to be withdrawn, and a plea in abatement filed, that the defendant's counsel thinks the plea best suited to meet the facts of the case.—*Id.*

[i] (Sup. 1871)

When an answer has been filed, and a demurrer sustained to one paragraph thereof, and a reply filed to other paragraphs, the plaintiff should take leave to withdraw his pleadings before filing an amended complaint.—*Miles v. Buchanan*, 36 Ind. 490.

[j] (Sup. 1877)

The court may properly, after the conclusion of the evidence in a case, refuse leave to withdraw an answer to allow the filing of a demurrer to the complaint.—*Leeds v. Boyer*, 59 Ind. 289.

[k] (Sup. 1882)

Where defendant filed a demurrer to the amended complaint, this operated as a withdrawal of an answer previously filed to the original complaint.—*Wintermute v. Reese*, 84 Ind. 308.

[l] (Sup. 1885)

It is discretionary with the trial court to permit pleas in bar to be withdrawn, and to give leave to file a plea in abatement.—*D. S. Morgan & Co. v. White*, 101 Ind. 413.

[m] (Sup. 1886)

A plaintiff may, at any time before the jury retire, dismiss part of his complaint; and a general objection to the offer to dismiss will present no available question on appeal; for, if the dismissal leaves the complaint indefinite, the defendants should move to make it more specific.—*Louisville, N. A. & C. Ry. Co. v. Worley*, 107 Ind. 320, 7 N. E. 215.

[n] (Sup. 1887)

Where a pleading contains an admission, the party has a right to show under what circumstances his pleading was written and to explain or contradict it by any competent evidence, but he cannot destroy its competency by withdrawal.—*Baltimore & O. & C. Ry. Co. v. Evarts*, 14 N. E. 369, 112 Ind. 533.

[o] (Sup. 1890)

Where a defendant, after the allowance of an amendment to the complaint, asked permission to withdraw its demurrer to the original complaint, it is the duty of the court to grant the request, and a refusal is error.—*Hartford City Natural Gas & Oil Co. v. Love*, 25 N. E. 346, 125 Ind. 275.

[p] (Sup. 1900)

An agreement that "all matters material in evidence might be proved under the general denial to the pleadings, the same as if specially pleaded by cross complaint, answer, or reply," does not withdraw from the record cross complaints filed when the agreement was made.—*Capital Nat. Bank v. Reid*, 55 N. E. 1023, 154 Ind. 54.

[q] (App. 1903)

When a pleading is withdrawn, the rulings thereon pass out of the record.—*Chappell v.*

Jasper County Well & Gas Co., 66 N. E. 515, 31 Ind. App. 170.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. §§ 1033-1045; 22

CENT. DIG. Ex. & Ad. § 1849.

See, also, 31 Cyc. pp. 600-603.

§ 340. Lost or destroyed pleadings.

[a] (Sup. 1819)

The court may properly order new pleadings to be filed in place of those lost from the files.—*Ludlow v. Kincaid*, 1 Blackf. 488.

[b] (Sup. 1862)

Lost pleadings may be supplied.—*Sidner v. Mitchell*, 18 Ind. 224.

[c] (Sup. 1881)

Where a paragraph of a complaint has been lost, and the plaintiff voluntarily goes to trial, making no application to supply the loss by substitution until the finding of the court is being announced, such substitution may properly be refused.—*Sharpe v. Dillman*, 77 Ind. 230.

[d] (Sup. 1882)

The papers and pleadings in a case, and the record of the judgment, were stolen from the files of the court. Held that, in reinstating the judgment, it was not necessary to reinstate the pleadings or to perpetuate the evidence of their existence or contents.—*Cox v. Stout*, 85 Ind. 422.

[e] (Sup. 1882)

A paper furnished by counsel to the clerk as a substitute for a lost pleading, without order or leave of court, is no part of the record.—*Burkam v. McElfresh*, 88 Ind. 223.

[f] (App. 1902)

Under Burns' Rev. St. 1901, § 382, providing that, if an original pleading be lost, the court may authorize a copy to be filed and used, a copy of the lost original complaint in an action may, at the close of the evidence and argument, be filed on leave of court.—*Pape v. Ferguson*, 62 N. E. 712, 28 Ind. App. 298.

A substituted complaint, filed in place of the lost original, is presumed to be a true copy of such original, and takes its place as of the date of the original filing.—*Id.*

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. §§ 1026-1032.

See, also, 31 Cyc. pp. 598-600.

XI. MOTIONS.

Effect of remedy by motion in ejectment as affecting remedy by demurrer, see EJECTMENT, § 75.

Error in motion as ground for new trial, see NEW TRIAL, § 18.

Failure to take objection by motion as waiver thereof, see post, § 406.

In actions to contest or set aside wills or probate, see WILLS, § 284.

In equity, see EQUITY, §§ 261-264.

Objections to pleading taken by demurrer or motion, see ante, §§ 193-196.

Raising defense of limitations by motion, see LIMITATION OF ACTIONS, § 180.

Raising defense of res judicata, see JUDGMENT, § 948.

Record for purpose of review, see APPEAL AND ERROR, §§ 501, 518.

Review of decisions, see APPEAL AND ERROR, §§ 196, 256, 682, 960, 1024, 1039, 1042.

Waiver of objections to rulings, see post, § 426.

§ 341. Scope and purposes of remedy by motion in general.

[a] A motion to strike out cannot perform the office of a demurrer.—(Sup. 1855) *Port v. Williams*, 6 Ind. 219; (1871) *Gorden v. Garr*, 37 Ind. 403; (1880) *City of Elkhart v. Simonton*, 71 Ind. 7; (1882) *McCammack v. McCammack*, 86 Ind. 387; (1885) *Burk v. Taylor*, 103 Ind. 390, 3 N. E. 129; (1896) *Atkinson v. Wabash R. Co.*, 143 Ind. 501, 41 N. E. 947; (1908) *Toledo & I. Traction Co. v. Toledo & C. Interurban Ry. Co.*, 171 Ind. 213, 86 N. E. 54; (App. 1909) *Ellison v. Branstrattor*, 88 N. E. 963.

[b] (Sup. 1889)

A motion to "strike out another motion to strike out" is not known in either the code or common-law system of pleading.—*White v. D. S. Morgan & Co.*, 21 N. E. 968, 119 Ind. 338.

[c] (Sup. 1897)

There is no error in refusing to entertain a motion to strike out a motion.—*Clause Printing-Press Co. v. Chicago Trust & Savings Bank*, 48 N. E. 245, 148 Ind. 680.

[d] (Sup. 1906)

Where some of the defendants moved that the causes contained in a complaint alleged to be multifarious be separately docketed as against each of them, and others subsequently moved for a separate trial as to the causes alleged against them, the question of multifariousness of the complaint is necessarily presented.—*Boonville Nat. Bank v. Blakey*, 166 Ind. 427, 76 N. E. 529.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. §§ 1046, 1047.

See, also, 28 Cyc. pp. 45, 46, 31 Cyc. pp. 604, 605.

§ 342. Judgment on pleadings.

Harmless error in rulings on motions, see APPEAL AND ERROR, § 1039.

In ejectment, see EJECTMENT, § 79.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. §§ 1048-1077; 27

CENT. DIG. Inj. § 430; 28 CENT. DIG.

Insurance, § 1631; 39 CENT. DIG. Paymt.

§ 252; 41 CENT. DIG. Quiet. T. § 88.

See, also, 31 Cyc. pp. 605-615.

§ 343. — In general.[a] (*Sup.* 1857)

Where a declaration setting up a judgment before a justice of the peace in another state was silent on the subject and the answer alleged affirmatively a want of jurisdiction and the reply did not traverse that averment, defendant was entitled to a judgment on the pleadings.—*Willey v. Strickland*, 8 Ind. 453.

[b] (*Sup.* 1863)

Suit to set aside a wife's title in certain lands, on the ground of fraud, and to subject the same to the debts of her husband. She answered in 15 paragraphs, of which the last stated that the land was purchased with the proceeds of certain real estate owned by the wife as her separate property, and purchased for her with the knowledge, consent, etc., of the plaintiff. To this paragraph there was no reply. There was a trial and verdict for the defendant. *Held*, that the defendant might have had judgment on a motion based on the pleadings, and though this had been neglected, yet, under the verdict in her favor, the court would not consider errors at the trial assigned by the plaintiff.—*Needham v. Webb*, 20 Ind. 213.

[c] (*Sup.* 1867)

A refusal of the plaintiff below to reply to an answer, setting up new matter constituting a valid defense to the action, entitles the defendant to a judgment, under the statute, without a trial.—*Shirts v. Irons*, 28 Ind. 458.

[d] (*Sup.* 1835)

Where a party has waived the right to require an answer, by agreeing to submit the cause for trial, he cannot ask for judgment on the pleadings.—*Hartlep v. Cole*, 101 Ind. 458.

[e] (*App.* 1891)

Where a paragraph of an answer containing a general plea of payment is not replied to, it is proper to enter judgment for the defendant, and the sufficiency of the other paragraphs of the answer is immaterial.—*Adams v. Tuley*, 1 Ind. App. 490, 27 N. E. 991.

[f] (*App.* 1895)

Where plaintiff in an action on a note fails to reply to one paragraph of answer, alleging want of consideration, after his demurrer thereto is overruled, judgment should be entered for defendant, though plaintiff has also, by general denial, put in issue the plea of payment made in another paragraph.—*Kern v. Saul*, 14 Ind. App. 72, 42 N. E. 496.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1048-1051;
39 CENT. DIG. Paymt. § 252.

See, also, 31 Cyc. p. 606.

§ 345. — Insufficient cause of action or defense.[a] (*Sup.* 1839)

Where a plea professes to answer only part of the cause of action, plaintiff's reply to the plea, without demanding judgment for that part

of his demand not covered by the plea, will not operate as a discontinuance, if, after a demurrer to the replication is overruled at the same term at which the plea was filed, he demands judgment therefor.—*Hunt v. Mansur*, 5 Blackf. 214.

[b] (*Sup.* 1851)

On a foreign attachment against A. upon a debt evidenced by a joint and several note of A. and B., the defendant pleaded that B. was a resident of the county and the owner of lands and goods sufficient to satisfy the note. *Held*, that the court was authorized to treat such plea as a plea in bar, and render a judgment *quod recuperet*.—*Higgins v. Pence*, 2 Ind. 566.

[c] (*Sup.* 1857)

The plaintiff is entitled to judgment on the pleadings, where the defense relied upon as a bar to an action of trespass is an order of the county commissioners authorizing the opening of a private way, which order is void on its face.—*Barnard v. Haworth*, 9 Ind. 103.

[d] (*Sup.* 1860)

A judgment for the plaintiff over the general issue untried is error.—*Talbott v. Armstrong*, 14 Ind. 254.

[e] (*Sup.* 1878)

In an action to quiet title, where defendant answered by special plea, admitting the title claimed by plaintiff, but alleging that prior to the conveyance to plaintiff defendant had purchased the property at a sheriff's sale under decree of foreclosure of a mortgage executed by plaintiff's grantor, *held* that, on an issue of general denial by plaintiff, he was not entitled to judgment on the pleadings.—*Stevens v. Overturn*, 62 Ind. 331.

[f] (*Sup.* 1889)

In an action on a note and mortgage securing its payment, executed to plaintiff by defendant, the complaint alleged that L. had possession of the note and mortgage, claiming an interest therein, but that he had none. Defendant answered, bringing into court the amount alleged to be due, and prayed the court to determine who was entitled to the money. L. asserted title by delivery. *Held*, that it was proper to overrule plaintiff's motion for judgment on the pleadings against defendant.—*Doyal v. Landes*, 119 Ind. 479, 20 N. E. 719, 21 N. E. 1108.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1055-1059;
27 CENT. DIG. Inj. § 430; 28 CENT. DIG.
Insurance, § 1631; 41 CENT. DIG. Quiet
T. § 88.

See, also, 31 Cyc. p. 608.

§ 347. — Defective pleading.[a] (*Sup.* 1860)

A reply defective because not verified by affidavit is yet sufficient to prevent a judgment

for want of a reply.—*Wells v. Dickey*, 15 Ind. 361.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 1052.

See, also, 31 Cyc. pp. 607, 608.

§ 349. — Admissions in pleading.

[a] (Sup. 1863)

To a complaint a general denial and a special answer stating facts barring recovery were filed. To the answer there was a reply of confession and avoidance. *Held* that, after, demurrer to the reply was sustained, and plaintiff refused to plead further, judgment was properly rendered for defendant on the pleadings; *Burns' Rev. St. 1901*, § 380, providing that every material allegation of new matter in the answer not controverted by the reply shall be taken as true.—*Hibberd v. Trask*, 67 N. E. 179, 160 Ind. 498.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1067–1069.

See, also, 31 Cyc. p. 606.

§ 350. — Application and proceedings thereon.

[a] (Sup. 1865)

Where an answer to a complaint in three paragraphs professes, in terms, to answer only the first, a motion, after verdict for the plaintiff, for a judgment "on the pleadings," is too vague and indefinite.—*Holcraft v. King*, 25 Ind. 352.

[b] (Sup. 1890)

A motion for judgment on the pleadings must direct the court's attention to the specific point sought to be raised.—*Brown v. Jones*, 125 Ind. 375, 25 N. E. 452, 21 Am. St. Rep. 227.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1053, 1054, 1070–1077.

See, also, 31 Cyc. pp. 606, 607.

§ 351. Striking out pleading or defense.

Exhibits annexed to pleading, see ante, § 307.

Ground for new trial, see NEW TRIAL, § 18.

Inaction for divorce on nonpayment of alimony, see DIVORCE, § 262.

Motion to strike out as demurrer, see ante, § 341.

Necessity of reswearing jury after striking out plea in abatement for want of verification, see JURY, § 148.

Petition to compel payment, of claim against decedent's estate, see EXECUTORS AND ADMINISTRATORS, § 283.

Raising defense of limitations by motion to strike out, see LIMITATION OF ACTIONS, § 180.

Remedy by demurrer, see ante, §§ 192–196.

Review of decisions, see APPEAL AND ERROR, §§ 900, 1042.

Right to strike out pleading as against motion to amend, see ante, § 271.

Waiver of objections to rulings, see post, § 426.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1078–1146; 17 CENT. DIG. Eject. § 219; 23 CENT. DIG. Forc. E. & D. § 128.

See, also, 31 Cyc. pp. 615–643; note, 115 Am. St. Rep. 950.

§ 352. — In general.

[a] Special pleas amounting only to the general issue are properly stricken out on motion.—(Sup. 1839) *Lair v. Abrains*, 5 Blackf. 191; (1874) *Ohio & M. Ry. Co. v. Selby*, 47 Ind. 471, 17 Am. Rep. 719; (1885) *Stevens v. La Fayette & Concord Gravel Road Co.*, 99 Ind. 392.

[b] Where the general issue is pleaded, any other pleas merely amounting to the general issue may be rejected on motion.—(Sup. 1845) *Jackson v. Yandes*, 7 Blackf. 526; (1846) *Crookshank v. Kellogg*, 8 Blackf. 256.

[c] Where several pleas filed are substantially the same, the court may, on motion, set aside all of them except one.—(Sup. 1846) *Lomax v. Bailey*, 7 Blackf. 599; (1853) *Hunt v. Bailey*, 4 Ind. 630.

[d] (Sup. 1852)

The setting aside of a special plea cannot be complained of when another remains, under which the defense set up in the former plea could be made out in bar of the action.—*Wood v. Commons*, 3 Ind. 418.

[e] (Sup. 1855)

A count may be bad on demurrer, which yet cannot be regarded as a nullity and rejected on motion.—*Heddy v. Driver*, 6 Ind. 350.

[f] Other defenses contained in the same paragraph with a denial, whether equivalent to it or not, may be stricken out on motion.—(Sup. 1858) *Johnson v. Crawfordsville, F. K. & Ft. W. R. Co.*, 11 Ind. 280; (1858) *Garrison v. Clark*, Id. 369; (1859) *Indianapolis, P. & C. R. Co. v. Taffe*, 11 Ind. 458.

[g] (Sup. 1859)

The declaration set up various connected allegations. The answer contained a general denial and specific denials of the allegations. The latter were stricken out on motion, and the court *held* that this was correctly done, as repeated denials only confuse the jury and encumber the record.—*Page v. Ford*, 12 Ind. 46; *Campbell v. Swasey*, Id. 70.

[h] (Sup. 1859)

Where a general denial is pleaded in a suit on a judgment, a further answer of null tiel record may be rejected on motion as surplusage.—*Westcott v. Brown*, 13 Ind. 83.

[i] (Sup. 1860)

The remedy for an argumentative answer is by a motion to strike it out and cause a simple denial to be substituted.—*Williams v. Port*, 14 Ind. 569.

[j] (Sup. 1861)

Objections to a reply, on the ground of duplicity or redundancy, must be taken by motion.—*Judah v. Trustees of Vincennes University*, 16 Ind. 56.

[k] (Sup. 1861)

Departure should be objected to by motion.—*Reilly v. Rucker*, 16 Ind. 303.

[kk] (Sup. 1861)

Under the Code, the joining of a father's right of action for loss of service with the claim of the child for the personal injury to himself would be duplicity, to be taken advantage of by motion to strike out.—*Rogers v. Smith*, 17 Ind. 323, 79 Am. Dec. 483.

[l] Where an argumentative or special denial is filed in connection with a general denial, the former may be stricken out on motion.—(Sup. 1865) *Holcraft v. King*, 25 Ind. 352; (1874) *Western Union Tel. Co. v. Meek*, 49 Ind. 53.

[ll] (Sup. 1865)

The complaint, in a suit for damages caused by the sinking of a flatboat while it was being towed by the defendant's steamboat, alleged that the loss resulted from the unskillfulness and negligence of the defendants, their servants, etc. The defendant pleaded a general denial, and that the loss resulted from the fault and negligence of the plaintiffs. *Held*, that the second answer amounted only to a denial, and was properly stricken out on motion.—*Neal v. Scott*, 25 Ind. 440.

[m] (Sup. 1869)

Where a demurrer has been properly overruled and another demurrer for the same cause is filed to the same pleading, there is no available error in striking out the latter demurrer.—*Goodwine v. Miller*, 32 Ind. 419.

[mm] (Super. 1873)

Where a special plea amounting to a general issue is pleaded with the general issue, objection should be taken by motion.—*Greenstreet v. Norris*, Wils. 419.

[n] (Sup. 1874)

It is not error to sustain a demurrer to an argumentative pleading, though the better practice is to strike it out on motion.—*O'Harra v. Stone*, 48 Ind. 417.

[nn] (Sup. 1876)

An answer to a complaint for libel, based on perjury, which contains no defense except a denial of malice, may be struck out where an answer of general denial is filed.—*Downey v. Dillon*, 52 Ind. 442.

[o] (Sup. 1876)

In an action for the value of goods sold and delivered by the plaintiff to the defendant, the answer set up a defect of parties, in that the plaintiff had no interest in the cause of action; that the goods were sold by plaintiff to a third person named, and by him to defendant; and that defendant never purchased of plaintiff

any portion of the goods. *Held*, that there was no error in striking out this answer, on motion; there being an answer of general denial remaining.—*Marshall v. Beeber*, 53 Ind. 119.

[oo] (Sup. 1877)

In an action on an injunction bond conditioned only that the injunction should be wrongful, if additional breaches be assigned than the only assignable breach, viz., that the injunction was wrongful, the remedy is by a motion to strike them out.—*Boden v. Dill*, 58 Ind. 273.

[p] (Sup. 1878)

Under 2 Rev. St. p. 155, § 209, providing for striking out the answer and entering a default against defendant, who, upon being subpoenaed as a witness on behalf of the plaintiff, refuses to appear and testify, a joint answer by such defendant and a codefendant may be struck out, so far as the recusant defendant is concerned.—*Nelson v. Neely*, 63 Ind. 194.

[pp] (Sup. 1879)

Where a paragraph of answer is pleaded to the whole complaint, its sufficiency is not to be tested by a motion to strike out.—*State ex rel. Nave v. Newlin*, 69 Ind. 108.

[q] (Sup. 1881)

Where a complaint states a cause of action for the recovery of land, an objection to its sufficiency to authorize the award of incidental relief such as the correction of a deed, asked thereby, should be taken by motion to strike the allegations as to such relief, or by motion to make them more specific.—*Smith v. Kyler*, 74 Ind. 575.

[qq] (Sup. 1881)

Where the real defense presented by a paragraph of the answer is property in third persons, this is admissible under the general denial, even though the seizure of the property be alleged to have been justified by a writ of execution; and there is no available error in striking out such paragraph.—*Lane v. Sparks*, 75 Ind. 278.

[r] (Sup. 1881)

Where a pleading is not so insufficient as to state no cause of action or defense the remedy is by motion.—*Crowder v. Reed*, 80 Ind. 1.

[rr] (Sup. 1882)

In an action for obstructing a private way over defendant's land, a defense that the use of the way was not adverse, but was under license from defendant, is available under a general denial, and there is no available error in striking it out.—*Hill v. Hagaman*, 84 Ind. 287.

[s] (Sup. 1882)

It is not error to sustain a demurrer to a general denial of an application for a receiver, though the better practice is to reach the same result by means of a motion to strike out or to reject.—*Bitting v. Ten Eyck*, 85 Ind. 357.

[ss] (Sup. 1883)

Where two defenses are blended in one paragraph, the remedy is by motion.—Woodworth v. Zimmerman, 92 Ind. 349.

[t] (Sup. 1884)

An answer containing a valid set-off should not be stricken out, though it also contains much idle and superfluous matter.—Newman v. Ligonier Building, Loan & Savings Ass'n, 97 Ind. 295.

[tt] (Sup. 1887)

An answer in abatement, not supported by affidavit, and pleaded with, instead of before, an answer in bar, as required by the Code (Rev. St. 1881, § 365), may well be stricken out, on motion.—State ex rel. Ruhlman v. Ruhlman, 111 Ind. 17, 11 N. E. 793.

[u] (App. 1891)

In an action brought by a buyer against the sellers of a cow, the property of a third person, who recovered a judgment for its value against the buyer and the sellers, the answer was a general denial, with a special paragraph alleging that in the action to recover for the cow the sellers had taken an appeal from the judgment, and that, while it was pending, the buyer paid the judgment, and thereupon their appeal was dismissed. Held that, as these facts could have been shown under the general denial, the court did not err in striking out the special paragraph.—Bash v. Young, 2 Ind. App. 297, 28 N. E. 344.

[uu] (Sup. 1892)

Under Rev. St. 1881, §§ 1055, 1071, providing that, in a suit to quiet title, all matters of defense may be proven under the general denial, it is not error to strike out an additional paragraph of the answer setting up a special defense.—Mason v. Roll, 130 Ind. 260, 29 N. E. 1135.

[v] (App. 1892)

Where an answer of set-off, which is filed in an action in which a set-off is not allowed by law, states a cause of action against plaintiff, the proper practice is to move to strike it out, or to object to the introduction of evidence under it.—Howlett v. Dilts, 4 Ind. App. 23, 30 N. E. 313.

[vv] (App. 1892)

The remedy for argumentativeness in a pleading is by motion.—McFadden v. Schroeder, 29 N. E. 491, 30 N. E. 711, 4 Ind. App. 305.

[w] (Sup. 1893)

That a plea is not responsive to allegations of the complaint should be taken advantage of by motion to strike out.—Miller v. Rapp, 135 Ind. 614, 34 N. E. 981, 35 N. E. 693.

[ww] (App. 1893)

In an action for money loaned, where the answer pleads general denial, and partnership between the parties, it is not error to strike

out the latter plea, since the proof is admissible under the general denial.—Clodfelter v. Lucas, 34 N. E. 828, 7 Ind. App. 379.

[x] (Sup. 1894)

In an action on a note, a motion to strike out a cross-complaint alleging fraud and asking cancellation of the note was properly overruled.—Shirk v. Mitchell, 36 N. E. 850, 137 Ind. 185.

[xx] (Sup. 1897)

It is not error to refuse to strike out a cross complaint in which several defendants join, on the ground that some of them are not properly parties to the action, where such objection does not apply to all.—McCoy v. Stockman, 46 N. E. 21, 146 Ind. 668.

[y] (Sup. 1904)

Where, without authority or consent from the legal guardian of an insane person, who is so imbecile as not to know anything that is being done, proceedings were instituted and an appeal taken on behalf of the insane person, the pleadings will be stricken from the files.—Chase v. Chase, 163 Ind. 178, 71 N. E. 485.

[yy] (Sup. 1905)

Defects of substance in a bill cannot be taken advantage of by a motion to strike.—Guthrie v. Howland, 73 N. E. 259, 164 Ind. 214.

[z] (Sup. 1906)

Under the Civil Code a motion to strike out a pleading is not designed to perform the office of a demurrer, and the sufficiency of the pleading in regard to the facts alleged cannot properly be challenged in whole or in part by such a motion.—Toledo & I. Traction Co. v. Indiana & C. Interurban Ry. Co., 171 Ind. 213, 86 N. E. 54.

[zz] (App. 1909)

If a pleading is so palpably irrelevant that it is manifest that it could not be amended so as to make the facts stated in any wise germane to the controversy, it may be rejected on motion, but the motion reaches formal defects only, and cannot take the place of a demurrer to raise the question of a pleading's sufficiency in matters of substance.—Ellison v. Branstrator, 88 N. E. 963.

[zzz] (App. 1910)

Under Burns' Ann. St. 1908, § 371, providing that an answer in bar and a plea in abatement cannot be pleaded together, where, in an action against a municipal corporation, a plea to the jurisdiction is joined with an answer in bar, the plea might have been struck out on motion, but the same result may be attained by sustaining a demurrer.—Town of Knox v. Golding, 91 N. E. 857.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1078-1091, 1125; 17 CENT. DIG. Eject. § 219; 23 CENT. DIG. Forc. E. & D. § 128.

See, also, 31 Cyc. pp. 615, 616; note, 4 L. R. A. (N. S.) 1185.

§ 354. — Insufficient allegations or denials.

[a] (Sup. 1855)

The matter contained in one paragraph of an answer may not be a sufficient defense to bar the action; and yet, if pertinent, a court should not strike it out on motion. To justify that, it must be very irrelevant or a sham defense.—Port v. Williams, 6 Ind. 219.

[b] (Sup. 1877)

To a complaint averring a conveyance of lands to one who executed his notes for part of the purchase money, and a subsequent conveyance by the grantee to defendant, who assumed payment of the notes as part of the consideration to be paid by him, and that they are due and unpaid, an answer and cross-complaint, averring that such notes were secured by a mortgage on the lands, executed to plaintiff by his grantee, and that defendant has conveyed to a third person, who has assumed payment of the notes, and asking that such third person and plaintiff's grantee be made defendants, is insufficient, and may be stricken out on motion.—Campbell v. Patterson, 58 Ind. 66.

[c] (Sup. 1880)

An answer cannot be struck out on motion where it is authorized and required by statute in the action in which it is filed, even though it be an insufficient defense to the suit or proceeding, as a motion to strike out will not perform the office of a demurrer.—City of Elkhart v. Simonton, 71 Ind. 7.

[d] (Sup. 1885)

A motion to strike out will not perform the office of a demurrer for want of sufficient facts; and, where an answer contains allegations that are pertinent and relevant to the issue, it is error to sustain a motion to strike out the answer, even though it may not state a good defense.—Burk v. Taylor, 103 Ind. 399, 3 N. E. 129.

[e] (Sup. 1889)

Where a petition is not as definite and certain as the rules of pleading require, the remedy is by motion.—Williams v. Board of Com'rs of Lawrence County, 23 N. E. 76, 121 Ind. 239.

[f] (Sup. 1891)

A motion to strike should not be sustained if the facts stated in the paragraph are pertinent to the question to which they are addressed, though not sufficient to withstand a demurrer.—Mabin v. Webster, 28 N. E. 863, 129 Ind. 430, 28 Am. St. Rep. 199.

[g] (Sup. 1896)

A motion to strike out cannot take the place of a demurrer, but is proper only in the case of irrelevant matter; and if allegations in a pleading tend, by themselves or in connection with other material allegations, to constitute a cause of action or defense, they should not be stricken out.—Atkinson v. Wabash R. Co., 143 Ind. 501, 41 N. E. 947.

[h] (Sup. 1897)

A cross complaint cannot be stricken out because it fails to state facts constituting a cause of action.—McCoy v. Stockman, 146 Ind. 668, 46 N. E. 21.

[i] (Sup. 1897)

The proper method of testing the legal sufficiency of affirmative defenses contained in an answer is not by motion to strike out.—Pittsburgh, C. & St. L. Ry. Co. v. Mahony, 46 N. E. 917, 148 Ind. 196, 40 L. R. A. 101, 62 Am. St. Rep. 503.

[j] (Sup. 1907)

If an answer is so palpably irrelevant that it is manifest that it could not be so amended as to make the facts therein stated in any wise germane to the controversy, it may be rejected on motion.—Hart v. Scott, 168 Ind. 530, 81 N. E. 481.

FOR CASES FROM OTHER STATES,

SEE 39 ENT. DIG. Plead. §§ 1092-1095.

See, also, 31 Cyc. pp. 619-623.

§ 355. — Defective or irregular pleading.

[a] (Sup. 1867)

A general demurrer, misreciting a specialty, over of which was obtained preliminary thereto, may be set aside on motion, notwithstanding it may reach other defects of the declaration than the apparent variance produced by the false recital.—Rudisill v. Sill, 4 Blackf. 282.

[b] (Sup. 1840)

The plea of non est factum, if not sworn to, should be set aside on motion.—Barber v. Summers, 5 Blackf. 339; Ferraud v. Walker, Id. 424.

[c] (Sup. 1861)

A demurrer to one paragraph only, assigning a misjoinder of causes in the different paragraphs, should be stricken out on motion.—Bougher v. Scobey, 16 Ind. 151.

[d] (Sup. 1863)

Where a pleading is not signed, as required by statute, by either the party or his attorney, it should be stricken from the files on motion made in due time.—Fankboner v. Fankboner, 20 Ind. 62.

[e] (Sup. 1867)

The proper practice where a plea is filed without being verified is to move to reject or strike it from the record.—Indianapolis, P. & C. Ry. Co. v. Summers, 28 Ind. 521.

[f] Want of verification of a pleading must be taken advantage of by a motion to reject.—(Sup. 1882) Swihart v. Shaffer, 87 Ind. 208; (1886) Vail v. Rinehart, 105 Ind. 6, 4 N. E. 218; (1892) Champ v. Kendrick, 30 N. E. 787, 130 Ind. 549.

[g] (App. 1906)

Where a complaint is bad for duplicity, the remedy is by a motion to strike out.—Western

Union Telegraph Co. v. McClelland, 38 Ind. App. 578, 78 N. E. 672.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1102-1110.

See, also, 31 Cyc. pp. 629, 630.

§ 356. — Amended or supplemental pleading.

[a] (Sup. 1856)

Amendments filed without leave may be stricken out.—Hyatt v. Kirk, 8 Ind. 178.

[b] (Sup. 1872)

Where an amendment to a complaint is made, a question whether the amendment makes a new cause of action barred by limitations cannot be raised by motion to strike out the amendment.—Jeffersonville, M. & I. R. Co. v. Hendricks, 41 Ind. 48.

[c] (Sup. 1877)

2 Rev. St. 1876, p. 82, § 90, provides that the court may, in its discretion, allow a party to file his pleadings after the time limited therefor. *Held*, that where, in an action on a note, the case is put at issue and continued until the next term, when the court gives leave, without objection, to file an additional paragraph of answer, setting up the statute of limitations, it is not an abuse of discretion for the court afterwards to refuse to strike out such paragraph, even without requiring defendant to pay the costs of the previous term.—Duncan v. Cravens, 55 Ind. 525.

[d] (Sup. 1879)

There is no abuse of discretion in striking out an additional paragraph of an answer seeking to make new parties defendant, to enable the original defendant and such new parties to set off a joint claim against plaintiff, filed after the issues have been made up and the venue changed, and after one or two continuances.—Rout v. Woods, 87 Ind. 319.

[e] (Sup. 1908)

Where a paragraph was good before amendment, and the amendment did not make it bad, a motion to strike out the amendment was properly overruled.—Alerding v. Allison, 170 Ind. 252, 83 N. E. 1006, 127 Am. St. Rep. 363.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1111-1119.

See, also, 31 Cyc. pp. 617, 618.

§ 357. — Bill of particulars.

Striking out as ground for new trial, see NEW TRIAL, § 18.

FOR CASES FROM OTHER STATES,

See, also, 31 Cyc. p. 616.

§ 358. — Frivolous pleading.

[a] (Sup. 1873)

Where an answer is so framed that it does not set up a valid defense, but states facts that may, being properly averred, constitute a defense, it cannot be struck out as frivolous.—

Clark v. Jeffersonville, M. & I. R. Co., 44 Ind. 248.

A frivolous answer is one which, assuming its contents to be true, presents no defense.—Id.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1096-1101.

See, also, 31 Cyc. pp. 621, 622.

§ 359. — Sham answer or defense.

Leave of court to file sham answer, see ante, § 82.

[a] (Sup. 1825)

If a plea show on its face that it is a sham plea, it should be rejected on motion.—Henderson v. Reed, 1 Blackf. 347.

[b] (Sup. 1837)

A party is not bound to answer pleadings containing untrue recitals on oyer, and he may move to reject such pleadings.—Rudisill v. Sill, 4 Blackf. 282.

[c] (Sup. 1840)

A plea, which from its face, and from the plaintiff's affidavit, appears to be false and filed merely for delay, may be rejected on motion.—Smith v. Webb, 5 Blackf. 287.

[d] (Sup. 1859)

An answer setting up new matter which is untrue, and intended merely to delay the trial, will be deemed a sham defense, though in point of law good on its face.—Beeson v. McConnaha, 12 Ind. 420.

[e] (Sup. 1871)

The court cannot examine the answers to interrogatories to determine whether an answer is a sham pleading or not.—Raleigh v. Tossett, 36 Ind. 295.

[f] (Sup. 1873)

Where an answer is so framed that it does not set up a valid defense, but states facts that may, being properly averred, constitute a defense, it cannot be struck out as sham.—Clark v. Jeffersonville, M. & I. R. Co., 44 Ind. 248.

[g] (Sup. 1882)

Under Rev. St. 1881, § 382, any pleading may be rejected as a sham pleading, where, upon its face, it is clearly false in fact, or is shown to be false by the answers to interrogatories propounded for the purpose of testing it.—Lowe v. Thompson, 86 Ind. 503.

[h] (Sup. 1895)

There is no error in striking out an irresponsible answer.—Louisville, N. A. & C. Ry. Co. v. Miller, 37 N. E. 343, 141 Ind. 533.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1120-1128.

See, also, 31 Cyc. pp. 623-628; note, 72 Am. Dec. 521.

§ 360. — Application and proceedings thereon.

[a] (Sup. 1838)

A motion to set aside a declaration on account of a variance between it and the writ must be made on or before the day for which the cause is docketed for trial at the first term of the circuit court.—*Cozine v. Tousey*, 5 Blackf. 46.

[b] (Sup. 1844)

A plea, apparently good on its face, cannot be set aside upon an affidavit that it is false.—*Walpole v. Cooper*, 7 Blackf. 100.

[c, d] (Sup. 1858)

An answer good on its face, and not judicially known to the court to be a sham defense, must not be stricken out on affidavits of its falsity.—*Brown v. Lewis*, 10 Ind. 232.

[e] (Sup. 1859)

Where a party, by answers to interrogatories, admits the facts set up in his answer to be untrue, the court will strike out the answer as a sham defense.—*Beeson v. McConnaha*, 12 Ind. 420.

[f] (Sup. 1861)

When an amended answer is stricken from the files, the original answer stands as if no amended answer had been filed.—*Hill v. Jamieson*, 16 Ind. 125, 79 Am. Dec. 414.

[g] (Sup. 1870)

The answers made by a party under oath to interrogatories propounded by the opposite party, as provided by Code Civ. Proc. § 303 (2 Gav. & H. St. p. 189), cannot be considered by the court on a motion to strike out a pleading as a sham which is good on its face.—*Bogges v. Davis*, 34 Ind. 82; *Mooney v. Musser*, Id. 373.

[h] (Sup. 1873)

The answers made by a party under oath to interrogatories propounded by the adverse party, under Code, § 303, cannot be examined by the court, for the purpose of sustaining a motion to strike out, as a sham pleading, a pleading which is good on its face.—*Nelson v. Cain*, 42 Ind. 563.

[i] (Sup. 1882)

Only reasonable notice, and not service of process, as in ordinary, original and independent actions, is necessary on a motion, pending appeal, to strike from the files as an exhibit a paper which was never filed with the original pleadings.—*Bash v. Christian*, 84 Ind. 180.

In a motion pending appeal to strike a paper from the files as an exhibit to an answer, a statement that such paper was never filed as an exhibit to the original pleading is sufficient.—Id.

A motion pending appeal to strike from the files as an exhibit a paper which was never filed with the original pleadings in the action need not be verified.—Id.

[j, k] (App. 1895)

The sustaining of a motion to strike out a motion or pleading is the same as overruling the original motion or pleading.—*Albany Land Co. v. McElwaine-Richards Co.*, 39 N. E. 297, 11 Ind. App. 477.

[l] (Sup. 1898)

Burns' Rev. St. 1894, § 385 (Rev. St. 1881, § 382; Horner's Rev. St. 1897, § 382), requires the court to reject, as sham, any pleading, either when it plainly appears upon the face thereof to be false in fact, or when shown to be so by answers of the party to special interrogatories propounded to him. *Held*, that where the court was required to determine whether physical facts set forth in answers to certain interrogatories overcome plaintiff's positive statements in answer to other interrogatories that he did certain acts, showing he was without contributory negligence, as he was compelled to plead and prove to recover, the question of fact thus presented cannot be tried and determined on a motion to reject the pleading as sham.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Frazee*, 50 N. E. 576, 150 Ind. 576, 65 Am. St. Rep. 377.

[m] (Sup. 1901)

Under the direct provisions of *Burns' Rev. St. 1901, § 385 (Rev. St. 1881, § 382; Horner's Rev. St. 1901, § 382)*, a complaint shown to be false by the answers of plaintiff to special interrogatories may be rejected on motion.—*Tilden v. Louisville & J. Ferry Co.*, 62 N. E. 31, 157 Ind. 532.

[n] (App. 1903)

Burns' Rev. St. 1901, § 385, providing that a pleading shall be rejected as sham when shown to be so by answers of the party to special written interrogatories propounded to him to ascertain whether the pleading is false, does not authorize the court to strike out a pleading as sham upon answers of the party to interrogatories propounded to him upon his examination before trial, under *Burns' Rev. St. 1901, § 517*, providing for examination of an adverse party as a witness before trial.—*Stars v. Hammersmith*, 67 N. E. 554, 31 Ind. App. 610.

[o] (Sup. 1905)

Burns' Ann. St. 1901, § 345, providing that, if the court sustains or overrules a demurrer, the party affected by the ruling may plead over or amend on such terms as the court may direct, and on payment of costs occasioned by the demurrer, does not apply where the pleading is stricken out on motion, and is thereby eliminated from the record, so as not to be amendable.—*Guthrie v. Howland*, 73 N. E. 259, 164 Ind. 214.

In passing on a ruling of the trial court and striking a complaint from the files, the test is not as to the sufficiency as against a demurrer, but whether the facts stated tend to constitute a cause of action.—Id.

[p] (App. 1909)

Where motions to strike out a cross-complaint were joint as to all the paragraphs of the cross-complaint, it would be error to sustain them if either of the paragraphs was sufficient to withstand the motions.—*Ellison v. Branstrator*, 88 N. E. 963.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1129-1146; 17 CENT. DIG. Eject. § 219.

See, also, 31 Cyc. pp. 606, 607.

§ 361. Striking out matter from pleading.

In action on note on insurance premium, see INSURANCE, § 188.

Remedy by motion or demurrer, see ante, § 193. Review of decisions, see APPEAL AND ERROR, §§ 960, 1042.

Striking notice of mechanic's lien from complaint to enforce same, see MECHANICS' LIENS, § 271.

Waiver of objections to ruling, see post, § 426.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1145, 1147-1172.

See, also, 31 Cyc. pp. 636-643.

§ 362. — In general.

[a] (Sup. 1855)

Where a party craving oyer of an unsealed instrument, which is given without objection, makes such instrument a part of his plea, it is error to order so much of the plea to be stricken out on motion.—*Russell v. Drummond*, 6 Ind. 216.

[b] (Sup. 1859)

Part of a pleading may be stricken out, though it is thereby left so imperfect as to be demurrable.—Page v. Ford, 12 Ind. 46.

[c] (Sup. 1860)

The improper joining in one statement of different causes of action, which may be joined in the same complaint, should be taken advantage of by motion.—*Schlosser v. Fox*, 14 Ind. 365.

[d] (Sup. 1863)

A. and B. had been partners in business. Afterwards A., B., and C. became partners in the same business. Still later, A. retired from the firm, and B. and C. continued in partnership for some time, when they dissolved. Afterwards B. sued C. for profits received and not accounted for by him. C. answered (1) by denial, (2) payment, (3) claim for personal services, and (4) that he had paid out all the profits made by B. and C. upon old debts of the firm of A., B., and C. On the fourth paragraph of the answer the court held A. a necessary party, and ordered that he be made a party, and continued the cause for that purpose. No steps were taken by C. to make him a party before the next term. The cause was again continued for the same purpose, and under the same or-

der. Still no steps were taken by C. to make him a party. The court, at the next term, struck out the fourth paragraph. *Held* not error.—*Elliott v. Stevenson*, 21 Ind. 359.

[e] (Sup. 1864)

A motion cannot be sustained to strike out causes of action contained in a complaint on the ground that it contains more than one cause of action.—*Fritz v. Fritz*, 23 Ind. 388.

[f] (Sup. 1865)

Where an additional paragraph, filed to a complaint, counts upon a cause of action which accrued subsequent to the service of the summons, it may be stricken out on motion.—*Farrington v. Hawkins*, 24 Ind. 253.

[g] (Sup. 1869)

If the paragraph of a complaint is double, the remedy is by motion to compel the plaintiff to separate the causes of action into paragraphs and to number them, and not by motion to strike out part of the complaint.—*Hendry v. Hendry*, 32 Ind. 349.

[h] (Sup. 1871)

It is not error to strike out on motion a special denial in reply; there being a general denial in already.—*Gaff v. Hutchinson*, 38 Ind. 341.

[i] (Sup. 1873)

Immaterial matter in a complaint may be struck out on motion, or evidence offered in support of it may be rejected.—*Willett v. Porter*, 42 Ind. 250.

[j] (Sup. 1873)

Motions to strike out are not to be encouraged unless it is manifest to the court that it will be to the prejudice of the party that has to answer or reply to suffer the objectionable matter to remain.—*Clark v. Jeffersonville, M. & I. R. Co.*, 44 Ind. 248.

[k] (Sup. 1873)

Where a pleading is double, the remedy is by motion to compel the party pleading to separate the causes of action or defense into paragraphs and number them, such a defect is not reached by a motion to strike out.—*Hendry v. Hendry*, 32 Ind. 349; *Booher v. Goldsborough*, 44 Ind. 490.

[l] (Sup. 1873)

A motion to strike out is well taken when there is no cause of action or defense, or when the matter proposed to be struck out is immaterial, but is connected with matter that is material.—*Booher v. Goldsborough*, 44 Ind. 490.

[m] (Sup. 1873)

It is not error to strike out a part of the prayer of a complaint, when sufficient remains to authorize the court to give the plaintiff any relief to which he may be entitled under the facts charged.—*Board of Com'rs of Tippecanoe County v. Reynolds*, 44 Ind. 500, 15 Am. Rep. 245.

[n] (Sup. 1873)

It is reversible error to strike out material matter from the pleading.—*Dill v. O'Ferrell*, 45 Ind. 268.

[o] (Sup. 1876)

A complaint alleging facts relied upon as constituting a cause of action cannot be made stronger by an averment that the defendant represented the facts to be as alleged; and such an averment will, on motion, be struck out as immaterial.—*Evans v. White*, 53 Ind. 1.

Material matter which renders a pleading double should be stricken out on motion.—*Id.*

[p] (Sup. 1881)

Where a complaint improperly unites several causes of action, the proper remedy of the defendant is a motion to separate the causes of action or to strike out all the causes of action which are improperly joined.—*Baddeley v. Patterson*, 78 Ind. 157.

[q] (Sup. 1883)

No error was committed in striking out a paragraph of an answer where the matters pleaded were admissible under the general denial, which was also pleaded.—*Jones v. White*, 90 Ind. 255.

[r] (Sup. 1910)

If a complaint to enforce an employé's lien for services states facts sufficient to entitle plaintiff to a personal judgment, questions as to the sufficiency of the notice of a lien, or its absence from the complaint, may be properly presented by a motion to strike out allegations seeking to enforce the lien.—*Indiana Sand & Gravel Co. v. Donovan*, 91 N. E. 597.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1147-1155.

See, also, 31 Cyc. pp. 636, 637; note, 113 Am. St. Rep. 639.

§ 364. — Irrelevant, redundant, or scandalous matter.

[a] After the general denial has been pleaded, a further portion of the answer, including only what might be given in evidence under the general denial, is rightly stricken out.—(Sup. 1862) *Anthony v. Slonaker*, 18 Ind. 273; (1862) *Coquillard's Adm'r's v. French*, 19 Ind. 274; (1881) *Gerard v. Jones*, 78 Ind. 378; (1889) *Colchen v. Ninde*, 120 Ind. 88, 22 N. E. 94.

[b] (Sup. 1863)

It is not error to strike out a paragraph of an answer which renders necessary no other proof than was already made necessary by the previous filing of the general denial.—*Stevens v. Campbell*, 21 Ind. 471.

[c] (Sup. 1863)

Where several paragraphs of an answer are substantially the same in legal effect, they may all but one be stricken out on motion; or, if they all amount to the general denial, where the latter is not pleaded in form, they may all but one be stricken out on motion; and, if the gen-

eral denial be so pleaded, they may all be stricken out in like manner.—*City of Aurora v. Cobb*, 21 Ind. 492.

[d] (Sup. 1866)

Where it is apparent to the court that several paragraphs of a complaint are founded on the same cause of action without any substantial variance in the form or legal effect of their respective averments, all but one of them should be stricken from the record.—*Holcraft v. King*, 25 Ind. 352.

[e] Matters specially pleaded, if admissible under the general denial, should be stricken out as redundant.—(Sup. 1867) *Markel's Adm'r v. Spittler's Adm'r*, 28 Ind. 488; (1871) *Porter v. Wilson*, 35 Ind. 348; (1871) *Urton v. State*, 37 Ind. 339; (1873) *Sherlock v. Alling*, 44 Ind. 184, judgment affirmed in (1876) 93 U. S. 99, 23 L. Ed. 819.

[f] (Sup. 1868)

The striking out of an allegation which was a mere repetition of an averment contained in the same paragraph, as well as in another paragraph, under which the facts stricken out were all admissible in evidence, is not prejudicial error.—*Hallock v. Iglehart*, 30 Ind. 327.

[g] (Sup. 1869)

A paragraph of an answer or cross-complaint may be struck out on motion without error, where it is merely a denial in argumentative form, and any evidence under it is equally proper under another paragraph.—*Dice v. Morris*, 32 Ind. 283; *McCabe v. Raney*, Id. 309.

[h] (Sup. 1870)

Where a paragraph in an answer pleads matter of law merely, it may be stricken out on plaintiff's motion.—*Hawes v. Coombs*, 34 Ind. 455.

[i] (Sup. 1873)

The true test of the materiality of averments sought to be struck out is to inquire whether such averments tend to constitute a cause of action or defense, and, if they do, they are not irrelevant.—*Clark v. Jeffersonville, M. & I. R. Co.*, 44 Ind. 248.

[j] (Sup. 1873)

A party is required to plead facts, and not evidence, and, where a pleading contains the evidence tending to prove the substantial averments of the pleading, a motion to strike out the evidence should be sustained.—*King v. Enterprise Ins. Co.*, 45 Ind. 43.

Redundant averments, unnecessary exhibits and useless verbiage in a pleading, should be struck out on motion.—*Id.*

[k] (Sup. 1874)

Interrogatories filed with an answer should be struck out when not relevant to any issue made by the pleadings.—*Mutual Ben. Life Ins. Co. v. Cannon*, 48 Ind. 264.

[l] Where the material facts set up in a paragraph in an answer are admissible in evidence under the general denial, the striking out of a paragraph is not error.—(Sup. 1874) *Allen v. Randolph*, 48 Ind. 496; (1879) *Shellenbarger v. Blake*, 67 Ind. 75; (1883) *Ketcham v. Brazil Block Coal Co.*, 88 Ind. 515; (1883) *Boyce v. Graham*, 91 Ind. 420; (1887) *Columbus, H. & G. Ry. v. Braden*, 110 Ind. 558, 11 N. E. 337.

[m] (Sup. 1875)

There is no error in striking out a paragraph of an answer in which there is contained no matter which is not admissible under remaining paragraphs of such answer.—*Watts v. Coxen*, 52 Ind. 153.

[n] (Sup. 1876)

Where the matters alleged in a paragraph of a pleading could have been given in evidence under the remaining paragraph, as to such paragraph, the better practice in the court below was by a motion to strike it out, rather than by a demurrer thereto.—*Cool v. Cool*, 54 Ind. 225.

[o] (Sup. 1877)

It is not error to strike out a special paragraph of a pleading, where all the facts alleged in such paragraph are admissible in evidence under the remaining paragraphs.—*Hayden v. Souger*, 56 Ind. 42, 26 Am. Rep. 1; *Brown v. College Corner & R. Gravel Road Co.*, 56 Ind. 110.

[p] (Sup. 1877)

By a simple answer to the complaint, in an action by the holder of a mortgage on lands to foreclose it against the mortgagor and the owner by purchase from the mortgagor of the equity of redemption, the defendant owner of the equity of redemption admitted the purchase of such land for a certain sum, and alleged that he had executed to the mortgagor his promissory note therefor, and that the same had been sold and assigned to a certain person without notice of such mortgage. *Held*, that it was not error to strike out of such answer a prayer that such assignee be made a party to the action to answer as to his interest.—*Reagan v. Hadley*, 57 Ind. 509.

[q] (Sup. 1877)

It is proper to strike out a paragraph of an answer amounting only to a general denial, where such general denial is pleaded in another paragraph.—*City of Evansville v. Thayer*, 59 Ind. 324.

Surplusage in a pleading may subject it to a motion to strike out the redundant and irrelevant matter.—*Id.*

[r] (Sup. 1879)

There is no available error in denying a motion to strike mere surplusage from a pleading.—*Rout v. Woods*, 67 Ind. 319.

[s] (Sup. 1882)

Where a general denial was pleaded, it was not error to strike out a paragraph of the re-

ply which was equivalent to a denial.—*Hervey v. Parry*, 82 Ind. 263.

[t] (Sup. 1889)

It is proper to strike out of a pleading paragraphs that present the same issues set up in other paragraphs of the same pleading.—*Davis v. Davis*, 119 Ind. 511, 21 N. E. 1112.

[u] (App. 1891)

A part of an answer, which was in its nature evidentiary, and contained no fact the denial of which would make a material issue, was properly struck out on motion.—*Petree v. Fielder*, 3 Ind. App. 127, 29 N. E. 271.

[v] (App. 1898)

It is proper, where a complaint contains irrelevant or redundant matter, to move to strike it out.—*Lake Erie & W. R. Co. v. Juday*, 49 N. E. 843, 19 Ind. App. 436.

[w] (App. 1902)

A complaint seeking relief from a judgment alleged that the cross-complainant had filed his complaint attacking the judgment, after complainant's counsel had withdrawn and stated that he would be absent, "cunningly and designedly, and with a view to taking undue advantage of the complainant, on account of the absence of her attorney." *Held*, that it was proper to strike out the quoted words, inasmuch as they were mere epithets.—*Harlow v. First Nat. Bank*, 65 N. E. 603, 30 Ind. App. 160.

[x] (Sup. 1905)

A motion to strike out is proper for the purpose of stripping a pleading of immaterial, impertinent, and redundant matter, or to strike out a sham pleading, or to strike a pleading from the files in case of failure to comply with the formalities of the statute.—*Guthrie v. Howland*, 164 Ind. 214, 73 N. E. 259.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1156-1162.

See, also, 31 Cyc. pp. 637-641.

§ 365. — Application and proceedings thereon.

[a] (Sup. 1864)

A motion to strike out a part of a pleading need not be in writing, unless required by a rule of the court in which it is made.—*Swinney v. Nave*, 22 Ind. 178.

[b] (Sup. 1866)

In determining a motion to strike out a part of a single sentence in a pleading, the whole sentence must be considered.—*Beals v. Beals*, 27 Ind. 77.

[c, d] (Sup. 1871)

Where a paragraph of an answer is properly struck out on motion as amounting to the general denial, which has been filed, the ruling cannot be made erroneous by a subsequent withdrawal of the general denial.—*Indianapolis & C. R. Co. v. State ex rel. City of Lawrenceburg*, 37 Ind. 480.

[a] (Sup. 1876)

A motion to strike out part of a pleading, alleging no reason therefor, should not be sustained.—*Lucas v. Smith*, 54 Ind. 530.

[f] (Sup. 1877)

A motion to strike out part of a pleading should specify some reason therefor.—*Brinkmeyer v. Helbling*, 57 Ind. 435.

[g] (Sup. 1880)

A motion to strike a paragraph of a complaint does not raise the question of the sufficiency of such paragraph.—*Woollen v. Wishmeyer*, 70 Ind. 108.

[h] (Sup. 1882)

Error in refusing to strike out irrelevant parts of a pleading is not ground for reversal; the remedy being by objection to evidence in regard to the irrelevant facts.—*Lake Erie & W. Ry. Co. v. Kinsey*, 87 Ind. 514.

[i] Overruling a motion to strike out parts of a pleading is not available error.—(Sup. 1890) *Hudson v. Houser*, 123 Ind. 309, 24 N. E. 243; (1890) *Ætna Ins. Co. v. Deming*, 123 Ind. 384, 24 N. E. 86, 375; (1890) *Walker v. Larkin*, 127 Ind. 100, 26 N. E. 684; (1891) *Lewis v. Godman*, 129 Ind. 359, 27 N. E. 563; (1892) *Garn v. Working*, 5 Ind. App. 14, 31 N. E. 821; (1893) *Petree v. Brotherton*, 133 Ind. 692, 32 N. E. 300; (1893) *Koehring v. Aultman, Miller & Co.*, 7 Ind. App. 475, 34 N. E. 30, 35 N. E. 30.

[j] (App. 1905)

Under Acts 1903, p. 339, c. 193, § 2, requiring a motion to strike out any part of a pleading to be in writing and to set forth the words sought to be stricken, a motion to strike, which merely indicates the words sought to be stricken by reference to pages and lines of the complaint, fails to sufficiently state the parts sought to be stricken.—*Lindley v. Kemp*, 76 N. E. 798, 38 Ind. App. 355.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1163-1172.

See, also, 31 Cyc. pp. 657-669.

§ 367. Making more definite and certain.

Complaint in action for penalty for false list of property for assessment, see **TAXATION**, § 845. Ground for new trial, see **NEW TRIAL**, § 18. Harmless error in rulings on motions, see **APPEAL AND ERROR**, § 1039.

In action against directors of bank for negligence, see **BANKS AND BANKING**, § 82.

In action on insurance policy, see **INSURANCE**, § 633.

In action to enforce municipal assessment, see **MUNICIPAL CORPORATIONS**, § 567.

In will contest, see **WILLS**, § 282.

Ordering bill of particulars on motion to make pleading more specific, see ante, § 323.

Remedy by demurrer, see ante, §§ 192-196.

Remedy by motion to strike out or by objections to evidence, see post, § 428.

Requiring pleadings to be made more definite and certain on court's own motion, see ante, § 232.

Review of decisions involving discretion of court, see **APPEAL AND ERROR**, § 960.

Waiver of objections to pleading by failure to move to make more specific, see post, § 406.

[a] (Sup. 1861)

Where a petition in an action for partition indefinitely describes the land sought to be partitioned, objection must be by motion to have the pleading made certain and definite, as the uncertainty in the description cannot be regarded as an omission of a fact necessary to be stated in order to constitute a cause of action.—*Godfrey v. Godfrey*, 17 Ind. 6, 79 Am. Dec. 448.

[aa] A defect in the prayer for relief should be taken advantage of by a motion to make the pleading more specific.—(Sup. 1861) *Bennett v. Preston*, 17 Ind. 291; (1877) *Baker v. Armstrong*, 57 Ind. 189.

[aaa] (Sup. 1867)

To an interrogatory filed by a defendant to the plaintiff, in an action brought on a note, requiring the several items constituting the consideration of the note and their value, the plaintiff replied under oath that he was unable to furnish the items or their value. *Held*, on a motion to strike out, "and to compel a positive, clear, and full answer," that the court could not require a more definite answer.—*Wheelock v. Barney*, 27 Ind. 462.

[b] (Sup. 1873)

Where a steamboat is insured while running between certain points, and afterwards, for an additional premium, the terms of the policy are extended, so as to extend the risk while running between other points, a motion to have an answer setting up a cancellation and release of the latter agreement, in bar of a suit on the policy, made more specific by stating whether the release was in writing or not, where it is not alleged in the motion that it was in writing, and the motion is not supported by affidavit showing it to have been in writing, should be overruled.—*King v. Enterprise Ins. Co.*, 45 Ind. 43.

[bb] (Sup. 1874)

In an action for damages for injury to the person, the complaint averred that the defendant, a railroad company, did not use due care, diligence, and skill in carrying the plaintiff; but, on the contrary, the track of the railroad was in bad condition and repair, and the defendant by its servants, etc., negligently, unskillfully, and carelessly ran its train of cars, whereby, etc. *Held* that, if defendant desired a more particular description of the condition of the track, a motion to make the averment more specific should have been made.—*Ohio & M. R. Co. v. Selby*, 47 Ind. 471, 17 Am. Rep. 719.

[bbb] (Sup. 1874)

The remedy is by a motion to make the complaint or bill of particulars more specific, where a complaint to recover for personal serv-

ices does not definitely state the date at which they were rendered.—*Pierce v. Baird*, 48 Ind. 378.

[c] (Sup. 1875)

Where, in a bill of particulars filed with a pleading, the account set out consisted of the fees of a district attorney in a number of cases, and the items were merely statements of the names of the parties in each case, with the amount of the fee carried out in figures, a motion of the adverse party to require the pleader to make such bill more specific, by giving the dates of the prosecutions and the courts in which they were prosecuted, presented a reasonable request, and should have been sustained.—*Goodwin v. Walls*, 52 Ind. 268.

[cc] (Sup. 1877)

Defects in a complaint for the recovery of money, as to the averments of ownership, are properly reached by a motion, before issue is joined, to make the pleading more specific.—*Doman v. Bedunnah*, 57 Ind. 219.

[ccc] (Sup. 1877)

Where, in an action on a note, defendant answers, alleging that such instrument is the last of a series of usurious renewals of a usurious note, and that the real principal, and lawful interest thereon, have been overpaid, and asking to recoup the excess, an objection that the dates of such renewals, and of the payments thereon, are not alleged, should be made by motion to make more specific.—*Holcraft v. Mellott*, 57 Ind. 539.

[d] Objection to a pleading because it is blank as to material dates should be made by motion to make more certain.—(Sup. 1879) *Baugh v. Boles*, 66 Ind. 376; (1879) *Dean v. Miller*, Id. 440; (1881) *Lentz v. Martin*, 75 Ind. 228.

[dd] (Sup. 1879)

A pleading setting up a chain of title to lands from which an equitable title may be inferred is not bad on demurrer, although subject to a motion to make it specific and certain, because of the want of an affirmative averment of title.—*Earle v. Peterson*, 67 Ind. 503.

[ddd] (Sup. 1879)

Defects in a complaint on a delivery bond in that it does not state with sufficient certainty when the execution issued, and when the levy was made, may be reached by a motion to make more certain and specific.—*Hunter v. Brown*, 68 Ind. 225.

[e] (Sup. 1881)

After the defendant has answered, he cannot move to have the complaint made more specific, unless, by leave of court, the answer is withdrawn.—*Hart v. Walker*, 77 Ind. 331.

[ee] (Sup. 1881)

Objections that a petition for a ditch or a drain is indefinite and uncertain as to the general description of the proposed route can be

raised only by a motion to make the pleading more certain and specific, and not by motion in arrest of judgment.—*Bryan v. Moore*, 81 Ind. 9.

[eee] The objection that a pleading is too indefinite or uncertain must be by motion to have it made more definite and certain.—(Sup. 1865) *Fultz v. Wycoff*, 25 Ind. 321; (1866) *Board of Com'rs of Bartholomew County v. Ford*, 27 Ind. 17; (1872) *Hazzard v. Heacock*, 39 Ind. 172; (1872) *Same v. Southwick*, Id., 178; (1873) *Lewis v. Edwards*, 44 Ind. 333; (1874) *Ohio & M. Ry. Co. v. McClure*, 47 Ind. 317; (1877) *Brookville & C. Turnpike Co. v. Pumphrey*, 59 Ind. 78, 26 Am. Rep. 76; (1877) *Schee v. McQuilken*, 59 Ind. 269; (1877) *City of Evansville v. Thayer*, Id. 324; (1877) *Pennsylvania Co. v. Sedwick*, Id. 336; (1878) *Fleming v. Easter*, 60 Ind. 399; (1878) *Inglis v. State ex rel. Hughes*, 61 Ind. 212; (1878) *Boyce v. Brady*, Id. 432; (1878) *Sibbitt v. Stryker*, 62 Ind. 41; (1878) *City of Goshen v. Kern*, 63 Ind. 468, 30 Am. Rep. 234; (1878) *Hampson v. Fall*, 64 Ind. 382; (1878) *Jameson v. Board of Com'rs of Bartholomew County*, Id. 524; (1879) *Proctor v. Cole*, 66 Ind. 576; (1879) *Dale v. Thomas*, 67 Ind. 570; (1879) *Davis v. State ex rel. Long*, 68 Ind. 104; (1879) *Terrell v. State ex rel. Root*, Id. 153; (1879) *Hyatt v. Mattingly*, Id. 271; (1879) *Gabe v. McGinnis*, Id. 538; (1879) *Milroy v. Quinn*, 69 Ind. 406, 35 Am. Rep. 227; (1880) *Walterhouse v. Garrard*, 70 Ind. 400; (1880) *Kennedy v. Richardson*, Id. 524; (1880) *Sharp v. Radebaugh*, Id. 547; (1880) *Buchanan v. Logansport, C. & S. W. Ry. Co.*, 71 Ind. 265; (1880) *Trayser Piano Co. v. Kirschner*, 73 Ind. 183; (1881) *Snyder v. Baber*, 74 Ind. 47; (1881) *State ex rel. Shuckman v. Neff*, Id. 146; (1881) *Town of Auburn v. Eldridge*, 77 Ind. 126; (1881) *Crowder v. Reed*, 80 Ind. 1; (1881) *Mitchell v. Stinson*, Id. 324; (1881) *Boyce v. Fitzpatrick*, Id. 526; (1882) *Grand Rapids & I. R. Co. v. Jones*, 81 Ind. 523; (1882) *Boesker v. Pickett*, Id. 534; (1882) *Supreme Lodge of Knights of Honor v. Abbott*, 82 Ind. 1; (1882) *Wright v. Williams*, 83 Ind. 421; (1883) *Continental Life Ins. Co. v. Houser*, 89 Ind. 258; (1883) *Leaman v. Sample*, 91 Ind. 236; (1883) *Herron v. Herron*, Id. 278; (1884) *Galway v. State ex rel. Ballow*, 93 Ind. 161; (1884) *McComas v. Haas*, Id. 276; (1884) *Louisville, N. A. & C. Ry. Co. v. Harrigan*, 94 Ind. 245; (1884) *City of Evansville v. Worthington*, 97 Ind. 282; (1884) *Louisville, N. A. & C. Ry. Co. v. Shanklin*, 94 Ind. 297; Id., 98 Ind. 573; (1885) *Cleveland, C., C. & I. Ry. Co. v. Wynant*, 100 Ind. 160; (1885) *Petry v. Ambroscher*, Id. 510; (1885) *Thomson v. Madison Building & Aid Ass'n*, 103 Ind. 279, 2 N. E. 735; (1886) *Sannes v. Ross*, 5 N. E. 699, 105 Ind. 558; (1886) *Town of Rushville v. Adams*, 8 N. E. 292, 107 Ind. 475, 57 Am. Rep. 124; (1887) *Pittsburgh, C. & St. L. Ry. Co. v. Hixon*, 11 N. E. 285, 110 Ind. 225; (1888) *Thomas v. Mertry*, 15 N. E. 244, 113 Ind. 83; (1888) *Ohio & M. Ry. Co. v. Walker*, 113 Ind. 196, 15 N. E.

234, 3 Am. St. Rep. 638; (1889) *Betts v. Quick*, 16 N. E. 172, 114 Ind. 165; (1888) *Board of Com'rs of Ripley County v. Hill*, 16 N. E. 156, 115 Ind. 316; (1889) *Ratliff v. Stretch*, 117 Ind. 526, 20 N. E. 438; (1889) *Cleveland, C., C. & I. R. Co. v. Wynant*, 20 N. E. 730, 119 Ind. 539; (1891) *Sheeks v. Erwin*, 130 Ind. 31, 29 N. E. 11; (App. 1892) *Sluyter v. Union Central Life Ins. Co.*, 3 Ind. App. 312, 29 N. E. 608; (1892) *Adamson v. Shaner*, 29 N. E. 944, 3 Ind. App. 448; (Sup. 1893) *Evansville & R. R. Co. v. Maddux*, 134 Ind. 571, 33 N. E. 345, 34 N. E. 511; (1893) *Garard v. Garard*, 135 Ind. 15, 34 N. E. 442, 809; (App. 1893) *Town of Nappanee v. Ruckman*, 34 N. E. 609, 7 Ind. App. 361; (1893) *American Wire Nail Co. v. Connelly*, 8 Ind. App. 398, 35 N. E. 721; (1893) *Hindman v. Timme*, 8 Ind. App. 416, 35 N. E. 1046; (Sup. 1894) *Starkey v. Starkey*, 136 Ind. 349, 36 N. E. 287; (App. 1894) *City of Bloomington v. Rogers*, 36 N. E. 439, 9 Ind. App. 230; (Sup. 1898) *Clow v. Brown*, 48 N. E. 1034, 49 N. E. 1057, 150 Ind. 185; (1898) *Rogers v. Baltimore & O. S. W. Ry. Co.*, 49 N. E. 453, 150 Ind. 397; (1898) *Frain v. Burgett*, 50 N. E. 873, 52 N. E. 395, 152 Ind. 55; (1899) *Cleveland, C., C. & St. L. Ry. Co. v. Berry*, 53 N. E. 415, 152 Ind. 607, 46 L. R. A. 33; (App. 1899) *City of Mt. Vernon v. Hoehn*, 53 N. E. 654, 22 Ind. App. 282; (1903) *Mulky v. Karsell*, 68 N. E. 689, 31 Ind. App. 595; (1904) *Blanchard Hamilton Furniture Co. v. Colvin*, 69 N. E. 1032, 32 Ind. App. 398; (Sup. 1906) *Baltimore & O. S. W. R. Co. v. Slaughter*, 167 Ind. 330, 79 N. E. 186, 7 L. R. A. (N. S.) 579, 119 Am. St. Rep. 503.

[f] (Sup. 1882)

Argumentative pleading can be reached only by a motion to make more definite and certain.—*Vance v. Schroyer*, 82 Ind. 114.

[ff] (Sup. 1882)

In an action against a railroad company for negligently setting fire to plaintiff's property, the failure to allege in the complaint the particular defects in defendant's engine, or the distance of plaintiff's land from defendant's right of way, or any particular acts of negligence, must be taken advantage of by motion to make more specific.—*Louisville, N. A. & C. Ry. Co. v. Krinning*, 87 Ind. 351.

[fff] (Sup. 1883)

Where the complaint, in a suit against a physician for negligently treating a case, fails to allege the specific acts of omission or commission which constitute the alleged negligence and unskillfulness, it is error to deny a motion to make the complaint more specific in such respect.—*Hawley v. Williams*, 90 Ind. 160.

[g] (Sup. 1884)

The remedy for an imperfect statement of facts in a complaint is by motion to make more specific.—*Johnston Harvester Co. v. Bartley*, 94 Ind. 131.

[ss] (Sup. 1884)

Averments, in themselves surplusage, will not be ordered made more definite and certain.—*Knox v. Trafalet*, 94 Ind. 346.

[sss] (Sup. 1884)

An objection that a complaint for negligence was too general must be taken by a motion to make more specific.—*City of Evansville v. Worthington*, 97 Ind. 282.

[h] (Sup. 1886)

Where a complaint, charging negligence, fails to specify in what the negligence consists, the proper way to reach the infirmity is by a motion to make more specific.—*Cincinnati, L., St. L. & C. Ry. Co. v. Gaines*, 104 Ind. 526, 4 N. E. 34, 5 N. E. 746, 54 Am. Rep. 334.

[hh] (Sup. 1886)

Where the complaint is for the conversion of railroad lumber appropriated by a railroad in several counties, but owing to loss of memoranda more specific locations cannot be given, it is not reversible error to overrule a motion to make the complaint more certain.—*Louisville N. A. & C. Ry. Co. v. Balch*, 105 Ind. 93, 4 N. E. 288.

[hhh] (Sup. 1886)

A complaint made under the occupying claimant's law to recover the value of improvements placed by him on land from which he was evicted, described the improvements as "clearing and fencing, removing stones, and putting the land in a state of cultivation." On a motion to make the complaint more specific, *held*, that the appellant was entitled to a statement of the character and value of the clearing, and of the kind and amount of fencing, and a specific statement of what was done towards putting the land in a state of cultivation.—*Wallace v. Brooker*, 105 Ind. 598, 5 N. E. 175.

[i] (Sup. 1889)

The objection that the complaint in a suit for damages for personal injuries alleges that plaintiff was "compelled" by his employer's agent to couple the cars, without giving the facts constituting the compulsion, should be raised by motion to make the complaint more specific.—*Brazil Block Coal Co. v. Gaffney*, 119 Ind. 455, 21 N. E. 1102, 12 Am. St. Rep. 422, 4 L. R. A. 850.

In an action by an infant for personal injuries, the point that the complaint was defective for alleging that the infant had been compelled to endanger himself without pleading the facts is reached by a motion to make more specific.—*Id.*

[ii] (Sup. 1889)

In an action for malpractice, that a complaint fails to set forth in what particular defendant was negligent in the performance of his duties as physician and surgeon, should be objected to by motion to make more specific.—*De Hart v. Etnire*, 121 Ind. 242, 23 N. E. 77.

[iii] (Sup. 1890)

A contract not alleged to be in writing is conclusively presumed to rest in parol; and a motion to make more specific a complaint on contract, which does not allege whether the contract was in writing or by parol, will not avail.—*Walker v. Larkin*, 127 Ind. 100, 26 N. E. 684.

[j] (Sup. 1891)

Uncertainty in a complaint cannot be reached by assignment of error challenging its sufficiency, since the proper remedy is by motion to make more specific.—*Falley v. Gribbling*, 128 Ind. 110, 26 N. E. 794.

[jj] (App. 1891)

That a count in a declaration for money had and received lacked a bill of particulars should be objected to by a motion to make more definite and certain.—*McCoy v. Oldham*, 1 Ind. App. 372, 27 N. E. 647, 50 Am. St. Rep. 208.

[jjj] (Sup. 1892)

In an action against a railroad company for injuries received at a crossing, plaintiff need not allege affirmatively the precautions taken to avoid injury; but an averment that the injury occurred without his fault is sufficient, and, if defendant desires a more particular statement of facts, his remedy, if any, is by motion to make the complaint more specific.—*Pennsylvania Co. v. Horton*, 132 Ind. 189, 31 N. E. 45.

[k] (Sup. 1893)

Where in an action against a railway company for injuries sustained by a brakeman while on a train, it was material to defendant to have a specific statement as to the particular place in the train the brakeman occupied when the injury occurred, the practical remedy was by the motion to require a greater certainty in that respect.—*Pennsylvania Co. v. Sears*, 34 N. E. 15, 36 N. E. 353, 136 Ind. 460.

[kk] (App. 1893)

It is not error to refuse to require an unnecessary allegation of a complaint to be made more specific.—*Indiana Stone Co. v. Stewart*, 7 Ind. App. 563, 34 N. E. 1019.

[kkk] (Sup. 1894)

An averment of a parol agreement for a right of way generally through defendant's lands is not assailable by motion to make more specific. If too vague for enforcement, it is only subject to demurrer.—*Corns v. Clouser*, 137 Ind. 201, 36 N. E. 848.

[l] (Sup. 1894)

Where specific allegations in a complaint in an action for a personal injury could not have weakened the complaint and were not essential to advise the defense of the cause of action defendant was called on to defend, the refusal to require more specific allegations was not error.—*Heltonville Mfg. Co. v. Fields*, 36 N. E. 529, 138 Ind. 58.

[ll] (Sup. 1894)

In an action for personal injuries the complaint alleged that they resulted from a defective bridge over a water course "leading from Numa to Clinton Locks." *Held*, in view of the difficulty in describing a water course, that a motion to make the complaint more specific as to such water course was properly overruled.—*Board of Com'rs of Parke County v. Wagner*, 138 Ind. 609, 38 N. E. 171.

[lll] (Sup. 1894)

The objection to a complaint in an action for personal injuries, that it fails to state which of two persons was driving a team, must be raised by demurrer, and cannot be raised on a motion to make the complaint more definite.—*Board of Com'rs of Jackson County v. Nichols*, 139 Ind. 611, 38 N. E. 526.

[lm] (Sup. 1896)

In an action for personal injuries, defendant is entitled to have the surroundings and circumstances attending the accident set out in the complaint; and, to compel such a statement, the proper remedy is by motion to make the complaint more specific.—*Peerless Stone Co. v. Wray*, 143 Ind. 574, 42 N. E. 927.

[lmm] (App. 1896)

In an action for damages caused by fire started on a railroad right of way, a motion to make the complaint more specific by alleging what engine started the fire was properly overruled, upon the averment that plaintiff could not do so.—*Baltimore & O. R. Co. v. Countryman*, 16 Ind. App. 139, 44 N. E. 265.

[lmmm] (App. 1899)

Where the only objection to a pleading is that some material averment is not sufficiently definite, positive, or specific, it should be taken on motion to make more specific.—*City of Hammond v. Meyers*, 55 N. E. 102, 23 Ind. App. 235.

[nn] (Sup. 1900)

Where a complaint, in an action for injuries sustained by an explosion of gas occasioned by defendant's negligence, averred that defendant negligently permitted its high-pressure line to become defective, insufficient, and out of repair, so that the gas flowing therein escaped, the overruling of a motion to make it more specific was reversible error.—*Tipton Light, Heat & Power Co. v. Newcomer*, 58 N. E. 842, 156 Ind. 348.

[nnn] (Sup. 1901)

An objection to a complaint by a receiver of a bank against the directors thereof for damages resulting from their gross negligence, in that the charges of negligence are too general, must be pointed out by a motion to make the allegation more certain.—*Coddington v. Canaday*, 61 N. E. 567, 157 Ind. 243.

[nnnn] (Sup. 1902)

The question of the uncertainty of a petition in proceedings to compel a railway company to construct a highway crossing across its

right of way for a newly established highway, which alleges that a legal notice of the application for the establishment of the highway was given to the railway company, can only be raised by a motion to make it more specific.—*Baltimore & O. S. W. R. Co. v. State ex rel. Greenwood*, 65 N. E. 508, 159 Ind. 510.

[o] (Sup. 1904)

In an action to enforce a collection of assessments for public improvements, where a complaint shows that the city council had contracted for the construction of a sewer and house connections, a motion to make more specific by setting out separately the amount due on sewer and the amount on house connections was properly overruled, since the sewer included the house connections.—*Boyce v. Tuhey*, 163 Ind. 202, 70 N. E. 531.

[oo] (Sup. 1904)

Where, in an action for money had and received, defendant desires information as to the special facts relied on, his remedy is a motion for a bill of particulars, or to make the complaint more specific.—*Harbaugh v. Tanner*, 71 N. E. 145, 163 Ind. 574.

[ooo] (App. 1905)

A complaint in an action against an employer for injuries received by an employé while engaged in assisting the placing of trusses in a building, which set forth the manner of doing the work, and alleged that the work was dangerous; that the employé was placed in a dangerous position; that the danger was not apparent to him, who was inexperienced; that the employer did not warn him of the danger, but assured him that the place was safe—construed as setting forth a cause of action based on the theory that the employer, knowing the danger and the inexperience of the employé, directed him to work in a particular place, without instructing him as to the danger, was sufficient as against a motion to make it more specific.—*Fletcher Bros. Co. v. Hyde*, 75 N. E. 9, 36 Ind. App. 96.

[p] (App. 1905)

Where, in an action for injuries, the negligence charged was that defendant negligently left a switch open at a time when it should have been closed, and required decedent to run a train over it without notice, and negligently used in connection with the switch a defective lock, which rendered the use of the switch unsafe, and required decedent to use it without notice of the defect, a motion to require more, specific averments as to what the defects were, and wherein located, was properly refused.—*Cleveland, C., C. & St. L. Ry. Co. v. Snow*, 74 N. E. 908, 37 Ind. App. 646.

[pp] (Sup. 1906)

In an action for injuries to a coal miner, where the complaint alleged that the miner, under the direction of his employer given through its mine boss, entered a certain part of the mine, and while he was working there in the

line of his duty the roof gave way, causing his injuries, a motion to compel the plaintiff to make the complaint more specific and allege the particular kind of work on which the miner was engaged and the manner in which he was performing it was properly denied. Judgment (1905) 73 N. E. 818, affirmed.—*Diamond Block Coal Co. v. Cuthbertson*, 76 N. E. 1060, 166 Ind. 290.

[ppp] (Sup. 1906)

Where it is uncertain whether a complaint in an action by a contractor constructing a street improvement bases the action on the bonds issued by the city in anticipation of the assessment for the improvement or on the lien created by the assessment, the remedy is by a motion to make the complaint more specific.—*Shirk v. Hupp*, 167 Ind. 509, 78 N. E. 242, 79 N. E. 490.

[q] (App. 1906)

An objection to a cross-complaint, seeking reformation of a contract sued on, that it failed to clearly and definitely point out the mistake objected to, should be taken advantage of by motion to make the cross-complaint more specific.—*Nichols & Shepard Co. v. Berning*, 76 N. E. 776, 37 Ind. App. 109.

[qq] (App. 1906)

Where, in an action for breach of a contract to convey certain land to plaintiff in consideration of his services in running defendant's farm and paying all the proceeds to defendant to enable him to discharge certain debts, plaintiff alleged that all of the proceeds of the land for about three years were received by defendant, either directly from plaintiff or in collecting the profits from others, and it was not claimed that plaintiff paid any of defendant's debts, it was proper for the court to overrule a motion to compel plaintiff to make his complaint more specific, by showing the debts paid by plaintiff, the amount of each, to whom they were paid, and by showing all the credits or moneys he turned over to defendant, with the dates and amounts.—*Grau v. Grau*, 77 N. E. 816, 37 Ind. App. 635.

[qqq] (App. 1906)

If a complaint is obscure, a motion to make more specific is the remedy.—*Lewis Tp. Improvement Co. v. Royer*, 38 Ind. App. 151, 76 N. E. 1068.

[r] (App. 1906)

Where the alternative averments of a complaint do not vitiate it, the remedy is by motion to make the same more specific.—*Indianapolis & N. W. Traction Co. v. Henderson*, 39 Ind. App. 324, 79 N. E. 539.

[rr] (Sup. 1907)

Where answers in an action for the price of goods sold failed to set out the specific time that the goods were ascertained to be unfit for the purpose for which they were bought, a motion to make more specific is the proper remedy.—*Oil-Well Supply Co. v. Watson*, 168

Ind. 603, 80 N. E. 157, 15 L. R. A. (N. S.) 868.

[rrr] (Sup. 1907)

Where a complaint is so inconsistent, uncertain, or repugnant as to mislead the defendant, he should move to separate the causes or make the complaint more specific.—*Chicago & E. R. Co. v. Lawrence*, 169 Ind. 319, 79 N. E. 363, 82 N. E. 768.

[s] (App. 1907)

Where, in an action for injuries to real estate and growing crops by the diversion of water, the complaint is defective in that the description of the premises is indefinite, the objection should be raised by motion to make more specific.—*Evansville & Princeton Traction Co. v. Broermann*, 80 N. E. 972, 40 Ind. App. 47.

[ss] (App. 1907)

Where a complaint against an electric railway company alleged that plaintiff was injured through the motorman negligently starting the car while plaintiff was alighting, it was not error to overrule a motion to make the complaint more specific by stating whether the car had, prior to its sudden start, been stopped or was slowly moving.—*Louisville & S. I. Traction Co. v. Leaf*, 40 Ind. App. 214, 79 N. E. 1066.

[t] (App. 1907)

Where a pleading is on its face uncertain, a motion to make it more specific is the proper remedy.—*Grand Trunk W. Ry. Co. v. State*, 40 Ind. App. 695, 82 N. E. 1017.

[tt] (App. 1908)

Where a paragraph of a complaint was insufficient to state a cause of action, a motion containing specifications to make it more specific should be overruled.—*Kelsay v. Chicago, C. & L. R.*, 41 Ind. App. 128, 81 N. E. 522.

[u] (App. 1908)

Where a complaint for injuries by a defect in a sidewalk did not allege on which side of the street the defect existed and the particular place in the walk where plaintiff fell and was injured, defendant's remedy was by motion to make more specific.—*City of Huntington v. Stuver*, 41 Ind. App. 171, 83 N. E. 518.

[uu] (App. 1908)

A complaint alleging that defendant owed plaintiff "for work and labor for three months, June 7, 1904, to September 7, 1904, the total of \$300, * * *" and that it was agreed and understood that plaintiff was to act as defendant's manager at a salary of \$100 per month, etc., is sufficient to enable a person of common understanding to know what is intended; and it is not reversible error to overrule a motion to make it more definite and a demurrer for want of facts.—*Huntington Fuel Co. v. McIlvaine*, 41 Ind. App. 328, 82 N. E. 1001.

[v] (App. 1908)

The court will sustain a motion to make a pleading more definite, when the precise nature

of the charge is not apparent, and when by failure to do so a substantial injustice would be committed; otherwise the overruling of such a pleading is not reversible error.—*Grass v. Ft. Wayne & Wabash Valley Traction Co.*, 42 Ind. App. 395, 81 N. E. 514.

[w] (App. 1909)

Where the theory of a complaint for the death of a freight brakeman is that defendant negligently maintained an overhead bridge, which made it unsafe for its servants, a motion to make the complaint more definite as to contributory negligence was properly denied.—*Baltimore & O. S. W. R. Co. v. McOsker*, 88 N. E. 950.

[x] (Sup. 1910)

Defendant moved that plaintiff be required "to make his complaint more specific in each of the following respects," setting out four specifications, two referring to all the paragraphs of the complaint, one to the first and second, and another specification to the third and fourth paragraphs. *Held*, that the motion was joint as to all the paragraphs of the complaint.—*Indianapolis Abattoir Co. v. Neidlinger*, 92 N. E. 169.

A motion to make more specific certain paragraphs of the complaint, which was joint as to all the paragraphs, was properly overruled, unless all of them were objectionable for generality.—*Id.*

[y] (App. 1910)

The complaint alleged that defendant was a railroad corporation, maintaining a large number of switches in a certain city and that intestate had been employed by it for about four months before March 28, 1906, as brakeman, switchman and yard conductor and on that date was engaged as yard conductor in such city in moving defendant's cars in such yards and was killed because of a defective car. *Held* that the remedy for any indefiniteness in the allegations as to the existence of the relation of master and servant at the time intestate was killed was by a motion to make more specific.—*Cleveland, C., C. & St. L. Ry. Co. v. Heineman*, 90 N. E. 899.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1173-1193;

28 CENT. DIG. Insurance, § 1631.

See, also, 31 Cyc. pp. 644-651.

§ 368. Separating and numbering causes of action or defenses.

Harmless error in rulings, see APPEAL AND ERROR, § 1039.

In action to set aside fraudulent conveyance, see FRAUDULENT CONVEYANCES, § 259.

Review of decisions involving discretion of court, see APPEAL AND ERROR, § 960.

[a] (Sup. 1856)

The court below, on motion, divided a "paragraph" in the answer into two divisions. *Held*, that the ruling was erroneous for the

reason that the paragraph was not objectionable on the ground of duplicity.—*Conwell v. President, etc., of Town of Connersville*, 8 Ind. 358.

[b] (Sup. 1869)

Where a complaint contains but one paragraph, presenting a single cause of action, the court cannot require the plaintiff to "paragraph his complaint."—*Schenck v. Butsch*, 32 Ind. 338.

[c] Where a petition contains several causes of action, plaintiff should, on motion of the defendant, be required to separately state and number them.—(Sup. 1869) *Hendry v. Hendry*, 32 Ind. 349; (1873) *Booher v. Goldsborough*, 44 Ind. 490.

Where a pleading is double, the remedy is by motion to compel the party pleading to separate the causes of action or defense into paragraphs, and number them.—Id.

[d] (Sup. 1873)

Where but one defense is set up in a paragraph of answer, a motion to separate it into paragraphs should be overruled.—*Booher v. Goldsborough*, 44 Ind. 490.

[e] (Sup. 1874)

A motion to separate a complaint into paragraphs should state how the mover thinks it ought to be divided. A general motion to separate is too indefinite.—*Scott v. Indianapolis Wagon Works*, 48 Ind. 75.

[f] (Sup. 1877)

A motion by defendants to require plaintiff to separate her complaint into paragraphs is properly overruled, if the motion is not in writing, and does not assign any reason for the separation.—*Hay v. State ex rel. McClanahan*, 58 Ind. 337.

[g] (Sup. 1880)

In an action on a note and to foreclose a mortgage securing payment of the same, given for the purchase price of land, the answer averred that a bargain was made between plaintiff as executor and the defendant for the sale and conveyance of a farm or tract of land within certain lines and corners which the plaintiff pointed out to the defendant, and a price not less than \$6,000, which was the sum for which the mortgage was given, was agreed on for the whole tract; that three parcels of the land, which were of greater value than the balance due on the mortgage, were not conveyed or possession thereof given to the defendant under the deeds; that two of the parcels were at the time and continued to be held adversely by paramount title, the plaintiff's testator having had no title thereto and that the third parcel was omitted from the deeds by plaintiff with intent to cheat the defendant and that the defendant did not get and never had possession thereof. It was also averred that plaintiff made certain false representations to the defendant to induce him to purchase the land. *Held*, that it was not error to refuse to order the answer separated into two paragraphs.—*Jones v. Noe*, 71 Ind. 368.

[h] (Sup. 1883)

In an action against a railroad company, the complaint alleged that on a certain day eight sheep of plaintiffs' were killed on defendant's road by its locomotive and cars, at a point where the road was not securely fenced, etc.; that on another day two horses belonging to plaintiffs were wounded and injured on defendant's road, etc.; and that the animals so killed and injured were of the value of \$300. A bill of particulars was filed, in which the value of the sheep was stated to be \$25, and the damage for injury to the horses was stated to be \$275. *Held*, that the complaint stated two causes of action, and a motion to require plaintiffs to state separately such causes should have been sustained.—*Wabash, St. L. & P. Ry. Co. v. Rooker*, 90 Ind. 581.

[i] (Sup. 1891)

Where, in a suit to foreclose a chattel mortgage given to secure two notes, the cause of action is stated in one paragraph, it is not error to overrule a motion to require the plaintiff to separately state and number his causes of action.—*Mansfield v. Shipp*, 128 Ind. 55, 27 N. E. 427.

[j] (App. 1897)

A motion to compel plaintiff to separate his complaint into paragraphs is properly denied where it states a cause of action for damages on account of fraudulent representations, and also charges the defendants with conversion, but does not state facts sufficient to sustain a cause of action for conversion.—*Shaw v. Ayres*, 47 N. E. 235, 17 Ind. App. 614.

[k] (Sup. 1899)

A motion to separate a complaint into paragraphs may be overruled, where a single cause of action is stated.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Beck*, 53 N. E. 439, 152 Ind. 421.

[l] (Sup. 1899)

Where a complaint alleged that plaintiff had been seduced by defendant's artifices, had become pregnant on two occasions, and that her seducer and a codefendant, in order to prevent publicity, conspired to persuade plaintiff to submit to an abortion on each occasion, and that by reason of their representations plaintiff allowed defendants to produce the abortions, such allegations showed a continuous wrong, constituting a single cause of action, for which defendants were jointly liable; and hence a motion to separate the complaint into paragraphs and a demurrer for misjoinder of causes of action were properly denied.—*Gunder v. Tibbitts*, 55 N. E. 762, 153 Ind. 591.

[m] (App. 1904)

Where more than one cause of action is stated in a single paragraph of complaint, the remedy is by motion to separate or by demurrer for misjoinder.—*Blanchard-Hamilton Furniture Co. v. Colvin*, 69 N. E. 1032, 32 Ind. App. 398.

[n] (App. 1906)

Where a complaint is bad for duplicity, the remedy is by motion to separate the causes of

action into paragraphs.—*Western Union Telegraph Co. v. McClelland*, 38 Ind. App. 578, 78 N. E. 672.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1194–1198.

See, also, 31 Cyc. pp. 661, 662.

§ 369. Election between causes of action, counts, or defenses.

[a] (Sup. 1844)

In a suit to recover back usurious interest paid, the pleas were the general issue and the statute of limitations. After the trial was commenced, the cause, by consent, was withdrawn from the jury, and submitted to the court, the parties agreeing that the only issue should be whether the defendant had received usurious interest from the plaintiff, and how much. *Held*, that by the agreement the defendant had waived the plea of the statute of limitations.—*State Bank v. Enslinger*, 7 Blackf. 105.

[b] (Sup. 1854)

The court cannot compel a defendant to elect to which count he will apply the evidence, where there are several counts in the declaration.—*McMasters v. Cohen*, 5 Ind. 174.

[c] (Sup. 1860)

A complaint set up a written agreement to pay for certain work partly in cash and partly in goods, and admitted the cash payment. A second paragraph was assumpsit for doing the above work at the price agreed on, giving credit for the cash payment, and claiming the balance in cash. *Held*, that the plaintiff could not be compelled to elect which paragraph he would rely upon, though both concerned the same subject-matter.—*Wilstach v. Hawkins*, 14 Ind. 541.

[d] (Sup. 1865)

A party may, under the Code, state his cause of action in different forms in the several paragraphs of his complaint, and cannot be required to elect between them on affidavit of their identity.—*Snyder v. Snyder*, 25 Ind. 390.

[e] (Sup. 1878)

Plaintiff in a civil case cannot be compelled to elect on which of several paragraphs of the complaint he will proceed to trial.—*Vandever v. Garshwiler*, 63 Ind. 185.

[f] (Sup. 1881)

There is no available error in the action of the court in refusing to require plaintiff to elect upon which of substantially similar paragraphs of his complaint he would rely.—*Trammel v. Chipman*, 74 Ind. 474.

[g] (App. 1894)

In an action on an account containing debits and credits, plaintiff cannot be required to elect on which particular items of his bill of particulars he relies for recovery.—*Elgin v. Mathis*, 9 Ind. App. 277, 36 N. E. 650.

[h] (Sup. 1895)

Rev. St. 1894, § 2766 (Rev. St. 1881, § 2596), providing that, in contesting a will, con-

testant must set forth undue influence, fraud, "or any other valid objection to its validity," does not require a contestant to elect between his allegations that the will is a forgery, and that it was obtained by undue influence, though these allegations are contained in the same paragraph.—*McDonald v. McDonald*, 41 N. E. 336, 142 Ind. 55.

[i] (App. 1908)

One seeking recovery on a contract of employment and on a quantum meruit need not elect at the close of evidence on which cause of action he will rely, though he testifies that there was a definite contract, since he is entitled to have all the evidence submitted to the jury.—*Model Clothing House v. Hirsch*, 42 Ind. App. 270, 85 N. E. 719.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1190–1209;

7 CENT. DIG. Bills & N. § 1471; 42 CENT. DIG. Replev. § 206.

See, also, 31 Cyc. pp. 651–657.

XII. ISSUES, PROOF, AND VARIANCE.

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§ 370. Nature and requisites of issue.

Waiver of objection of want of issue, see post, § 404.

[a] (Sup. 1850)

A trial without an issue is erroneous, whether the judgment be for the plaintiff or the defendant.—*Wilbridge v. Case*, 2 Ind. 36.

[b] (Sup. 1850)

An issue of fact arises only where the same fact is affirmed on one side and denied on the other.—*Burton v. Johnson*, 2 Ind. 339.

[c] (Sup. 1853)

Where a case is submitted by a written agreement of parties containing the precise point the court is to determine, an issue is substantially formed for trial.—*Swift v. Hetfield*, 4 Ind. 623.

[d] (Sup. 1859)

Demurrers were sustained as to certain parts of an answer, and other parts were withdrawn. The cause, by agreement of parties, was then submitted to the court without jury, and damages were assessed by the court, who found for the plaintiff. *Held*, that this was not a trial without an issue.—*Smith v. Baxter*, 13 Ind. 151.

[e] (Sup. 1881)

A pleading alleging a fact which is admitted by the other party presents no issue.—*State v. Davis*, 73 Ind. 359.

[f] (App. 1909)

The issues in a cause are the points in dispute between the parties on which they put their cause to trial, and the matter in issue is that matter on which plaintiff proceeds by his action, and which defendant controverts by his pleading.—*Abner T. Bowen v. W. O. Eaton & Co.*, 89 N. E. 961.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 1210.

See, also, 31 Cyc. pp. 670-674.

§ 371. Materiality of issues.

Affecting questions of variance, see post, § 388.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

[a] (Sup. 1847)

In debt for goods sold, the plea was that that goods had not been delivered; and the replication was that the goods had been delivered, etc. *Held*, that the plea was bad, and the issue immaterial.—*Ramsey v. Kochenour*, 8 Blackf. 325.

[b] (Sup. 1864)

When the answer in a suit on a bill of exchange sets up payment, part in money and the residue in bills of exchange which, it is averred, were received by the plaintiff in payment, a replication which simply avers the non-payment of the bills and the insolvency of the drawers and drawees at their maturity tenders an immaterial issue, and the finding should be for the defendant upon the pleading.—*Frisbee v. Lindley*, 23 Ind. 511.

[c] (Sup. 1875)

Where a paragraph of answer in confession and avoidance is bad, and no demurrer thereto is filed, but issue is taken thereon, and, upon the trial, its allegations are proved to be true, it does not follow that the finding should be for the defendant, but such immaterial issue should be disregarded.—*Western Union Tel. Co. v. Fenton*, 52 Ind. 1.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. § 1211.

See, also, 31 Cyc. pp. 672, 673.

§ 372. Scope of issues of fact.

[a] (Sup. 1860)

Where the complaint specially sets out the consideration of the agreement sued on, a general answer of want of consideration is included in the general denial.—*Butler v. Edgerton*, 15 Ind. 15.

[b] (Sup. 1878)

In an action by the trustees of a church, a general denial, or a paragraph of the answer, alleging that such persons are not trustees of the church, does not put in issue the corporate existence of the church itself.—*Wiles v. Trustees of Philippi Church*, 63 Ind. 206.

[c] (Sup. 1898)

Where defendant claimed that he received less than he bargained for and paid more than he contracted to pay, either element of such defense sounded in contract, and the contract, having been in writing and not pleaded, was not in issue.—*Durfinger v. Baker*, 49 N. E. 276, 149 Ind. 375.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1212-1216.

See, also, 31 Cyc. pp. 673, 674.

§ 373. Matters to be proved.

As dependent on verification of pleading, see ante, § 291.

In ejectment, see EJECTMENT, § 76.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1217-1236;
17 CENT. DIG. Eject. §§ 201-203.

See, also, 31 Cyc. pp. 674-680.

§ 374. — Allegations in general.

[a] (Sup. 1832)

If the performance of a condition precedent be averred by the declaration, and put in issue by the plea, the averment must be proved as laid.—*Smith v. Brown*, 3 Blackf. 22.

[b] (Sup. 1847)

Where there are several issues in fact, arising from pleas to the whole cause of action, the plaintiff cannot recover unless he succeed on all the issues.—*Way v. Simmons*, 8 Blackf. 559.

[c] (Sup. 1854)

It was agreed between the parties to a suit that defendant might offer in evidence, under the general issue, any defense which he could if the same were pleaded specially. *Held*, that the defendant was excused by the agreement from proving the execution of a written instrument set up in the defense.—*Wakeman v. Jones*, 5 Ind. 454.

[d] (Sup. 1856)

Everything that is material to be alleged in a declaration must be proved.—*Spaulding v. Harvey*, 7 Ind. 429.

[e] (Sup. 1872)

It is error for the court to charge the plaintiff is entitled to recover unless defendant has proved the allegations in two independent and sufficient paragraphs of the answer.—*Maynard v. Black*, 41 Ind. 310.

[f] (Sup. 1879)

It is not true, as a general rule, that plaintiff is bound to prove all the allegations in his complaint, but he is bound, when his complaint is denied, to prove all the averments therein which are necessary to his recovery.—*Morgan v. Wattles*, 69 Ind. 260.

[g] (Sup. 1881)

The rule that a party must recover upon the allegations of his pleadings, or not at all, does not require the party to prove every allegation of his complaint, but it is sufficient if the substance of the issue be established.—*Phoenix Mut. Life Ins. Co. v. Hinesley*, 75 Ind. 1.

[h] (App. 1894)

Where evidence introduced under all the paragraphs of a complaint was sufficient to sustain only one, a recovery under such paragraph was proper.—*Price v. Boyce*, 10 Ind. App. 145, 36 N. E. 766.

[i] (Sup. 1895)

Where suit is brought on a chose in action, or in regard to personal property of any kind, the specific title alleged must be proved as laid, as in an action for real estate.—*Indisr-*

apolis, D. & W. Ry. Co. v. Center Township, Marion County, 40 N. E. 134, 143 Ind. 63.

[l] (Sup. 1905)

The rule that the proof must conform to the allegations of the pleadings requires plaintiff to prove no more than the substance of the material facts constituting his cause of action.—Pittsburgh, C. & St. L. Ry. Co. v. Higgs, 165 Ind. 694, 76 N. E. 299, 4 L. R. A. (N. S.) 1081.

[k] (App. 1907)

In an action to recover usury, an allegation that an investment company from whom the loan had been originally procured had sold and transferred the assignment of plaintiff's wages to defendant, "who claimed to succeed to the business of the investment company," was a mere recital, and not a direct allegation that defendant succeeded to the general business of such investment company, so as to require plaintiff to prove that fact.—Brandt v. Hall, 40 Ind. App. 651, 82 N. E. 929.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1217-1223.

See, also, 31 Cyc. pp. 674, 675.

§ 375. — Surplusage and unnecessary allegations.

[a] (Sup. 1867)

Unnecessary particularity of averment in a complaint will require a corresponding exactness in proof, when the unnecessary matter cannot be stricken out without destroying the right of action, or when it identifies the contract or fact averred.—Dickensheets v. Kaufman, 28 Ind. 251.

[b] (Sup. 1895)

A plaintiff may allege more facts than are essential to constitute a cause of action, and in such case it is ordinarily held that he need only prove the substance of so many of them as constitute a cause of action, and the balance of them will be regarded as immaterial.—Terre Haute & I. R. Co. v. McCorkle, 40 N. E. 62, 140 Ind. 613.

[c] (App. 1897)

Where the complaint seeks to recover on the ground of negligence of defendants in driving diseased hogs upon plaintiff's farm, and also contains allegations of willful injury by defendants in so doing in disregard of an order not to do so, plaintiff may recover without proof of such willful injury.—Burton v. Figg, 47 N. E. 1081, 18 Ind. App. 284.

[d] (App. 1905)

It is not necessary to prove unnecessary allegations in a complaint.—Central Union Telephone Co. v. Sokola, 34 Ind. App. 429, 73 N. E. 143.

[e] (App. 1906)

Allegations in a pleading, treated as surplusage, need not be proved.—Hobbs v. Town of Eaton, 78 N. E. 333, 38 Ind. App. 628.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 1224.

See, also, 31 Cyc. pp. 675, 676.

§ 376. — Admissions in general.

[a] (Sup. 1856)

Where, in an action on a subscription to stock, the answer admits the subscription as alleged, it is not necessary to introduce the subscription book in evidence.—Fisher v. Evansville & C. R. Co., 7 Ind. 407.

[b] (Sup. 1856)

It is not error to disallow evidence to prove a fact which is admitted by the state of the pleadings.—Bird v. Lanus, 7 Ind. 615.

[c] (Sup. 1857)

Where a party pleading admits a fact, his opponent has no occasion to offer evidence of it, but all other matters in the same pleading, if put in issue, must be proved.—Johnson v. Kent, 9 Ind. 252.

[d] (App. 1909)

Admissions made in an affirmative paragraph of the answer pleaded with a general denial cannot be considered as admissions to relieve plaintiff of the burden of proof cast upon him by the general denial or as a waiver of such proof.—Graves v. Garard, 90 N. E. 22.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1225-1227;

17 CENT. DIG. Eject. §§ 201-203.

See, also, 31 Cyc. pp. 676-678.

§ 377. — Admissions by failure to deny.

Necessity for defense in general, see ante, § 78.

[a] (App. 1900)

Where a complaint alleged the appointment of a receiver, and that plaintiff obtained an order from the court making the appointment authorizing him to sue such receiver, his authority to sue not having been properly questioned in the answer, it was not necessary that it be proved, under Horner's Rev. St. 1897, § 365 (Burns' Rev. St. 1894, § 368), providing that the authority by virtue of which a person sues need not be proven, unless it be denied by a pleading under oath, or by an affidavit filed therewith.—Ayres v. Foster, 57 N. E. 725, 25 Ind. App. 99.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1228-1231;

17 CENT. DIG. Eject. §§ 201-203.

See, also, 31 Cyc. p. 678.

§ 378. — Denials.

[a] (Sup. 1856)

Under the laws, a denial in general terms of all material allegations of the declaration puts the plaintiff to the proof of each of them.—Spaulding v. Harvey, 7 Ind. 429.

[b] (Sup. 1868)

The general denial throws on the plaintiff the burden of proving every material allegation.

tion of the complaint.—*Lafayette & I. R. Co. v. Ehman*, 30 Ind. 83.

[c] (Sup. 1875)

A general denial under the Code puts the plaintiff on proof of the joint liability of all the defendants, if he seeks to obtain a joint judgment.—*Stafford v. Nutt*, 51 Ind. 535.

[d] (Sup. 1886)

An answer in general denial puts the plaintiff on proof of all the material allegations of his complaint.—*City of Lafayette v. Wortman*, 8 N. E. 277, 107 Ind. 404.

[e] (App. 1896)

A defendant who files a general denial, and also special denials denying particular facts alleged in the complaint which are necessary to the statement of a cause of action, does not thereby assume the burden of establishing the falsity of the allegations so denied; the general denial having cast such burden on plaintiff.—*Gifford v. Hess*, 15 Ind. App. 450, 43 N. E. 906.

[f] (Sup. 1902)

The general denial challenges proof of every material averment of the complaint, which means proof, by competent evidence dehors the complaint, of every step in the statutory scheme that leads up to and clothes the board of trustees with power to make a valid assessment.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Fish*, 63 N. E. 454, 158 Ind. 525.

[g] (App. 1906)

The filing of general denials to a complaint places on plaintiff the burden of proving all material allegations of his complaint by competent evidence.—*Littler v. Robinson*, 77 N. E. 1145, 38 Ind. App. 104.

[h] (App. 1907)

Where an answer consists of a general denial and a plea of confession and avoidance, plaintiff must prove the material averments of his complaint.—*Merchants' Nat. Bank v. McClellan*, 40 Ind. App. 1, 80 N. E. 854.

[i] (App. 1909)

A general denial to each paragraph of the complaint casts the burden upon plaintiff of proving every material allegation thereof.—*Graves v. Garard*, 90 N. E. 22.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1232-1236.

See, also, 31 Cyc. pp. 679, 680.

§ 379. Evidence admissible under pleadings.

Effect of sustaining demurrer to pleading, see ante, § 223.

Objections to evidence as not within issues, see post, § 427.

Objections to evidence for insufficiency of pleading, see post, § 428.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1237-1239.

See, also, 31 Cyc. pp. 680-689; note, 9 Am. Dec. 432.

§ 380. — Conformity to pleadings in general.

Evidence of pendency of other suit under plea in bar, see ante, § 108.

[a] (Sup. 1851)

In an action on common counts for money had and received, for land bargained and sold, for interest for the forbearance of moneys loaned and on an account stated, the nonpayment of a note could not properly be proved.—*Williams v. Williams*, 3 Ind. 222.

[b] (Sup. 1858)

If evidence is given in reference to allegations on a plea to which no issue was joined, such evidence is irrelevant.—*State ex rel. McClain v. O'Haver*, 8 Ind. 282.

[c] Evidence in a case cannot be considered on an issue not presented by the pleadings.—(Sup. 1857) *Marion & M. V. R. Co. v. Ward*, 9 Ind. 123; (1863) *Graydon v. Gaddis*, 20 Ind. 515.

[d] (Sup. 1878)

In the absence of an allegation of a writing, it will be presumed that a warranty alleged in an answer lay in parol, and a written warranty could not be admitted in evidence.—*Morgan v. Incorporated Co. of Gaar, Scott & Co.*, 64 Ind. 213.

[e] (Sup. 1890)

It is a rule of this court, well established, that plaintiff to an action before he can recover judgment must proceed upon some definite theory, and the evidence which he introduces must support that theory.—*Wagner v. Winter*, 23 N. E. 754, 122 Ind. 57.

[f] (App. 1906)

Plaintiff must recover upon a definite theory shown in his complaint, and cannot proceed on one theory, and recover on a different one.—*Cool v. McDill*, 38 Ind. App. 621, 78 N. E. 679.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1237, 1239-1252.

See, also, 31 Cyc. pp. 680-682.

§ 381. — Scope and sufficiency of allegations.

[a] (Sup. 1859)

Insanity of the maker of an instrument cannot be proved under a plea of nondelivery of the instrument sued on.—*Dearmond v. Dearmond*, 12 Ind. 455.

[b] (Sup. 1861)

In a suit by the assignee of a promissory note, the defendant answered that before the assignment the payee was indebted to him under

a written contract, signed by said payee as "land agent" of a railroad company, agreeing to convey to defendant certain waste lands on the line of the railroad. The reply alleged want of consideration; that this indebtedness was that of the railroad company, which was authorized to make such contracts, to whom the consideration moved, and for whom the said payee was authorized to, and habitually did, make such contracts in the form set forth; all which the defendant well knew, etc. *Held*, that testimony offered by the plaintiff to show that the consideration of the contract averred by the defendant was a conveyance by him to the company of the described premises, which he had never made, was inadmissible under the reply, which set up no facts constituting the alleged failure.—*Prather v. Ross*, 17 Ind. 495.

[c] Under an answer of total failure of consideration, a partial failure may be proved and made available as a defense to the extent of such proof.—(Sup. 1863) *Landry's Adm'r v. Durham*, 21 Ind. 232; (1866) *Sinex v. Toledo, L. & B. R. Co.*, 27 Ind. 365.

[d] (Sup. 1871)

Where evidence is offered as a whole, and a part of it is not embraced in the pleadings, and issues, it is not error to reject it.—*Summers v. Vaughan*, 35 Ind. 323, 9 Am. Rep. 741.

[e] To warrant introducing, as evidence of title to land in suit, deeds which misdescribe the land, coupled with evidence to correct the error in the description, proper ground therefor must be laid in pleading, by alleging the mistake, and praying a reformation. Without this the evidence should not be received.—(Sup. 1872) *Cain v. Hunt*, 41 Ind. 466; (1873) *Ferguson v. Ramsey*, Id. 511.

[f] (Sup. 1873)

Evidence tending to prove matters that occurred subsequent to the filing of the complaint should be excluded.—*Musselman v. Manly*, 42 Ind. 462.

[g] (Sup. 1881)

An account cannot be admitted in evidence to support an answer which contains none of the items of said account.—*Bane v. Ward*, 77 Ind. 153.

[h] A plaintiff, in his complaint, must state the facts constituting his cause of action and is not at liberty to make out his case by giving in evidence facts which he has not stated in his complaint.—(Sup. 1862) *Hackler v. State ex rel. Coleman*, 81 Ind. 430; (1885) *Sims v. Smith*, 99 Ind. 469, 50 Am. Rep. 99; (1886) *Louisville, N. A. & C. Ry. Co. v. Godman*, 104 Ind. 490, 4 N. E. 163; (1889) *Evansville & T. H. R. Co. v. Crist*, 116 Ind. 446, 19 N. E. 310, 9 Am. St. Rep. 865, 2 L. R. A. 450.

[i] (Sup. 1898)

Where a written statement claimed to be the basis of an action was not pleaded, it was

inadmissible in evidence.—*Durflinger v. Baker*, 49 N. E. 276, 149 Ind. 375.

[j] (App. 1899)

It is not error to refuse to admit evidence offered by defendant in support of a bad paragraph of his answer.—*Beckett v. Little*, 54 N. E. 1069, 23 Ind. App. 65.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1238, 1253-1279.

See, also, 31 Cyc. pp. 682, 683.

§ 382. — General issue or general denial.

In action to set aside fraudulent conveyance, see FRAUDULENT CONVEYANCES, § 269.

In suit to quiet title, see QUIETING TITLE, § 43. Showing submission to arbitration and award, see ARBITRATION AND AWARD, § 85.

[a] (Sup. 1849)

Evidence which is admissible under a plea of liberum tenementum is admissible under the general issue.—*Fairfield v. Browning*, 1 Ind. 322, *Smith*, 141.

[b] Evidence of new or special matter in satisfaction or avoidance is not admissible under a general denial.—(Sup. 1856) *Millhollin v. Jones*, 7 Ind. 715; (1860) *Norris v. Amos*, 15 Ind. 365; (1889) *Louisville, N. A. & C. Ry. Co. v. Cauley*, 119 Ind. 142, 21 N. E. 546.

[c] (Sup. 1860)

In a real action, all legal and equitable defenses are admissible under the general denial under St. 1855.—*Vail v. Halton*, 14 Ind. 344.

[d] (Sup. 1860)

Suit upon a note for the second installment of purchase money of real estate. Answer, failure of consideration. Reply: (1) A general denial of the answer. (2) An argumentative denial. (3) An estoppel by former judgment upon the same defense. Quære, whether all the matters pleaded specially might have been given in evidence upon the general denial.—*French v. Howard*, 14 Ind. 455.

[e] (Sup. 1861)

Evidence under the general denial is restricted by the Code to that which tends to negative what the opposite party in the case is bound to prove in order to succeed upon the issue on trial.—*Moorman v. Barton*, 16 Ind. 206.

[f] Under a general denial, any and all proof that will meet and overthrow what the adverse party is bound to prove in order to recover is admissible.—(Sup. 1861) *Fowler v. Burget*, 16 Ind. 341; (1877) *Coburn v. Webb*, 56 Ind. 96, 26 Am. Rep. 15; (1878) *Blizzard v. Applegate*, 61 Ind. 368; (1886) *Leary v. Moran*, 106 Ind. 560, 7 N. E. 236.

[g] (Sup. 1861)

Under a general denial, every legal and equitable defense going to the merits of the

action can be put in evidence.—*Sowle v. Hol-
dridge*, 17 Ind. 236.

[h] (*Sup.* 1861)

Under the Code, a want of consideration cannot be given in evidence under the general denial, as it formally could under the general issue.—*Bingham v. Kimball*, 17 Ind. 396.

[i] (*Sup.* 1863)

In suits to recover possession of real estate, all defenses are admissible under the general denial.—*Woodruff v. Garnor*, 20 Ind. 174.

[j] (*Sup.* 1872)

Specific matter not alleged in answer cannot be introduced as evidence under the general denial.—*Milford v. Wesley*, Wils. 119.

[k] (*Sup.* 1875)

A want of consideration for an oral promise sued upon may be proved under an answer of general denial.—*Bush v. Brown*, 49 Ind. 573, 19 Am. Rep. 606.

[l] (*Sup.* 1876)

In an action for the recovery of the possession of real estate, under an answer of general denial, all defenses and all matters of reply may be given in evidence.—*Tracy v. Kelley*, 52 Ind. 535.

[m] (*Sup.* 1877)

Evidence to establish a set-off, counterclaim, or recoupment is not admissible under the general denial or a plea in bar.—*Brown v. College Corner & R. Gravel Road Co.*, 56 Ind. 110.

[n] (*Sup.* 1878)

Where a cross-complaint sets forth a cause of action in favor of cross-complainant against her codefendants and also authorizes affirmative relief to cross-complainant against plaintiff, the facts alleged therein cannot be given in evidence under general denial.—*Harlen v. Watson*, 63 Ind. 143.

[o] (*Sup.* 1883)

All defenses both and legal and equitable may be given under a general denial.—*Barnes v. Union School Tp.*, 91 Ind. 301.

[p] (*Sup.* 1884)

In an action against a township trustee for conversion of public funds, defendant might, under the general denial, show the correct amount properly expended by him so as to refute the charge.—*Searcy v. State ex rel. Harris*, 93 Ind. 556.

[q] (*Sup.* 1884)

Want of consideration cannot be proved under a general denial.—*Smith v. Flack*, 95 Ind. 116.

[r] (*Sup.* 1884)

Under Rev. St. 1881, § 356, providing that all defenses, except a mere denial, shall be pleaded specially, evidence of special defenses is inadmissible under a general denial.—*Pfaffenberger v. Platter*, 98 Ind. 121.

[s] (*Sup.* 1887)

Proof of a cross-complaint is not admissible under an answer of general denial.—*Rush v. Thompson*, 13 N. E. 665, 112 Ind. 158.

[t] (*Sup.* 1887)

Matter arising after issue joined may be given under the general issue.—*Indiana, B. & W. Ry. Co. v. Adams*, 112 Ind. 302, 14 N. E. 80.

[u] (*Sup.* 1887)

The mistake or wrong of a notary public in placing a seal belonging to another notary upon a certificate of acknowledgment is not available under an answer of general denial, where the instrument is perfect on its face.—*Muncie Nat. Bank v. Brown*, 112 Ind. 474, 14 N. E. 358.

[v] (*App.* 1891)

Evidence of set-off cannot be given under a general denial.—*Johnson v. Tyler*, 27 N. E. 643, 1 Ind. App. 387.

[w] A defendant under a general denial is not confined to negative proof in denial of the facts alleged in the complaint, but may introduce proof of facts, independent of those alleged in the complaint, and which are inconsistent therewith, and tend to meet and break down or defeat the plaintiff's cause of action.—(*App.* 1895) *Crum v. Yundt*, 40 N. E. 79, 12 Ind. App. 308; (*Sup.* 1897) *Jeffersonville Water Supply Co. v. Ritter*, 45 N. E. 697, 146 Ind. 521; (1901) *Hess v. Union State Bank of Bremen*, 60 N. E. 305, 156 Ind. 523.

[x] (*App.* 1895)

Defenses admissible under the general denial are those which deny that there ever was a cause of action. Those which admit that it once existed, but seek to avoid it by showing subsequent or other matter, must be specially pleaded.—*Crum v. Yundt*, 40 N. E. 79, 12 Ind. App. 308.

[y] (*App.* 1907)

Where, in an action on a fidelity bond, the complaint averred that the employment of the principal was continuous, and that the second year's employment began on December 1, 1898, at the termination of the first year's employment, an allegation in the answer that the second contract of employment was not entered into until February 27, 1899, was a mere denial of the alleged fact that the employment was continuous; such fact being provable under the general denial pleaded.—*Stamets v. Plano Mfg. Co.*, 40 Ind. App. 620, 82 N. E. 122, 923.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1280-1294.
See, also, 31 Cyc. pp. 689-696.

§ 384. — Set-off or counterclaim.

Under general denial, see ante, § 382.

[a] (*Sup.* 1825)

Matters of set-off cannot be proved under the statute unless there be a plea of payment.

with a statement of the charges relied on.—*Coe v. Givan*, 1 Blackf. 367.

[b] (*Sup.* 1855)

Under the former practice, a recoupment of damages could not be made at a trial without previous plea, counterclaim, or notice. And under the new Code a counterclaim is necessary.—*Estep v. Morton*, 6 Ind. 489.

[c] (*Sup.* 1861)

Where, in a suit to recover the value of certain bonds received by defendant as an attorney, and converted to his own use, the answer admits the reception and detention of the bonds, and sets up by way of counterclaim that complainants were indebted to him in a large sum for services as attorney, such pleading develops such necessity for an accounting between the parties as requires the admission of the evidence as set up in the answer.—*Judah v. Trustees of Vincennes University*, 16 Ind. 56.

[d] (*Sup.* 1881)

Where an answer, pleading a set-off by reason of certain county orders which were alleged to have been delivered to the plaintiff, identified such orders by date, number, and amount of principal and interest, the orders were admissible in evidence in support of the set-off.—*Highfill v. Monk*, 81 Ind. 203.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. §§ 1296-1298.

See, also, 31 Cyc. pp. 697-699.

§ 385. — Bill of particulars.

[a] (*Sup.* 1845)

Under a general charge, in a bill of particulars, of cash to a certain amount, the defendant will not be permitted to prove that, in the capacity of executor, he had overpaid the plaintiff a legacy left him by the defendant's testator.—*Harding v. Griffin*, 7 Blackf. 462.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 1299.

See, also, 31 Cyc. pp. 699, 700.

§ 386. Variance between allegations and proof.

Aider by verdict or judgment, see post, §§ 432, 433.

Amendment to conform pleading to proof, see ante, § 237.

In action of ejectment, see EJECTMENT, § 85. Objections to evidence on ground of variance, see post, § 430.

Presumptions on appeal or writ of error, see APPEAL AND ERROR, § 919.

Review of decisions, see APPEAL AND ERROR, § 197.

Variance between pleading and bill of particulars, see ante, § 328.

Variance between pleading and copy of account, see ante, § 330.

Variance between pleading and exhibits, see ante, § 312.

Variance between pleading and oyer, see ante, § 306.

Variance between process and declaration or complaint, see ante, § 74.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1300-1342.

See, also, 31 Cyc. pp. 700-714.

§ 387. — Nature and effect in general.

[a] (*Sup.* 1822)

In a suit by the assignee of an obligation for the payment of money against the obligor, the defendant, under the plea of payment with a set-off, proved payments to the obligee before the assignment to an amount exceeding the obligation. *Held*, that the defendant could not have a verdict for the overplus; such payments affecting the assignee no further than to bar his recovery.—*Johnson v. Collins*, 1 Blackf. 166.

[b] (*Sup.* 1885)

The allegations and the proofs must correspond or the verdict will be set aside.—*Cleveland, C., C. & I. Ry. Co. v. Wynant*, 100 Ind. 160.

[c] (*Sup.* 1885)

Plaintiff must recover secundum allegata et probata, or not at all.—*Brown v. Will*, 103 Ind. 71, 2 N. E. 283.

[d] (*App.* 1896)

The allegations and the proof must correspond.—*Indianapolis Union Ry. Co. v. Neubacher*, 16 Ind. App. 21, 43 N. E. 576, 44 N. E. 669.

[e] (*App.* 1906)

Where the complaint proceeds on a definite theory, and the evidence shows a substantially different one to be true, no recovery is permitted.—*Cool v. McDill*, 38 Ind. App. 621, 78 N. E. 679.

[f] (*Sup.* 1910)

Under the statute requiring plaintiff to state a particular and sufficient claim in writing, before the court will call on defendant to answer, plaintiff must proceed on some definite theory, and recovery on the case made in his complaint, or not at all, and he may not sue on a verbal contract and recover on a written one, nor declare on a special contract and recover on any implied one, nor sue on a special contract and recover on quantum meruit.—*Scholz v. Schneck's Estate*, 91 N. E. 730.

[g] (*App.* 1910)

A plaintiff must recover according to the allegations of his complaint, and he cannot allege one case in his complaint and prove another.—*Vandalia Ry. Co. v. Keys*, 91 N. E. 173.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1300-1304.

See, also, 31 Cyc. pp. 700-702.

§ 388. — Materiality to issue.

[a] (Sup. 1884)

An immaterial variance between the allegations of a pleading and the evidence will not justify a reversal.—*Hedrick v. D. M. Osborne & Co.*, 99 Ind. 143.

[b] (Sup. 1887)

Under Rev. St. §§ 391–393, a verdict cannot be set aside for an immaterial variance between the pleading and proof.—*Louisville, N. A. & C. Ry. Co. v. Phillips*, 112 Ind. 59, 13 N. E. 132, 2 Am. St. Rep. 155.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1305–1308.

See, also, 31 Cyc. pp. 702, 703.

§ 389. — Extent of variance in general.

[a] (Sup. 1886)

It is only where the evidence shows a state of facts different from that averred in the complaint that a fatal variance may be claimed.—*Louisville & N. R. Co. v. Hollertach*, 5 N. E. 28, 105 Ind. 137.

[b] (Sup. 1895)

A plaintiff is not bound to prove the facts precisely as alleged, but it is sufficient if he prove the substance of the allegations.—*Terre Haute & I. R. Co. v. McCorkle*, 40 N. E. 62, 140 Ind. 613.

[c] (App. 1899)

There is no variance where the evidence fairly tends to prove the substance of the issue.—*Terre Haute Electric Ry. Co. v. Lauer*, 52 N. E. 703, 21 Ind. App. 466.

A plaintiff need prove only such facts alleged as amount to a cause of action, and is not required to prove them precisely as alleged.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 1309.

See, also, 31 Cyc. pp. 701, 702.

§ 391. — Time.

Variance as to date of written instrument, see post, § 394.

[a] (Sup. 1841)

Whenever time is material, whether in matters of contract or of tort, the plaintiff is bound strictly by the time specified in the declaration.—*Ellis v. Ford*, 5 Blackf. 554.

[b] (Sup. 1831)

Every variance in point of time between the allegations and evidence is not fatal.—*Phoenix Mut. Life Ins. Co. v. Hinesley*, 75 Ind. 1.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1306, 1311.

See, also, 31 Cyc. pp. 706, 707.

§ 392. — Parties or other persons.

[a] (Sup. 1836)

In a suit against E. H., alias E. B. H., a judgment against E. H. is not objectionable as

evidence, on the ground of variance.—*Harris v. Muskingum Mfg. Co.*, 4 Blackf. 207, 29 Am. Dec. 372.

[b] (Sup. 1841)

If a bond sued on be described in the declaration as joint and several, and the bond produced on oyer be joint only, the variance is fatal.—*Sherry v. Foresman*, 6 Blackf. 56.

[c] (Sup. 1849)

A declaration alleging the contract sued on to have been signed by A. and four other persons, naming them, is not supported by the production of a contract signed by "B., agent of A. and others," without evidence that the "others" were the remaining four declared against.—*Warden v. Dundas*, 1 Ind. 396, Smith, 209.

[d] (Sup. 1875)

Under 2 Gav. & H. St. p. 218, § 368, providing that judgment may be given for or against one or more of several defendants, the plaintiff does not necessarily wholly fail in his action by failure to prove a joint liability of the defendants.—*Stafford v. Nutt*, 51 Ind. 535.

[e] (App. 1904)

In pleading it is not necessary to aver the middle name or the initial thereof; but if either be used a mistake therein constitutes a fatal variance.—*Cleveland, C. & St. L. Ry. Co. v. Peirce*, 34 Ind. App. 188, 72 N. E. 604.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1312–1319.

See, also, 31 Cyc. pp. 707–709.

§ 393. — Property or other subject-matter.

In action to enjoin disturbance of easement, see EASEMENTS, § 61.

[a] (Sup. 1831)

An averment that possession of certain notes was obtained "by trick, connivance, and fraudulent pretenses" is not supported by proof of possession by virtue of an agreement fraudulently procured.—*Timmons v. Wiggins*, 78 Ind. 297.

[b] (App. 1895)

An averment of an absolute title is supported by evidence of an interest in personal property under a conditional sale.—*Keck v. State ex rel. National Cash Register Co.*, 39 N. E. 899, 12 Ind. App. 119.

[c] (Sup. 1905)

Where a complainant alleges that his title is an absolute legal title in fee simple, he cannot recover on proof of an equitable title.—*Ryason v. Dunten*, 164 Ind. 85, 73 N. E. 74.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1320–1324.

See, also, 31 Cyc. p. 709.

§ 394. — Written instruments.

[a] (Sup. 1837)

Where the pleader professes to give the tenor of a writing, or where oyer of a deed is given, and non est factum pleaded, or where a record is described, and nul tiel record pleaded, verbal variances, except in cases of misspelling where the idems sonans is preserved and the sense of the word not changed, are fatal.—*Lynch v. Wilson*, 4 Blackf. 288.

[b] (Sup. 1839)

There is no variance between the declaration in debt on a bond, to recover the penalty, which sets out the contract substantially according to its legal effect, without professing to set it out in *hæc verba*, and the contract put in evidence.—*Hughes v. Houlton*, 5 Blackf. 180.

[c] (Sup. 1841)

If an instrument of writing be stated in pleading to have been made on such a day, without alleging when it was dated, an instrument dated on a different day from that stated may be given in evidence.—*Remington v. Henry*, 6 Blackf. 63.

[d] (Sup. 1845)

A variance between the bond and the declaration as to the date of the instrument is fatal.—*Comparet v. State*, 7 Blackf. 553.

[e] (Sup. 1884)

Allegation of a written warranty is not supported by proof of an oral one.—*Fleetwood v. Dorsey Mach. Co.*, 95 Ind. 491.

[f] (Sup. 1885)

An immaterial variance between a record set forth in a pleading and the record as offered in evidence is not fatal.—*Overton v. Rogers*, 99 Ind. 595.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1325-1332.

See, also, 31 Cyc. pp. 710-712.

§ 395. — Elements or incidents of cause of action.

[a] (Sup. 1838)

A count on a promise to execute a promissory note is not supported by proof of a promise to pay money.—*Hatten v. Robinson*, 4 Blackf. 479.

[b] (Sup. 1883)

Where the complaint, in a suit against a common carrier, counts upon a breach of his common-law liability, and the evidence shows a special contract, the variance is fatal.—*Lake Shore & M. S. Ry. Co. v. Bennett*, 89 Ind. 457.

[c] A party cannot sue upon one cause of action and recover on another.—(Sup. 1884) *Worley v. Moore*, 97 Ind. 15; (1885) *Hasselmap v. Carroll*, 26 N. E. 202, 102 Ind. 153; (1894) *Shirk v. Mitchell*, 36 N. E. 850, 137 Ind. 185; (1897) *Cincinnati, I., St. L. & C. Ry. Co. v. McLain*, 44 N. E. 306, 148 Ind. 188.

[d] A variance between the nature and elements of plaintiff's cause of action as alleged

in his pleadings and as proved at the trial is fatal.—(Sup. 1890) *Board of Com'rs of Clinton County v. Hill*, 122 Ind. 215, 23 N. E. 779; (App. 1892) *Becker v. Baumgartner*, 5 Ind. App. 576, 32 N. E. 786.

[e] (App. 1891)

Where one waives a tort and sues *ex contractu*, if the evidence establishes a tort, it is not such a variance as to deprive plaintiff of the right to recover, but he cannot recover *ex delicto*.—*Furry v. O'Connor*, 28 N. E. 103, 1 Ind. App. 573.

[f] (App. 1894)

Under an allegation that pasturage, the value of which plaintiff seeks to recover, was furnished to defendant under a contract with him, and at his "special instance and request," recovery may be had on proof of an implied promise.—*Pence v. Beckman*, 11 Ind. App. 263, 39 N. E. 169, 54 Am. St. Rep. 505.

[g] (Sup. 1895)

While the rule that one may plead the common count and recover, notwithstanding the evidence disclosed a special contract, would seem to be at variance with the ordinary rules of pleading and practice, yet it has been repeatedly held that under the Code such recovery may be had.—*Jenney Electric Co. v. Branham*, 41 N. E. 448, 145 Ind. 314, 33 L. R. A. 395.

[h] (Sup. 1910)

In civil actions, plaintiff must recover upon the case he makes in his complaint, if at all, and cannot sue upon one state of facts and recover upon another.—*Terre Haute Electric Co. v. Roberts*, 91 N. E. 941.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1333-1335.

See, also, 31 Cyc. p. 713.

§ 396. — Matters of defense.

[a] (Sup. 1882)

A plea of want of consideration is not supported by proof of partial failure of consideration.—*Wilson v. Town of Monticello*, 85 Ind. 10.

[b] (App. 1899)

Where a defense is based upon an oral contract, and it appears upon trial that the contract made is in writing, the defense must fail.—*Perkins Windmill & Ax Co. v. Yeoman*, 55 N. E. 782, 23 Ind. App. 483.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 1336.

§ 398. — Effect of variance to mislead or surprise.

[a] (App. 1900)

A complaint, in an action for personal injuries alleged to have been caused in the operation of a derrick by a defective rope, cannot be held as not supported by the proof because of a variance as to the details of the accident, where the averments of the complaint are substantially proved, and the variance was such

as not to have misled defendant in the preparation of its defense.—*Consolidated Stone Co. v. Williams*, 57 N. E. 558, 26 Ind. App. 131, 84 Am. St. Rep. 278.

[b] (Sup. 1904)

Burns' Ann St. 1901, §§ 394, 395, provide that no variance between the allegations and proof shall be deemed material unless it misleads the adverse party to his prejudice on the merits. *Held* that, where defendant claimed that there is a failure of proof on the part of the plaintiff, it must be shown that the allegations of the complaint are unproved in their general scope and meaning and not in merely some particulars.—*Hartwell Bros. v. William E. Peck & Co.*, 163 Ind. 357, 71 N. E. 958.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 1338.

See, also, 31 Cyc. pp. 703, 704.

§ 399. — Failure of proof.

[a] (Sup. 1903)

Where there is evidence sufficient to establish substantially the issuable facts constituting the cause of action set out in the complaint, it is sufficient although some of the allegations in the complaint are not proved.—*Stanley's Estate v. Pence*, 66 N. E. 51, 67 N. E. 441, 160 Ind. 636.

[b] (Sup. 1907)

Where an answer alleges that plaintiff and two other persons entered into a contract, and a special finding is that he entered into such contract with but one of such persons, there is a variance only, and not a failure of proof.—*Mount v. Board of Com'rs of Montgomery County*, 168 Ind. 661, 80 N. E. 629, 14 L. R. A. (N. S.) 483.

[c] (Sup. 1908)

Under Civ. Code, § 132 (*Burns' Ann. St.* 1901, § 396; *Thornton's Civ. Code*, § 168), providing that, where the allegation of the claim to which proof is directed is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance, but a failure to prove, proof that the agent of a shipper had frequently accompanied shipments under a provision of bills of lading did not support an allegation of a usage permitting him to accompany shipments under bills of lading containing no such provision.—*Chicago, I. & L. Ry. Co. v. Hostetter*, 171 Ind. 465, 84 N. E. 534.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1339-1342.

See, also, 31 Cyc. p. 714.

XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AIDER BY VERDICT OR JUDGMENT.

Aider by other allegations in same pleading in action on mutual benefit certificate, see INSURANCE, § 815.

Allegations as to damages, see DAMAGES, § 162.

Complaint in supplementary proceedings, see EXECUTION, § 377.

Defects in indictment and information, see INDICTMENT AND INFORMATION, § 195.

Demurrer to evidence as waiver of objections to pleadings, see TRIAL, § 155.

Grounds for arrest of judgment, see JUDGMENT, § 263.

Grounds for collaterally attacking judgment, see JUDGMENT, § 503.

Grounds for dismissal of action or nonsuit, see DISMISSAL AND NONSUIT, § 58.

Grounds for equitable relief against judgment, see JUDGMENT, § 425.

Grounds for new trial, see NEW TRIAL, § 18.

In assumpsit, see ASSUMPSIT, ACTION OF, § 24.

In equity, see EQUITY, § 330.

Review of decisions as dependent on presentation of question in lower court, see APPEAL AND ERROR, §§ 191-197.

Review of decisions as dependent on taking of exception in lower court, see APPEAL AND ERROR, §§ 252-256.

§ 401. Cure by subsequent pleading.

Aider of defective allegations by other allegations in same pleading, see ante, §§ 16, 30.

By filing copy of account, see ante, § 330.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1343-1347;

7 CENT. DIG. Bills & N. § 1472; 22

CENT. DIG. Ex. & Ad. § 1855; 23 CENT.

DIG. Forc. E. & D. § 132; 24 CENT.

DIG. Fraud. Conv. § 762; 32 CENT. DIG.

Libel, §§ 241, 242; 33 CENT. DIG. Mal.

Pros. § 111; 35 CENT. DIG. Mtg. § 1318;

41 CENT. DIG. Quiet. T. § 77; 42 CENT.

DIG. Replev. § 208.

See, also, 31 Cyc. pp. 714-717.

§ 402. — In general.

[a] (Sup. 1884)

In a suit on a bond for breach of a contract which had been modified, *held*, that the omission to declare on the contract as modified was not cured by the allegations in the reply to the answer.—*Potts v. Hartman*, 101 Ind. 359.

[b] (App. 1894)

Where plaintiff cannot recover except upon a reformation of his contract, and does not show himself entitled by the allegations of his complaint to such relief, but does in his reply, a judgment in his favor is improper.—*Phoenix Ins. Co. of Brooklyn v. Rogers*, 11 Ind. App. 72, 38 N. E. 865.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 1343.

See, also, 31 Cyc. pp. 714-717.

§ 403. — Pleading of adverse party.

[a] (Sup. 1841)

An admission or averment in the answer of a material fact omitted from the complaint will cure the defect arising from such omission.—*Watkins v. Gregory*, 6 Blackf. 113.

[b] (Sup. 1842)

A., B., and C., commenced a suit in a justice's court, describing themselves as late traders under a certain firm, and filed a note executed by defendant to the firm as their cause of action. The plea admitted plaintiffs to be the payees of the note, but alleged that plaintiffs had no title to the property for which it was given. The cause was transferred to the circuit court. *Held*, that the objection, if any, to the note as a cause of action, was cured by the admission in the plea.—*Wilson v. Merkle*, 6 Blackf. 118.

[c] (Sup. 1865)

A complaint in an action of slander charged the defendant with uttering words implying that he had had sexual intercourse with the plaintiff many times, but did not expressly allege that the slanderous words asserted that the intercourse was unlawful. If the complaint was defective in that respect, it was cured by the answer, which admitted speaking the words and alleged that they were true.—*Linck v. Kelley*, 25 Ind. 278, 87 Am. Dec. 362.

[d] (Sup. 1879)

In an action to enjoin an execution sale of land, an insufficient description, in the complaint, of the judgment is cured by an accurate description in the answer.—*Wiles v. Lambert*, 36 Ind. 494.

[e] (Sup. 1881)

In a suit against a husband and wife, with others, for the conversion of money, the insufficiency of the wife's separate answer, merely setting up her coverture, but failing to allege that she committed the act complained of in company with, or by the order of, her husband, is not cured by a reply that the wife voluntarily, and without coercion by her husband, committed the act.—*Stockwell v. Thomas*, 76 Ind. 506.

[f] (Sup. 1903)

Where the complaint in an action to recover assessments for street improvements was demurrable for failure to allege that the ordinance for the improvement of the street was adopted by a two-thirds vote of the common council, or that any such ordinance was passed, but defendants' answer expressly admitted that the improvement of the street was ordered by the common council, such admission cured the defect in the complaint, so as to entitle the plaintiff to a reversal for errors in the overruling of demurrers to the answer, which was also insufficient.—*Lux & Talbott Stone Co. v. Donaldson*, 68 N. E. 1014, 162 Ind. 481.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1343-1347; 7 CENT. DIG. Bills & N. § 1472; 22 CENT. DIG. Ex. & Ad. § 1855; 23 CENT. DIG. Forc. E. & D. § 132; 24 CENT. DIG. Fraud. Conv. § 762; 32 CENT. DIG. Libel, §§ 241, 242; 33 CENT. DIG. Mal. Pros. § 111; 35 CENT. DIG. Mtg. § 1318; 41 CENT. DIG. Quiet. T. § 77; 42 CENT. DIG. Replev. § 208.

See, also, 31 Cyc. pp. 714-717.

§ 404. Waiver of objections to pleadings in general.

[a] (Sup. 1835)

An award in favor of plaintiff cures the same defects in the declaration which would be cured by a verdict.—*Dickerson v. Hays*, 4 Blackf. 44.

[b] (Sup. 1859)

If duplicity is not objected to at the time but the party waives it by pleading over or taking issue, he must answer or take issue on both branches of the pleading.—*Prenatt v. Runyon*, 12 Ind. 174.

[c] Where a cause has been tried on the theory that allegations in a pleading are in issue, the objection that there was no issue is waived.—(Sup. 1859) *Denny v. Moore*, 13 Ind. 418; (1861) *Knowlton v. Murdock*, 17 Ind. 487; (1873) *Stingley v. Second Nat. Bank of Lafayette*, 42 Ind. 580; (1876) *Holten v. Board of Com'rs of Lake County*, 55 Ind. 194.

[d] (Sup. 1872)

An agreement of record between plaintiff and defendant, that all evidence may be given under the general issue or general denial, is a waiver of the right to require proper pleadings in the case; and neither party can object to recovery for the want of such pleadings.—*Talcott v. Jackson*, 41 Ind. 201.

[e] (Sup. 1877)

Where a judgment is entered by agreement of the parties, defects in the pleadings are waived.—*Collins v. Rose*, 59 Ind. 33.

[ee] (Sup. 1877)

A party who has gone to trial without objecting to the condition of the issues must be held to have waived any irregularity therein.—*Kirkpatrick v. Alexander*, 60 Ind. 95.

[f] (Sup. 1878)

A trial by agreement without an issue is a waiver of an issue.—*Cogswell v. State ex rel. Albert*, 65 Ind. 1.

[ff] (Sup. 1879)

Proceeding to trial without an issue, being a joinder on a plea or answer, is a waiver of a formal issue.—*Houston v. Houston*, 67 Ind. 276; *Davis v. Pool*, Id. 425.

[g] (Sup. 1881)

Conceding that 2 Rev. St. 1876, p. 58, § 50, requiring a demurrer to distinctly specify and number the grounds of objection to the

complaint, is mandatory, the requirement is one for the benefit of the adverse party, which it is competent for him to waive.—*Stribling v. Brougher*, 79 Ind. 328.

[h] (Sup. 1883)

A party who has proceeded to trial without objection, as on a regular issue, cannot afterwards avail himself of the objection that there was no plea or issue.—*Johnson v. Briscoe*, 92 Ind. 367.

[i] (Sup. 1889)

Where the parties go to trial before the cause is actually at issue, they waive all questions which would otherwise be available to them because of the absence of the necessary pleadings.—*Citizens' Bank v. Bolen*, 121 Ind. 301, 23 N. E. 146.

[j] (Sup. 1891)

In the absence of an express agreement, the voluntary submission of a cause for trial waives the failure to file pleadings forming an issue.—*Farmers' Loan & Trust Co. v. Canada & St. L. Ry. Co.*, 26 N. E. 784, 127 Ind. 250, 11 L. R. A. 740.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. §§ 1348-1354;
17 CENT. DIG. Divorce, § 353.

See, also, 31 Cyc. p. 717.

§ 405. Waiver of objections to declaration, complaint, petition, or statement, or want thereof.

Waiver by appearance, see APPEARANCE, § 25.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1355-1374, 1386; 22 CENT. DIG. Ex. & Ad. § 1855; 23 CENT. DIG. Forc. E. & D. § 132; 24 CENT. DIG. Fraud. Conv. § 762; 27 CENT. DIG. Inj. § 271; 28 CENT. DIG. Insurance, § 1591; 32 CENT. DIG. Libel, § 242; 33 CENT. DIG. Mal. Pros. § 111; 35 CENT. DIG. Mtg. § 1318; 38 CENT. DIG. Partit. § 182; 41 CENT. DIG. Quiet. T. § 77; 42 CENT. DIG. Replev. § 208.

See, also, 31 Cyc. pp. 717-732.

§ 406. — In general.

[a] (Sup. 1841)

The seller of a legacy, having received a tract of land in part payment, filed a bill in chancery against the buyer, complaining of fraud, etc., but did not offer to reconvey the land and rescind the contract, etc. The bill was answered, and the cause submitted on the merits. *Held*, that defendant, not having objected to the bill in time, was bound to abide the issue, etc.—*McCormick v. Malin*, 5 Blackf. 509.

[b] (Sup. 1853)

Where the declaration in a suit brought by an infant did not show that the next friend named therein was admitted by the court, nor that he filed his consent to act as such, according to Rev. St. 1843, p. 679, §§ 58-60, and no objec-

tion was made to the declaration on that account, the objection must be considered as waived.—*Wortman v. Ash*, 4 Ind. 74.

[c] (Sup. 1856)

By the Revised Statutes 1852, the defendant, by answering to the merits admitted the sufficiency of the complaint.—*Riser v. Snoddy*, 7 Ind. 442, 65 Am. Dec. 740.

[d] (Sup. 1857)

In an action for divorce, an objection that there is no averment of residence of the plaintiff in the petition cannot be raised after the trial has commenced.—*Lewis v. Lewis*, 9 Ind. 105.

[e] (Sup. 1860)

A failure to allege record or notice in a foreclosure suit against the mortgagor's grantee is cured by proof thereof at the trial without objection.—*Lyon v. Perry*, 14 Ind. 515.

[f] (Sup. 1861)

The complaint against the indorser of a note averred due presentment, protest, and notice. The note was dated February 3, 1860, payable 120 days after date, and it was presented for payment and protest on June 5th, or one day too soon, February 29th having been erroneously included. Plaintiff contended that as no demurrer was put into the complaint, the question of the proper time of making demand of payment could not be raised on appeal. *Held* that, if the protest and notice were not a part of the complaint, the complaint did not show the day when demand was made, and hence a demurrer would not have raised the question; if, on the other hand, the protest and notice were made a part of the complaint, they did not cause it to show legal demand and notice of nonpayment, and this defect might be taken advantage of by the indorser, on appeal.—*Kohler v. Montgomery*, 17 Ind. 220.

[g] (Sup. 1862)

Any objection to a petition which might have been, but was not, made by motion, demurrer, or in arrest, will be deemed waived.—*McClure v. McClure*, 19 Ind. 185.

[h] (Sup. 1866)

Under the Code, no defect in a complaint, not cured by a verdict, is waived by a failure to demur.—*Tomlinson v. Hamilton*, 27 Ind. 139.

[i] (Sup. 1868)

The objection to a complaint in partition that it discloses the fact that a certain portion of the lands sought to be divided is owned by the plaintiffs and defendants in common with a person whose name is not given, nor any reason for not disclosing it, is waived, if not taken by demurrer assigning that particular cause.—*Voorhees v. Hushaw*, 30 Ind. 488.

[j] (Sup. 1871)

Where the plaintiff in an action to recover the possession of real estate fails to describe the real estate with reasonable certainty, and in particular to designate the county and state in

which the land is situated, the defect is not cured by answer.—*Leary v. Langsdale*, 35 Ind. 74.

[k] (Sup. 1871)

Where a complaint sought relief from a certain transaction on account of the unsound mind of plaintiff, and there was no averment of restoration to soundness of mind, *held*, that although the presumption was that the want of capacity continued, yet the objection to the complaint should be taken by demurrer or answer, or it would be deemed to be waived.—*Wade v. State ex rel. Nix*, 37 Ind. 180.

[l] (Sup. 1876)

In an action to recover for injuries to live stock under a statute which requires that the actions shall be brought in the county where the injury occurred, a complaint which does not aver that they were killed in the county where the action is brought is defective, and the objection that the court has not jurisdiction may be raised either by answer or demurrer; but if not so raised it is not waived.—*Toledo, W. & W. Ry. Co. v. Milligan*, 52 Ind. 505.

[m] (Sup. 1878)

Under 2 Rev. St. 1876, p. 59, § 54, in an action to contest the validity or to resist or set aside the probate of a will, objections to the want of sufficient facts in the complaint to constitute a cause of action are not waived by failure to demur to the complaint or to raise such objections by answer.—*Harris v. Harris*, 61 Ind. 117.

[n] (Sup. 1880)

Where a substituted complaint was filed, and withdrawn on a demurrer to it, and a reply then filed to the answer to the original complaint, and the case proceeded to trial, defendant waived the right to take advantage of the error caused by there being no complaint left on record.—*Andre v. Frybarger*, 70 Ind. 280.

[o] (Sup. 1881)

A mere want of certainty in a complaint is waived by the general denial.—*City of Huntington v. Mendenhall*, 73 Ind. 460.

[p] (Sup. 1884)

Where a defendant took no action to enforce the order requiring plaintiff to separate his causes of action and have them separately docketed and filed his answer to the original complaint, the right to enforce the order was waived.—*State ex rel. Dunham v. Roche*, 94 Ind. 372.

[q] (Sup. 1887)

Rev. St. 1881, § 343, provides that, when no objection is taken by answer or demurrer, defendant shall be presumed to have waived the same, except as to jurisdiction and cause of action. Defendant filed an answer to a complaint. Upon his death his administratrix filed a demurrer for insufficiency of complaint without special leave or withdrawal of the answer. *Held*, that the waiver by the original defendant was obligatory on his administratrix, and the demur-

rer was properly overruled.—*Morrison v. Ross*, 113 Ind. 186, 14 N. E. 479.

[r] (App. 1891)

In a suit for the penalty imposed by Acts 1885, p. 151, providing that telegraph companies shall transmit messages "with impartiality and in good faith, and in the order of time in which they are received, and shall in no manner discriminate," a complaint is sufficient, when first questioned on appeal, which avers that the company held a dispatch for 18 hours, and "did not transmit in the order of time in which it was received, and with impartiality and in good faith, and without delay."—*Western Union Tel. Co. v. Trumbull*, 1 Ind. App. 121, 27 N. E. 313.

[s] (App. 1893)

In an action by an employé against a coal company, a complaint alleging that defendant negligently permitted the roofing in the mine in which plaintiff was working to become unsafe, and negligently failed to secure said roof, by reason whereof a large quantity of rock fell on plaintiff, is, in the absence of a motion to make the allegations more specific, sufficient to apprise defendant of the act of negligence relied on.—*Coal Bluff Min. Co. v. Watts*, 6 Ind. App. 347, 33 N. E. 662.

[t] (Sup. 1896)

In personal injury cases, defendant's right to have the complaint state the specific acts or omissions of defendant which constitute the negligence relied on, and all the surroundings and existing conditions, and what occurred at the time of the injury, is waived by its failure to require, by motion, that the complaint be made more specific.—*Louisville, N. A. & C. Ry. Co. v. Bates*, 45 N. E. 108, 146 Ind. 504.

[u] (Sup. 1902)

The complaint, even if defective in showing that plaintiff suing as administrator was appointed as such, was cured by the admission of the record by defendants that B. died intestate, and that plaintiff had been appointed as her administrator.—*Toner v. Wagner*, 63 N. E. 859, 158 Ind. 447.

[v] (App. 1903)

Where, in an action against executors to compel payment of a general legacy, the will is not made a part of the complaint by exhibit or otherwise, error cannot be predicated thereon in the absence of a demurrer.—*Coulter v. Bradley*, 66 N. E. 184, 30 Ind. App. 421.

[w] (Sup. 1906)

Defects in allegations in a complaint are waived by defendant's failure to move to make the complaint more specific.—*Indianapolis St. R. Co. v. Ray*, 167 Ind. 236, 78 N. E. 978.

[x] (Sup. 1907)

Objections to a complaint not urged on demurrer are regarded as waived.—*Indianapolis*

St. Ry. Co. v. Kane, 169 Ind. 25, 80 N. E. 841, 81 N. E. 721.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1355-1359, 1361-1365, 1367-1374, 1386; 22 CENT. DIG. EX. & AD. § 1855; 23 CENT. DIG. FORC. E. & D. § 132; 24 CENT. DIG. FRAUD. CONV. § 762; 27 CENT. DIG. INJ. § 271; 28 CENT. DIG. INSURANCE, § 1501; 32 CENT. DIG. LIBEL, § 242; 33 CENT. DIG. MAL. PROS. § 111; 35 CENT. DIG. MTG. §§ 1296, 1318; 38 CENT. DIG. PARTIT. § 182; 41 CENT. DIG. QUIET. T. § 77; 42 CENT. DIG. REPLEV. § 208; 46 CENT. DIG. TRESP. § 78.

See, also, 31 Cyc. p. 717.

§ 407. — Technical or formal defects and objections.

[a] (Sup. 1894)

A formal defect in a complaint which was not attacked by a demurrer is no ground for reversing a judgment for plaintiff.—Ades v. Levi, 137 Ind. 506, 37 N. E. 388.

[b] (App. 1901)

Hoerner's Rev. St. 1897, § 338, provides that a complaint shall specify the name of the court and county in which the action is brought, and the names of parties plaintiff and defendant, in its title. *Held*, that where the defendant answered, without demurring to the complaint, the objection that the complaint did not give the name of the court or county in its title and did not specify who was plaintiff or defendant cannot be raised on appeal.—Brandis v. Grissom, 60 N. E. 455, 26 Ind. App. 661.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 1360; 22 CENT. DIG. EX. & AD. § 1855.

See, also, 31 Cyc. pp. 726-731.

§ 408. — Failure to state cause of action.

[a] An objection to a complaint that it does not state a cause of action is not waived by failure to demur.—(Sup. 1866) Board of Com'rs of Miami County v. Hochstetter, 26 Ind. 48; (1868) Livesey v. Livesey, 30 Ind. 398.

[b] (App. 1894)

Where there is an entire absence of the averment of a substantial cause of action or there is wanting some fact or facts essential to the cause of action, and which may not be supplied by applying to the pleading the rules of intentment, then the judgment cannot be upheld, even though the complaint was assailed for the first time in this court, for there can be no valid judgment on a complaint which states no cause of action.—South Bend Iron Works v. Larger, 39 N. E. 209, 11 Ind. App. 367.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1362, 1366; 33 CENT. DIG. MAL. PROS. § 111.

See, also, 31 Cyc. p. 728.

§ 409. Waiver of objections to plea or answer or want thereof.

[a] Where both parties went to trial without an answer to the complaint and without objection the complaint will be regarded as controverted without answer.—(Sup. 1872) Taylor v. Short, 40 Ind. 506; (1882) Chambers v. Butcher, 82 Ind. 508.

[b, c] (Sup. 1876)

Where no issue, either in law or in fact, has been formed on a counterclaim, after trial, it will be held as if an answer in denial thereof had been filed.—Purdue v. Stevenson, 54 Ind. 161.

[d, e] (Sup. 1881)

Where defendants filed an answer containing a blank where the name of a person should have been inserted as plaintiffs' agent if plaintiffs deemed it important that the blank should have been filled, it was their duty to have made a proper motion therefor before demurring to the answer, and, in the absence of such a motion, the defect was waived.—Crowder v. Reed, 80 Ind. 1.

[f] (Sup. 1883)

Where the surety on a note sued to enjoin collection of a judgment thereon on the ground that the note had been satisfied and he went to trial without objection and without requiring the maker to answer, such answer was waived, and an objection after trial that the case was tried without any issue as to the maker was too late.—Helm v. First Nat. Bank of Huntington, 91 Ind. 44.

[g, h] (Sup. 1885)

Where a reply is filed to an insufficient answer without first demurring, and a demurrer to the reply is overruled, and there is no other motion or ruling calling in question the sufficiency of the answer, the party so replying cannot question the sufficiency of the answer on the appeal.—Cupp v. Campbell, 103 Ind. 213, 2 N. E. 565.

[i] (Sup. 1886)

Where an answer is clearly bad as presenting an immaterial issue, and would have been so held on demurrer, although no demurrer is filed, but a trial is had on reply in general denial, and evidence given supporting such issue, it is the duty of the court to disregard such issue, and render judgment without reference thereto.—Allyn v. Allyn, 108 Ind. 327, 9 N. E. 279.

[j] (Sup. 1889)

Though the parties to attachment proceedings filed no answer to the complaint or affidavit in attachment, neither was to be taken against them as confessed, for as they appeared to the action and were ruled to answer they were not subject to a default until this rule was withdrawn; and this not having been done, and the parties having gone to trial without answer, the plaintiffs should be deemed as hav-

ing waived the answer.—*Purple v. Farrington*, 21 N. E. 543, 119 Ind. 164, 4 L. R. A. 535.

[k] (Sup. 1892)

Where an answer fails to state any valid defense, the fact that a defense was pleaded, and that no demurrer was filed to the answer, and that the facts alleged therein were proven, does not entitle defendant to judgment.—*Indiana, I. & I. R. Co. v. Larrew*, 130 Ind. 368, 30 N. E. 517.

[l] (App. 1895)

In attachment, no answer was filed to the affidavit, and plaintiffs tried the case on the theory that it was necessary to prove the allegations therein. *Held* a waiver, and the issue must be determined as though such answer had been made.—*Schnull v. McPheeters*, 12 Ind. App. 509, 40 N. E. 758.

[m] (App. 1909)

The sufficiency of an answer for want of facts must be tested by a demurrer, or such objection will be considered waived.—*Purcell v. Ilsey*, 89 N. E. 520.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1375–1383, 1386; 24 CENT. DIG. Fraud. Conv. § 993; 32 CENT. DIG. Libel, § 242; 33 CENT. DIG. Mal. Pros. § 111.
See, also, 31 Cyc. p. 729.

§ 411. Waiver of objections to set-off or counterclaim or cross-complaint.

[a] (Sup. 1846)

In debt against A. and B., joint debtors, the process was returned served on A. only. A. pleaded a debt due to B. alone as a set-off. *Held* that, though the plea would have been bad on demurrer, it was not a nullity or so objectionable that it should be set aside on motion.—*Carter v. Berkshire*, 8 Blackf. 193.

[b] (Sup. 1863)

In a suit on an award, the answer set up a judgment by way of set-off, and purported to set forth a copy of the judgment, in which, however, neither pleadings nor issue were set forth. There was no demurrer to the answer, nor any motion that it should be made fuller, nor for a fuller transcript of the judgment, which, in fact, was in the custody of the clerk of the court in which this suit was pending. The parties appeared and submitted the cause by consent. *Held*, that the answer was not so defective as to be a nullity, and that a complete record might have been given in evidence under it.—*Douglass v. Reed*, 20 Ind. 203.

[c] (Sup. 1873)

A counterclaim is a complaint within the spirit and intent of the statute providing that the objection that a complaint does not state facts sufficient to constitute a cause of action is not waived by a failure to demur thereto.—*Campbell v. Routt*, 42 Ind. 410.

[d] (Sup. 1851)

The objection that a counterclaim does not state facts sufficient to constitute a cause of action is not waived by failure to demur thereto.—*Jones v. Hathaway*, 77 Ind. 14.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. §§ 1384, 1385.
See, also, 31 Cyc. pp. 728, 729.

§ 412. Waiver of objections to replication or reply or want thereof.

[a] (Sup. 1828)

If two replications be filed to one plea, defendant may demur specially for the duplicity; but a rejoinder to the replications cures the objection.—*King v. Anthony*, 2 Blackf. 131.

[b] (Sup. 1857)

Where, after bill and answer, the parties agree to submit the case as it stands, waiver of a general replication will be presumed.—*Earnhart v. Robertson*, 10 Ind. 8.

[c] (Sup. 1859)

Assumpsit on a verbal contract for goods sold and delivered. Plea of the statute of limitations. Replication that the goods were sold on a written contract and so not within the statute pleaded. A trial was had without objection to the replication. *Held*, on appeal, that, though there was probably a departure, the defect was waived.—*Prenatt v. Runyon*, 12 Ind. 174.

[d] (Sup. 1862)

The objection that there was no replication to the answer cannot be raised for the first time in supreme court.—*Evey v. Smith*, 18 Ind. 461.

[e] (Sup. 1863)

A judgment will not be reversed on the ground that no issue was joined, where defendant voluntarily went to trial after putting in answers containing matter of avoidance without insisting on his right to a rule for a reply.—*Preston v. Sandford's Adm'r*, 21 Ind. 156.

[f] Where the reply does not support the complaint by reason of a departure, it is too late to make the objection after verdict.—(Sup. 1865) *McAroy v. Wright*, 25 Ind. 22; (App. 1892) *Briggs v. Klosse*, 31 N. E. 208, 5 Ind. App. 129, 51 Am. St. Rep. 238.

[g] A defendant, by going to trial without objecting that no reply has been filed, waives the objection.—(Sup. 1867) *Shirts v. Irons*, 28 Ind. 458; (1870) *Harrison, N. T., R. & B. Turnpike Co. v. Roberts*, 33 Ind. 246; (1872) *Fetrow v. Wiseman*, 40 Ind. 148; (1874) *Benoit v. Schneider*, 47 Ind. 13; (1874) *Moffit v. Medsker Draining Ass'n*, 48 Ind. 107; (1876) *Walker v. Woollen*, 54 Ind. 164, 23 Am. Rep. 639; (1878) *Inglis v. State ex rel. Hughes*, 61 Ind. 212; (1880) *Carriger v. Sicks*, 73 Ind. 76; (1883) *Emerick v. Chesrown*, 90 Ind. 47; (1884) *Buchanan v. Berkshire Life Ins. Co.*, 96 Ind. 510; (App. 1895) *Crum v. Yundt*, 40 N. E. 79, 12 Ind. App. 308.

[h] The objection to the want of a replication or reply is waived by going to trial.—(Sup. 1869) *Ringle v. Bicknell*, 32 Ind. 369; (1870) *Sutherland v. Venard*, 32 Ind. 483; (1870) *Irvinson v. Van Riper*, 34 Ind. 148.

[i] (Sup. 1871)

An answer alleged payment and a set-off, and a reply was filed in these words: "The plaintiff denies each and every allegation therein contained." *Held*, that the paper filed did not amount to a reply, but that defendant waived the objection by going to trial without objection.—*Train v. Gridley*, 36 Ind. 241.

[j] (Sup. 1872)

Where no objection is made to the absence of a reply, the parties may proceed to trial without one.—*Pattison v. Vaughan*, 40 Ind. 253.

[k] Where a party goes to trial without a reply to new matter set up in the answer, the reply is thereby waived, and the answer is taken as denied.—(Sup. 1873) *McAlister v. Howell*, 42 Ind. 15; (1882) *Wilcox v. Majors*, 88 Ind. 203; (1883) *Hose v. Allwein*, 91 Ind. 497; (1892) *Young v. Gentis*, 7 Ind. App. 199, 32 N. E. 796; (1895) *Helton v. Wells*, 12 Ind. App. 605, 40 N. E. 930.

[l] (Sup. 1873)

In a suit on a joint contract, the answer showed that plaintiff had discharged one of the joint contractors, but, by plaintiff's reply, it was alleged that, at the time of the discharge, it was agreed by defendants that such discharge should not operate as a release of the other defendant. The parties proceeded to trial on the issues so joined; no objection being taken to the reply. *Held* that, although such reply may have been a departure, it was waived by failure to object.—*New v. Wambach*, 42 Ind. 456.

[m] (Sup. 1874)

If, in an action for slander, an answer in mitigation of damages needs a reply, defendant going to trial without a reply will be deemed to have waived it; and the answer will be deemed to have been controverted as if a reply had been filed.—*Waugh v. Waugh*, 47 Ind. 580.

[n] (Sup. 1875)

Where a cross-complaint or counterclaim is not answered, and defendant proceeds to trial as though an answer had been filed, he thereby waives an answer.—*Casad v. Holdridge*, 50 Ind. 529.

[o] (Sup. 1878)

Where the parties to an action in which there was a reply to part of the answer go to trial without objection, a replication will be deemed to have been waived, and the answer will be regarded as having been controverted in the same manner as if a denial thereto had been filed.—*Dodds v. Vannoy*, 61 Ind. 89.

[p] (Sup. 1878)

Where defendant is compelled by the court to go to trial, without requiring a reply to a special answer, such irregularity is waived by

the failure of defendant to give evidence under such answer.—*Hiatt v. Renk*, 64 Ind. 590.

[q] (Sup. 1879)

If paragraphs of an answer contain matter constituting a bar, but defendant neither denies nor avoids, the going to trial without an issue is a waiver by plaintiff.—*Locke v. Merchants' Nat. Bank*, 66 Ind. 353.

[r] (Sup. 1882)

Where matters stated in the reply were tried before the referee, it was too late after his report had been returned to object that they were not properly embraced in the issues on the ground of departure.—*Beard v. Hand*, 88 Ind. 183.

[s] (App. 1904)

Where plaintiff claimed the proceeds of a benefit certificate both as beneficiary and under an antenuptial agreement with her deceased husband, who was the insured, and defendant's demurrers to the paragraphs of the complaint setting up the antenuptial agreement were sustained, whereupon he answered, setting up the issuance of a subsequent certificate to him, he was estopped to object that plaintiff's reply, in which she relied on such antenuptial agreement, was a departure, since, if the order in which the facts were presented was erroneous, it was invited.—*Carter v. Carter*, 72 N. E. 187, 35 Ind. App. 73.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1387-1394.

See, also, 31 Cyc. pp. 729, 730.

§ 415. Objections to rulings on demurrer.

Waiver of demurrer, see ante, § 212.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1397-1406;

38 CENT. DIG. Partit. § 182.

See, also, 31 Cyc. pp. 744-750.

§ 416. — In general.

[a] (Sup. 1827)

Defendant, on a demurrer to his plea, obtained a judgment, without having joined in demurrer. *Held*, that plaintiff could not assign the want of the joinder for error.—*Harris v. McFaddin*, 2 Blackf. 71.

[b] (Sup. 1870)

Where defendant voluntarily goes to trial without having made any question as to the state of the pleadings, he thereby waives the decision of the court on a demurrer filed to a paragraph of his answer and yet undecided.—*Irvinson v. Van Riper*, 34 Ind. 148.

[c] (Sup. 1882)

Error in overruling a demurrer is waived by the party demurring withdrawing his demurrer.—*Stout v. Duncan*, 87 Ind. 383.

[d] (Sup. 1884)

Where a demurrer to a reply is overruled, and no exception taken by plaintiff, the answer

will not be held bad.—*Standley v. Northwestern Mut. Life Ins. Co.*, 95 Ind. 254.

[a] (Sup. 1837)

A demurrer, not objected to in the trial court, which assigns for cause that the answer "does not state facts sufficient to constitute a defense to plaintiff's complaint," will, on appeal, be deemed sufficient in form, although it does not follow the form prescribed by the statute.—*McFadden v. Fritz*, 110 Ind. 1, 10 N. E. 120.

Where defendant answers the complaint, and demurrers to the answers are sustained, defendant does not lose the benefit of exceptions to the rulings on the demurrers, although plaintiff subsequently amends his complaint, and the answers are not refiled.—*Id.*

[f] (App. 1899)

Where, after a demurrer to an answer has been sustained, plaintiff files additional paragraphs of complaint, materially different from the original, and defendant goes to trial on the issue made by a general denial, and special findings based on the additional paragraphs are made, defendant cannot complain of the ruling on the demurrer.—*Taggart v. Kem*, 53 N. E. 651, 22 Ind. App. 271.

[g] (Sup. 1904)

A defendant cannot assign as error the overruling of his demurrer to a paragraph of the complaint where on his motion a part of such paragraph was subsequently stricken out.—*Nurrenbern v. Daniels*, 71 N. E. 889, 163 Ind. 301.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1397-1400.
See, also, 31 Cyc. pp. 744-746.

§ 417. — Waiver by amendment.

[a] The filing of an amended pleading on the sustaining of a demurrer to the original pleading is a waiver of any error in the ruling on the demurrer.—(Sup. 1853) *Polleys v. Swope*, 4 Ind. 217; (1861) *St. John v. Hardwick*, 17 Ind. 180; (1861) *Jay v. Indianapolis, P. & C. R. Co.*, 17 Ind. 262; (1861) *Ham v. Carroll*, 17 Ind. 442; (1863) *Caldwell v. Bank of Salem*, 20 Ind. 294; (1863) *Aiken v. Bruen*, 21 Ind. 137; (1863) *Patrick v. Jones*, Id. 249; (1867) *Cross v. Truesdale*, 28 Ind. 44; (1871) *Earp v. Commissioners of Putnam County*, 36 Ind. 470; (1871) *Miles v. Buchanan*, Id. 490; (1876) *Wingate v. Wilson*, 53 Ind. 78; (1878) *De Armond v. Stoneman*, 63 Ind. 386; (1882) *Dickson v. Rose*, 87 Ind. 103; (1884) *Petty v. Church of Christ*, 95 Ind. 278; (1889) *Johnson v. Conkin*, 119 Ind. 109, 21 N. E. 462; (App. 1892) *Evans v. Queen Ins. Co.*, 5 Ind. App. 198, 31 N. E. 843; (Sup. 1894) *Wood v. Hughes*, 37 N. E. 588, 138 Ind. 179; (1895) *State ex rel. Gowen v. Jackson*, 142 Ind. 259, 41 N. E. 534; (1895) *Gowen v. Gilson*, 142 Ind. 328, 41 N. E. 504; (1896) *Davenport Mills Co. v. Chambers*, 44 N. E.

1109, 146 Ind. 156; (1899) *Zimmerman v. Gaumer*, 53 N. E. 829, 152 Ind. 552; (1899) *Scheiber v. United Tel. Co.*, 55 N. E. 742, 153 Ind. 609; (App. 1900) *City of Huntington v. Cast*, 56 N. E. 949, 24 Ind. App. 501.

[b] (Sup. 1870)

Where a demurrer to a paragraph of a reply has been sustained, and the plaintiff, by leave of the court, has amended such paragraph, and the cause has been tried with such amendment as part of the pleadings, no question can be raised on the ruling on the demurrer.—*White v. Garretson*, 34 Ind. 514.

[c] Where an amended complaint has been filed, an assignment of error based on a ruling on a demurrer to the original complaint presents no question for review.—(Sup. 1872) *Scotten v. Longfellow*, 40 Ind. 23; (1877) *Murphy v. Teter*, 56 Ind. 545; (1877) *Short v. Stotts*, 58 Ind. 29; (1895) *Dorsett v. City of Greencastle*, 141 Ind. 38, 40 N. E. 131.

[d] (Sup. 1874)

Where, in an action on an insurance policy, the copy filed as an exhibit was fatally defective in neither being signed nor countersigned, and an amendment of the exhibit according to the original policy was allowed on the trial, error in overruling a demurrer to the complaint, based on such defect, was cured.—*Mutual Ben. Life Ins. Co. v. Cannon*, 48 Ind. 264.

[e] (Sup. 1880)

Where demurrers were sustained to the answer, the defendant excepting, the filing of an amended paragraph of answer did not waive the exception to the sustaining of the demurrers.—*Washburn v. Roberts*, 72 Ind. 213.

By amending one of the paragraphs of his answer, defendant does not waive an exception reserved to the ruling on another paragraph.—*Id.*

[f] (Sup. 1884)

The mere granting of leave to amend a complaint is not a waiver by plaintiff of his exception to the sustaining of a demurrer thereto, but he may withdraw such leave and except to the ruling on the demurrer even at a subsequent term.—*West v. Wright*, 98 Ind. 335.

[g] (App. 1893)

Exception to a ruling sustaining a demurrer is not lost by leave to amend being granted, the amendment not having been made.—*O'Halloran v. Marshall*, 8 Ind. App. 304, 35 N. E. 926.

[h] (Sup. 1894)

An assignment that "the court erred in sustaining a demurrer to the 5th paragraph of defendant's answer, * * * and for sustaining demurrer to defendant W.'s cross complaint," is not available where the ruling on the fifth paragraph of answer was waived by filing an amended fifth paragraph, and there were fatal omissions in the allegations of such cross

complaint.—*Wood v. Hughes*, 138 Ind. 179, 37 N. E. 588.

[1] (App. 1900)

Where defendant failed to take an exception to the sustaining of demurrers to three paragraphs of his original answer, but filed amended paragraphs in lieu thereof, to which demurrers were also sustained, and exceptions taken, and defendant withdrew his answer to the remaining paragraphs, and judgment was rendered against him, the filing of the amended answer waived any error in the ruling on the original pleading.—*City of Huntington v. Cast*, 56 N. E. 949, 24 Ind. App. 501.

[J] (App. 1903)

Where a demurrer to a complaint consisting of a single paragraph is sustained, a pleading filed by plaintiff, purporting to be "his amended second paragraph of complaint," filed pursuant to leave to file "an amended second paragraph of complaint," will be treated as a complete amended complaint, which supersedes the original, and, under Burns' Rev. St. 1901, §§ 345, 662, authorizing pleading over, and restricting the record on appeal to amended pleadings, operates as a waiver of any error in sustaining the demurrer.—*Worl v. Republic Iron & Steel Co.*, 66 N. E. 1021, 31 Ind. App. 16.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1401, 1402.
See, also, 31 Cyc. pp. 744-750.

§ 418. — Waiver by pleading over.

[a] Error involved in the ruling on a demurrer to a plea or answer is waived by the subsequent filing of a replication or reply.—(Sup. 1837) *Early v. Patterson*, 4 Blackf. 449; (1852) *Harbert v. Dumont*, 3 Ind. 346; (1883) *Robertson v. Huffman*, 92 Ind. 247.

[b] (Sup. 1846)

The sustaining of a demurrer to a plea to the jurisdiction of the court cannot be objected to by defendant if he afterwards pleaded the general issue.—*Teagle v. Deboy*, 8 Blackf. 134.

[c] Error, if any, in sustaining a demurrer to a petition, is waived by the plaintiff pleading over.—(Sup. 1875) *Gordon v. Culbertson*, 51 Ind. 334; (1886) *Jouchert v. Johnson*, 9 N. E. 413, 108 Ind. 436.

[d] (Sup. 1886)

Where a party excepts to a ruling on demurrer which overthrows a valid pleading, he does not waive any rights by suffering the case to proceed to trial, nor is he bound to offer evidence on the subject covered by his pleading; his rights being preserved by his exception to the ruling on the demurrer.—*New v. Walker*, 108 Ind. 365, 9 N. E. 386, 58 Am. Rep. 40.

[e] (App. 1904)

Plaintiff, by replying, does not waive an exception reserved to the court's action in overruling his demurrer to a paragraph of the answer.—*Bowen v. Woodfield*, 72 N. E. 162, 33 Ind. App. 687.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1403-1406;
38 CENT. DIG. Partit. § 182.
See, also, 31 Cyc. pp. 744-747.

§ 420. Objections to amendments and rulings relating thereto.

[a] (Sup. 1819)

Where an answer is filed to an amended petition without objection, the filing of such answer amounts to a waiver of the objection that the amended petition was filed without leave or was not refiled after leave had been given.—*Ludlow v. Kincaid*, 1 Blackf. 488.

[b] (Sup. 1821)

Where, after issue joined and submission to a jury, and their discharge for nonagreement, plaintiff, without leave of court, amended his declaration by filing a new count, and the case afterwards proceeded through two juries to final judgment without any notice being taken of the amendment either by court or parties, an objection to the amendment comes too late.—*Vawter v. Smith*, 1 Blackf. 514.

[c] (Sup. 1865)

The objection to an amended complaint that it contains a new cause of action arising after the institution of the suit is waived by an answer or demurrer thereto.—*Farrington v. Hawkins*, 24 Ind. 253.

[d] (Sup. 1877)

Where an amendment to the complaint in an action is permitted by the court after it has announced its finding, defendant, to make available an objection by him to such action of the court, must, at the time, make a showing that he has been prejudiced thereby.—*Hay v. State ex rel. McClanrahan*, 58 Ind. 337.

[e] (Sup. 1902)

In an action on a lease for rent payable in installments, plaintiff, without objection, filed an amended complaint during trial, seeking recovery for installments not due when the action was commenced, but due when the amended complaint was filed. Defendant first demurred to, and then answered, the amended complaint. *Held* a waiver of an objection that the matter should have been set up in a supplemental bill. Judgment (App. 1901) 61 N. E. 12, reversed.—*Jordan v. Indianapolis Water Co.*, 64 N. E. 680, 159 Ind. 337.

[f] (App. 1902)

The filing of an amended complaint after the submission of the case to the court, so as to conform to evidence admissible under the original complaint, without changing the cause of action, though enlarging the amount of recovery, is not ground for a reversal, where the opposite party made no objection, nor showed he was misled or prejudiced.—*Pape v. Ferguson*, 62 N. E. 712, 28 Ind. App. 298.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1408-1412.
See, also, 31 Cyc. pp. 750-752.

§ 422. Want or insufficiency of signature, certificate of counsel, or verification.

[a] (Sup. 1863)

Where a party goes to trial without objecting that a pleading was not signed as required by statute, the defect is waived.—Fankboner v. Fankboner, 20 Ind. 62.

[b] (Sup. 1870)

Where an answer in abatement is not verified by affidavit, it seems that it would be proper to refuse to hear an objection to it on that ground after the jury has been sworn to try the cause.—Wilson v. Poole, 33 Ind. 443.

[c] (Sup. 1878)

Defendant demurring to a complaint for insufficiency, without having moved to reject it for want of a proper verification, will be deemed to have waived the objection.—Pudney v. Burkhardt, 62 Ind. 179.

[d] (Sup. 1880)

Where an issue was formed on an unverified answer in abatement, the objection for want of verification was waived.—Toledo Agricultural Works v. Work, 70 Ind. 253.

[e] (Sup. 1889)

The lack of verification of a pleading is waived by pleading over and going to trial on the merits without objection.—Lange v. Dammer, 119 Ind. 567, 21 N. E. 749.

[f] (App. 1899)

A plaintiff who, without objection, goes to trial on a joint answer denying execution of the note in suit, which is verified by only one of the defendants, waives any defect in the verification.—Wickhizer v. Bolin, 53 N. E. 238, 22 Ind. App. 1.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1414-1417;
38 CENT. DIG. Partit. § 182.

See, also, 31 Cyc. pp. 732, 733.

§ 423. Objections to exhibits or other instruments annexed to or filed with pleadings or want thereof.

[a] (Sup. 1855)

If oyer of an unsealed instrument, and of indorsements thereon, be given without objection when demanded, they become a part of the record, so as to entitle defendant to make the indorsements a part of his plea of payment.—Russell v. Drummond, 6 Ind. 216.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1418-1420.

See, also, 31 Cyc. pp. 725, 726.

§ 424. Objections to bill of particulars or copy of account.

[a] (Sup. 1876)

The objection that an answer is not accompanied by a bill of particulars is waived by plaintiff's failure to demur or move for a bill.—Chamness v. Chamness, 53 Ind. 301.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1421-1422.

See, also, 31 Cyc. p. 735.

§ 426. Objections to rulings on motions.

[a] (Sup. 1845)

If, after the refusal of the court to reject a plea, plaintiff reply to or join issue on the plea, the refusal to reject the plea cannot be assigned as error.—State v. Bodly, 7 Blackf. 355.

[b] (Sup. 1856)

After replication, and demurrer thereto, which last being overruled, defendant obtained leave to withdraw it, plaintiff, by leave, withdrew the replication. *Held* that, by so doing, plaintiff waived any objection to the ruling of the court allowing the demurrer to be withdrawn.—Dunn v. Sparks, 7 Ind. 490.

[c] (Sup. 1865)

Where, after the court has stricken out a paragraph of a pleading, the party amends and refiles the paragraph, he cannot afterward assign as error the order to strike out.—Neal v. Scott, 25 Ind. 440.

[d] (Sup. 1831)

Error in sustaining a motion to strike out part of an answer cannot be cured by the introduction of testimony.—Stanton v. State ex rel. Rich, 74 Ind. 503.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1425-1427.

See, also, 31 Cyc. pp. 752-754.

§ 427. Objections to evidence as not within issues.

[a] (Sup. 1832)

Facts admitted or alleged in a complaint need not be proved by defendant, but plaintiff cannot object because defendant puts them in evidence.—Musselman v. Wise, 84 Ind. 248.

[b] (Sup. 1833)

Though evidence may be admitted without objection as to an issue outside of the pleadings, it cannot be considered by the court or jury, except in a case where the record shows an agreement that all matters of defense may be heard under the general denial.—Norris v. Casel, 90 Ind. 143.

[c] (Sup. 1894)

In an action by creditors to set aside a conveyance as fraudulent, and for an accounting, an objection that there was no issue under which the claims of some of the creditors were admissible will not be considered when first made on appeal.—Doherty v. Holiday, 32 N. E. 315, 36 N. E. 907, 137 Ind. 282.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1428-1432.

See, also, 31 Cyc. pp. 754-762.

§ 428. Objections to evidence on ground of insufficiency of pleading.

[a] (Sup. 1857)

Where an invalid order of commissioners opening a way is set out in defense of an alleged trespass, although suffered to pass without demurrer, and pleaded in bar, it is inadmissible in evidence.—*Barnard v. Haworth*, 9 Ind. 103.

[b] (Sup. 1866)

Where defendant is required to make his answer more specific, and he declines to do so, the answer may be stricken out on motion. An order that defendant shall not be permitted to introduce any evidence under the answer is not the correct practice.—*Wheat v. Ragsdale*, 27 Ind. 191.

[c] (Sup. 1872)

In an action on a note providing for attorney's fees where the complaint does not sufficiently state the claim for attorney's fees the proper mode of getting the objection upon the record is to object to the introduction of evidence in support of that part of the cause of action.—*Baker v. Simmons*, 40 Ind. 442.

[d] Advantage may be taken of the insufficiency of an answer by rejecting evidence offered in support of it.—(Sup. 1873) *Freitag v. Burke*, 45 Ind. 38; (App. 1891) *Postel v. Oard*, 27 N. E. 584, 1 Ind. App. 252; (1891) *Dunn v. Barton*, 28 N. E. 717, 2 Ind. App. 444.

[e] (Sup. 1881)

Defects in a pleading to which no exception was taken can be attacked through objections to evidence.—*Bane v. Ward*, 77 Ind. 153.

[f] (Sup. 1889)

Defects in a pleading to which no exception was taken cannot be attacked through objections to evidence.—*Peden v. Mail*, 118 Ind. 556, 20 N. E. 493.

[g] (Sup. 1901)

Objections to questions in reference to the extent of the husband's indebtedness at the time of the conveyance to his wife, his intent to defraud his creditors, the amount of other property he had, the wife's knowledge of her husband's fraudulent intent, and the amount of consideration paid by her, were all properly sustained, since such questions sought only to elicit testimony that might support the defective affirmative replies.—*Shaw v. Jones*, 59 N. E. 166, 156 Ind. 60.

[h] (App. 1901)

Where a pleading is not demurred to, objection to the sufficiency of the facts which might have been so raised may be made to the evidence.—*Ayres v. Blevins*, 62 N. E. 305, 28 Ind. App. 101.

[i] (App. 1906)

Plaintiffs may object to the sufficiency of the evidence introduced by defendants under their answer without having demurred to such

answer.—*Zuelly v. Casper*, 76 N. E. 646, 37 Ind. App. 186.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1433-1436; 32 CENT. DIG. Libel, § 242; 33 CENT. DIG. Mal. Pros. § 111; 35 CENT. DIG. Mon. Recd. § 69; 35 CENT. DIG. Mtg. § 1318; 46 CENT. DIG. Trial, § 219.
See, also, 31 Cyc. pp. 759-762.

§ 429. Objections to evidence on ground of insufficiency of bill of particulars or variance between bill and pleading.

[a] (App. 1893)

An objection that an item admitted in evidence was not included in the bill of particulars cannot be first raised on appeal.—*Bank of Westfield v. Inman*, 8 Ind. App. 239, 34 N. E. 21.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 1437.
See, also, 31 Cyc. p. 762.

§ 430. Objections to evidence on ground of variance.

[a] Variance between pleading and proof must be taken advantage of at the trial or it is waived.—(Sup. 1866) *Hull v. Green*, 26 Ind. 388; (1866) *Woodward v. Wilcox*, 27 Ind. 207; (1873) *Krewson v. Cloud*, 45 Ind. 273.

[b] (Sup. 1868)

In an action against a consolidated corporation, an objection that the tort sued for was not alleged to have been committed by one of the old companies, as it was proved to have been, comes too late on appeal to make the variance fatal to a recovery.—*Indianapolis, C. & L. R. Co. v. Jones*, 29 Ind. 465, 95 Am. Dec. 654.

[c] (Sup. 1881)

Where plaintiff, in support of his complaint, introduced in evidence a certificate and tax deed, an objection that the description of the land therein was so imperfect as to be void did not present any question of variance between the description stated in the complaint and that set forth in the instrument offered in evidence.—*Sloan v. Sewell*, 81 Ind. 180.

[d] (Sup. 1886)

Where an averment in a complaint is uncertain, the remedy is by motion to make it certain, and evidence which removes the uncertainty cannot be objected to on the ground of a variance.—*Louisville & N. R. Co. v. Hollerbach*, 5 N. E. 28, 105 Ind. 137.

[e] (Sup. 1893)

A party objecting to a variance between the pleadings and the proof must make his objections at the proper time during the trial; otherwise he cannot afterwards avail himself of

the objection.—*Kruger v. State*, 35 N. E. 1019, 135 Ind. 573.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1438-1441; 46 CENT. DIG. Trial, §§ 219, 236.

See, also, 31 Cyc. pp. 756-759.

§ 431. Aider by verdict or judgment.

Petition for sale of decedent's real estate, see EXECUTORS AND ADMINISTRATORS, § 336.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1442-1485; 7 CENT. DIG. Bills & N. § 1473; 12 CENT. DIG. Corp. § 2030; 22 CENT. DIG. Ex. & Ad. § 1857; 23 CENT. DIG. Forc. E. & D. § 133; 32 CENT. DIG. Libel, §§ 241-245; 33 CENT. DIG. Mal. Pros. § 111; 35 CENT. DIG. Mon. Recd. § 69; 35 CENT. DIG. Mtg. § 1318; 38 CENT. DIG. Partit. § 182; 41 CENT. DIG. Quiet. T. § 77; 41 CENT. DIG. Quo. W. § 62; 42 CENT. DIG. Replev. § 206.

See, also, 31 Cyc. pp. 763-778; note, 1 Am. Dec. 210.

§ 432. — In general.

[a, b] (Sup. 1818)

A verdict without an issue cannot cure the want of it, nor is the absence of an allegation cured by the giving of a verdict.—*Van Glaricum v. Ward*, 1 Blackf. 485.

[c] (Sup. 1860)

In a suit for labor, the complaint stated the kind of service and the time sued for. *Held*, after judgment, that the failure to file a more specific bill of particulars was not fatal.—*Davis v. Jenkins*, 14 Ind. 572.

[d] (Sup. 1869)

In a contest for the probate of a will, it did not appear by the pleadings that either party to the contest had an interest in the subject-matter, but the contestant went to trial without objection, and the evidence showed that both parties were related to the testator and were devisees under the will. *Held* that, after the verdict, the contestant could not object that the pleading failed to show that the contestee had any interest.—*McElfresh v. Guard*, 32 Ind. 408.

[e, f] The failure to file with the complaint a copy of the note in suit is cured by verdict.—(Sup. 1876) *Purdue v. Stevenson*, 54 Ind. 161; (1877) *Eigenmann v. Backof*, 56 Ind. 594; (1879) *Galvin v. Woollen*, 66 Ind. 464. *CONTRA*, see (1885) *Rairden v. Winstandley*, 99 Ind. 600.

[g] A verdict cannot aid a defective averment questioned by demurrer.—(Sup. 1880) *Johnson v. Breedlove*, 72 Ind. 368; (1881) *McFadin v. David*, 78 Ind. 445, 41 Am. Rep. 587; (1885) *Rairden v. Winstandley*, 99 Ind. 600.

[h, i] (Sup. 1882)

Code, § 78, provides that, when any pleading is founded on a written instrument, the original or a copy thereof must be filed with the pleading. *Held* that, though a pleading does not comply with the statute and there is no demurrer, the defect is not cured by the verdict.—*Johnson School Tp. v. Citizens' Bank of Greenfield*, 81 Ind. 515.

[j] (Sup. 1884)

Where there is any defect, imperfection, or omission in any pleading, whether in substance or in form, which would have been a fatal objection on demurrer, yet if the issue joined be such as necessarily required on the trial proof of the facts so imperfectly or defectively stated or omitted, and without which it is not to be presumed that the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission is cured by verdict.—*Reid v. Mitchell*, 95 Ind. 397.

[k, l] The failure to file with the complaint a written instrument which is the foundation of the action is cured by a verdict.—(Sup. 1886) *Owen School Tp. v. Hay*, 107 Ind. 351, 8 N. E. 220; (1891) *Barrett v. Johnson*, 2 Ind. App. 25, 27 N. E. 983.

[m, n] (App. 1891)

Even if the lease be regarded as the foundation of an action by the lessor for the possession of land and damages for holding over after the expiration of the term, within the meaning of Rev. St. 1881, § 362, which requires a written instrument, or a copy, to be filed with a pleading founded thereon, yet, where the objection that the instrument or a copy thereof was not filed is first made in the appellate court, if the facts alleged are sufficient to bar another suit for the same cause of action the finding of the trial court in plaintiff's favor cures the defect, if any.—*Duffy v. Carman*, 3 Ind. App. 207, 29 N. E. 454.

[o, p] (App. 1894)

Formal defects, which might have been remedied by amendment, are cured by verdict.—*Rittenhouse v. Knoop*, 9 Ind. App. 126, 36 N. E. 384.

[q] (App. 1894)

Where no demurrer is interposed for failure to file the account sued on, or a copy thereof, with the pleading, the defect is cured by verdict.—*Darnall v. Simpkins*, 10 Ind. App. 469, 38 N. E. 219.

[qq] (Sup. 1895)

Rev. St. 1894, § 399 (Rev. St. 1881, § 396), giving the trial court discretion to allow an amendment "at any time," authorizes the court to allow an amendment after verdict. *Heddens v. Younglove* (1874) 46 Ind. 212, overruled.—*Raymond v. Wathen*, 41 N. E. 815, 142 Ind. 367.

[r] (App. 1896)

Where a material fact is lacking in a pleading, it is not cured by verdict.—*Harter v. Parsons*, 42 N. E. 1025, 14 Ind. App. 331.

[rr] (*App.* 1896)

The court, in its discretion, may allow an amendment to the complaint more than 10 days before trial.—*Consumers' Gas Trust Co. v. Corbaley*, 14 Ind. App. 549, 43 N. E. 237.

[s] (*App.* 1898)

After special verdict, a defective averment becomes immaterial.—*Miller v. Fuller*, 52 N. E. 101, 21 Ind. App. 254.

[t] (*Sup.* 1899)

A verdict cannot cure insufficient allegations in a pleading to which a demurrer has been overruled.—*Pittsburg, C., C. & St. L. Ry. Co. v. Moore*, 53 N. E. 200, 152 Ind. 345, 44 L. R. A. 638.

[u] (*Sup.* 1900)

If an averment essential to the sufficiency of a pleading is omitted, error in overruling a demurrer to such pleading cannot be cured by a special finding of facts finding such omitted averment.—*Doty v. Patterson*, 56 N. E. 668, 155 Ind. 60.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. §§ 1442-1450, 1485; 7 CENT. DIG. Bills & N. § 1473; 22 CENT. DIG. Ex. & Ad. § 1857; 32 CENT. DIG. Libel, § 243.

See, also, 31 Cyc. pp. 763-765.

§ 433. — Defects in or want of declaration, complaint, petition, or statement.

In action on insurance policy, see *INSURANCE*, § 633.

§ 433 (1). *In general.*

[a] Where there are several counts, some good and others bad, the declaration cannot be objected to after a general verdict.—(*Sup.* 1818) *Findley v. Buchanan*, 1 Blackf. 12; (1866) *Tomlinson v. Hamilton*, 27 Ind. 139.

[aa] (*Sup.* 1878)

Defects in a complaint which would render it demurrable are cured by verdict, if no exception was taken to the overruling of a demurrer thereto.—*Hosetler v. State ex rel. Dean*, 62 Ind. 183.

[b] A declaration which sets out a good cause of action, although imperfectly or defectively, is good after verdict, in the absence of objection.—(*Sup.* 1878) *McMakin v. Weston*, 64 Ind. 270; (1882) *Eshelman v. Snyder*, 82 Ind. 408.

[c] (*Sup.* 1881)

The finding of the court must be given the same effect as a verdict in respect to the aider of defects in the complaint.—*Charlestown School Tp. v. Hay*, 74 Ind. 127.

[d] A defectively stated cause of action is good after verdict.—(*Sup.* 1881) *Morrison v. Collier*, 79 Ind. 417; (1882) *Koons v. Carney*, 87 Ind. 34.

[dd] (*Sup.* 1881)

That a complaint was not verified is no ground for reviewing a judgment thereon.—*Decker v. Gilbert*, 80 Ind. 107.

[ddd] (*Sup.* 1882)

If a complaint states a cause of action, it is immaterial, after verdict, that it is apparent that plaintiff attempted to declare upon a special contract and failed to do so.—*Yeoman v. Davis*, 86 Ind. 189.

[e] (*Sup.* 1886)

Where all the facts essential to a cause of action are stated in the special finding, a judgment will not be reversed because of a defect in the complaint, where that pleading is attacked for the first time by the assignment of errors in the supreme court.—*Sohn v. Cambern*, 106 Ind. 302, 6 N. E. 813.

[ee] (*Sup.* 1886)

Where a verdict is based on an entire complaint, which contains two or more paragraphs, if either paragraph is bad, the judgment will be reversed.—*Belt Railroad & Stockyard Co. v. Mann*, 107 Ind. 89, 7 N. E. 893.

[f] (*Sup.* 1890)

Where a judgment exceeds the amount claimed in the complaint it will not be reversed, when it is no greater than the sum shown to be due, as plaintiff could have amended the prayer of his complaint, and it will be regarded as having been done.—*Ke-tuc-e-mun-guah v. McClure*, 122 Ind. 541, 23 N. E. 1080, 7 L. R. A. 782.

[ff] (*App.* 1892)

In an action by a surgeon against the county for his services in performing a surgical operation on a pauper, where the complaint alleges that the physician appointed by the county board had "refused" to undertake the operation because of his inexperience, and the evidence fails to show such refusal, but establishes the physician's incompetency, there is not such a variance as to warrant the appellate court in setting aside a verdict in plaintiff's favor obtained after a trial on the merits.—*Board Com'rs Perry County v. Lomax*, 5 Ind. App. 567, 32 N. E. 800.

[fff] (*Sup.* 1893)

Where defendant does not stand on his demurrer to the complaint, but joins plaintiff in submitting the cause to the court for trial on its merits, and the court makes full and explicit findings, and renders judgment thereon, the pleading demurred to will be cured by the findings, unless there is a total failure to allege some fact essential to a cause of action, or at least a failure to allege facts from which such necessary facts may be inferred.—*Fuller v. Cox*, 135 Ind. 46, 34 N. E. 822.

[g] (*App.* 1893)

Where a judgment is by default, the complaint is not aided by the verdict, and it must stand unsupported, save as supported by its own averments.—*Cleveland, C., C. & St. L. Ry. Co. v. Tyler*, 35 N. E. 523, 9 Ind. App. 680.

[h] Where the sufficiency of the complaint is first questioned on appeal, its defects will be considered cured by the verdict, unless it omits some material fact—(App. 1895) *Dotson v. Dotson*, 13 Ind. App. 436, 41 N. E. 845; (1896) *Plano Mfg. Co. v. Kesler*, 15 Ind. App. 110, 43 N. E. 925.

[i] (App. 1898)

Defects, if any, in a complaint, are waived by the agreement by the parties for judgment, and the finding and judgment of the court thereunder.—*Board of Com'rs of Floyd County v. Scott*, 49 N. E. 395, 19 Ind. App. 227.

[j] (App. 1898)

A defective allegation in a complaint, not objected to by demurrer, is cured by verdict.—*Dickey v. Kalfsbeck*, 50 N. E. 590, 20 Ind. App. 290.

[k] (App. 1898)

Where the complaint, in an action for damages for failure of defendant to deliver certain goods, for which plaintiff had contracted, averred that plaintiff had performed all the conditions of the contract, and there was a special verdict, any insufficiency of such averment was cured by such verdict.—*Rau v. Ball Bros. Glass Mfg. Co.*, 51 N. E. 945, 21 Ind. App. 147.

[l] (App. 1899)

A defect in a complaint is not cured by verdict, where the opposite party presented the question of its sufficiency by demurrer at the earliest possible opportunity.—*Pape v. Kaough*, 55 N. E. 775, 23 Ind. App. 525.

[m] (Sup. 1902)

The error committed by a court in overruling a demurrer to defective paragraphs of a complaint is not cured by a general verdict where the jury stated that it was founded upon paragraphs both good and bad, for the party endeavoring to escape from the consequences of the error must show by the record that the verdict is based exclusively on a good paragraph.—*Baltimore & O. S. W. Ry. Co. v. Jones*, 62 N. E. 994, 158 Ind. 87.

[n] (App. 1905)

Unless a complaint does not contain facts enough to bar another action, or fails to state a material fact absolutely necessary to recovery, the defects therein are cured by verdict and judgment.—*Smith v. Smith*, 74 N. E. 1008, 35 Ind. App. 610.

[o] (App. 1905)

The objection that a party could not recover because his complaint proceeded on the theory that the parties were partners, while the proof failed to show a partnership, was eliminated by the findings showing that the matters in controversy grew out of contracts of employment set forth as the basis of a cause of action.—*Arthur Jordon Co. v. Caylor*, 76 N. E. 419, 36 Ind. App. 640.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1451-1477, 1485; 1 CENT. DIG. Action, § 37; 1 CENT. DIG. Action on the Case, § 46; 7 CENT. DIG. Bills & N. § 1473; 12 CENT. DIG. Corp. § 2030; 22 CENT. DIG. Ex. & Ad. § 1857; 23 CENT. DIG. Forc. E. & D. § 133; 32 CENT. DIG. Libel, §§ 241, 243-245; 33 CENT. DIG. Mal. Pros. § 111; 35 CENT. DIG. Mon. Recd. § 69; 38 CENT. DIG. Partit. § 182; 41 CENT. DIG. Quiet. T. § 77; 41 CENT. DIG. Quo W. § 433; 42 CENT. DIG. Replev. § 209. See, also, 31 Cyc. pp. 769-778.

§ 433 (2). *Sufficiency of pleading or allegations in general.*

[a] (Sup. 1862)

A complaint bad on demurrer may be good after verdict, for, after verdict, the court will sustain the complaint by every legal intendment, if there is nothing material on record to prevent it.—*Shimer v. Bronnenburg*, 18 Ind. 363.

[b] (Sup. 1865)

A mortgagee who had purchased the mortgaged premises at foreclosure filed a complaint against A. and B., alleging the title to be in A., who had executed a title bond to B., who had executed a title bond to the mortgagor, and alleged that plaintiff "was entitled to a conveyance in fee simple." Held, that such averment, though defective, was sufficient after verdict to support evidence from which such conclusion might be drawn.—*Westfall v. Stark*, 24 Ind. 377.

[c] Where a complaint alleges facts sufficient to bar another suit for the same cause of action, all other defects to which no objection was interposed are cured by verdict.—(Sup. 1877) *Donellan v. Hardy*, 57 Ind. 393; (1880) *Peters v. Banta*, 120 Ind. 416, 22 N. E. 95, 23 N. E. 84; (1892) *Board of Com'rs of Vermillion County v. Chipps*, 131 Ind. 56, 29 N. E. 1066, 16 L. R. A. 228; (App. 1894) *Hasselman Printing Co. v. Fry*, 9 Ind. App. 393, 35 N. E. 1045, 36 N. E. 863; (1895) *Clark v. Maxwell*, 12 Ind. App. 190, 40 N. E. 274; (1895) *Town of Markle v. Hunt*, 12 Ind. App. 353, 40 N. E. 280.

[d] (Sup. 1881)

In an action for negligence against a railroad company for setting fire to some wood piled by the track, the charge that "defendant's locomotive emitted sparks which communicated with said wood and destroyed it, * * * through the carelessness of the defendant and her agents and employes, without the fault of the plaintiff," held to be a sufficient allegation of negligence after verdict.—*Pittsburgh, C. & St. L. R. Co. v. Noel*, 77 Ind. 110.

[e] (Sup. 1882)

In replevin defendant cannot, after verdict, object to the sufficiency of the description of the property in the complaint.—*State v. Welch*, 88 Ind. 308.

[f] (Sup. 1883)

A complaint in ejectment against a railway company, which has constructed its railway along a street, without paying damages, is sufficient, at least after verdict, where it contains a specific description of the property, followed by a statement that the land sued for abuts on a designated street in a city named, and that defendant unlawfully and without right has taken possession of such street.—*Terre Haute & S. E. R. Co. v. Rodel*, 89 Ind. 128, 46 Am. Rep. 164.

[g] (Sup. 1883)

In an action against an attorney to recover damages for negligence, the complaint alleged that defendant undertook, as plaintiff's attorney, to conduct an action of replevin, and that he so negligently and unskillfully drew an appeal bond on appeal to the circuit court that the action was dismissed. *Held*, that the complaint was sufficient after verdict.—*Jones v. White*, 90 Ind. 255.

[h] (Sup. 1884)

A complaint for divorce is sufficient after decree, where it contains statements from which all facts essential to relief prayed may be reasonably inferred, though it does not use the language of the statute in setting forth the causes of divorce.—*Short v. Kerns*, 95 Ind. 431.

[i] (Sup. 1884)

A complaint from which facts essential to the relief asked may be reasonably inferred is good after verdict.—*Murphy v. Murphy*, 95 Ind. 430.

[j] (Sup. 1884)

Where the complaint in an action on an attachment bond failed to allege directly that a writ of attachment was issued, but it alleged that "in obedience to the writ of attachment issued in said cause the sheriff levied upon and attached the property of the plaintiff," and no objection was made in the court below, the defect, if any, was cured by the finding or verdict.—*Hedrick v. D. M. Osborne & Co.*, 99 Ind. 143.

[k] (Sup. 1889)

A complaint in an action begun before a justice of the peace, and appealed to the circuit court, averring that defendant "justly owes plaintiff \$63.21, and that the payment of the said sum has been unreasonably delayed," and that "there is the further sum of \$11.23 as interest on the same," is sufficient after verdict.—*Smith v. Heller*, 119 Ind. 212, 21 N. E. 657.

[l] (Sup. 1889)

When the sufficiency of a pleading is called in question after verdict, all intendments are taken in favor of the pleading, and, if facts sufficient are stated to bar another suit for the same cause of action, the verdict cures all other defects, and the complaint will be held sufficient to uphold the judgment.—*Colchen v. Ninde*, 22 N. E. 94, 120 Ind. 88.

[m] (Sup. 1889)

A complaint in partition which alleges that the plaintiff owns an undivided interest in the land to be partitioned; that he is tenant in common with the defendants, who claim some interest in the land, of the nature and extent of which the plaintiff is not advised,—is sufficient, after a finding in favor of the plaintiff.—*Bowen v. Swander*, 121 Ind. 164, 22 N. E. 725.

[n] (App. 1891)

Where the sufficiency of a complaint is first objected to on appeal, after verdict and judgment below, the latter will not be disturbed, unless the complaint wholly omits the averment of material and necessary facts.—*McAninch v. Hamilton*, 1 Ind. App. 429, 27 N. E. 719.

[o] If a complaint is sufficient to bar another action for the same cause, and if the defects are such as may be supplied by proof, it is good after verdict.—(Sup. 1891) *Robinson v. Powers*, 28 N. E. 1112, 129 Ind. 480; (App. 1894) *Citizens' St. R. Co. of Indianapolis v. Stoddard*, 37 N. E. 723, 10 Ind. App. 278; (1894) *Warden v. Nolan*, 37 N. E. 821, 10 Ind. App. 334.

[p] (Sup. 1892)

After verdict, a complaint on an insurance policy on a building and contents, alleging that plaintiff was the owner of the property at the time of its destruction by fire, sufficiently alleges ownership in fee of the real estate.—*Phenix Ins. Co. of Brooklyn v. Wilson*, 132 Ind. 449, 25 N. E. 592.

A complaint alleging that, two days after the fire, plaintiff gave notice thereof, in writing, to the company at its office, as by the policy provided, is sufficient, after verdict, to show that proper proofs of loss were given.—*Id.*

[q] (Sup. 1900)

Where the sufficiency of a complaint is challenged for the first time after judgment, it will be held sufficient if each essential element of a right of recovery is stated, though the statement is so deficient as to have made it demurrable.—*Peoria & E. Ry. Co. v. Attica, C. & S. Ry. Co.*, 56 N. E. 210, 154 Ind. 218.

[r] (App. 1905)

Under Burns' Ann St. 1901, § 6718, declaring that the trustees of each town shall constitute ex officio a board of health, and requiring them to elect a secretary, who shall be health officer of the board, and that it shall be the duty of the board to protect the public health, and to take prompt action to arrest the spread of contagious and infectious diseases, a complaint alleging that one S. was found afflicted with smallpox in the livery stable of plaintiff's husband, and, after being brought to plaintiff's house without her consent, he and a certain physician and plaintiff were quarantined therein, and plaintiff was directed by the town secretary of the board of health to care for and nurse S. and such physician, it was sufficient after verdict to entitle plaintiff to recover from the town the reasonable value of her services

performed in that behalf.—*Town of Knights-town v. Homer*, 75 N. E. 13, 36 Ind. App. 139.

[e] (App. 1906)

A complaint attacked for the first time on appeal will be held sufficient if it states facts sufficient to bar another action for the same cause.—*Over v. Dehne*, 38 Ind. App. 427, 75 N. E. 664, 76 N. E. 883.

[f] (App. 1907)

A complaint to enjoin collection of certain taxes, alleging that plaintiff prior to 1892 was and since then had been a bona fide resident of the city of V., S. county; that as a resident of V. she was assessed from 1893 to 1903, inclusive, on personal property; that defendant was treasurer of the city of P., in M. county, and was claiming that plaintiff was the owner of personal property omitted from assessment for such years and on which she was liable to be assessed in P.; that she was not during those years a resident of P., and that the threatened assessment was wrongful—was sufficient where attacked for the first time in the Appellate Court, under the rule that a complaint, after judgment, will be held sufficient if it exhibits facts enough to bar another action for the same cause.—*Schmoll v. Schenck*, 40 Ind. App. 581, 82 N. E. 803.

[g] (App. 1908)

A complaint, showing that defendant lessees assigned their lease, which contained their express covenant to pay, is sufficient after judgment, as the assignment would not release the lessees from liability on the express covenants.—*Dailey v. Heller*, 41 Ind. App. 379, 81 N. E. 219.

Where the complaint states that defendants failed to comply with the terms of their contract, and specifically states in what particular it failed, it is sufficient when attacked on appeal for the first time, especially where on prior appeals the court impliedly held the complaint sufficient in sustaining a demurrer to the answer.—*Id.*

[v] (App. 1909)

Where the sufficiency of the cause of action is called in question for the first time after verdict, and the facts stated in the complaint are sufficient to bar another suit for the same cause of action, the defects in the complaint are cured by the verdict.—*Hill v. Kerstetter*, 43 Ind. App. 431, 86 N. E. 997, 87 N. E. 605.

[w] (App. 1910)

A contention that a judgment for defendant after overruling demurrers to the complaint should be affirmed on appeal because the complaint does not state facts sufficient to constitute a cause of action should be considered as if the sufficiency of the complaint was first raised on appeal, and it will be held sufficient if the facts stated therein would bar another action for the same cause; any defects being cured by the verdict.—*Beaning v. South Bend Electric Co.*, 90 N. E. 786.

FOR CASES FROM OTHER STATES.

SEE 39 CENT. DIG. Plead. §§ 1451-1477, 1485; 1 CENT. DIG. Action, § 37; 1 CENT. DIG. Action on the Case, § 46; 7 CENT. DIG. Bills & N. § 1473; 12 CENT. DIG. Corp. § 2030; 22 CENT. DIG. Ex. & Ad. § 1857; 23 CENT. DIG. Forc. E. & D. § 133; 32 CENT. DIG. Label, §§ 241, 243-245; 33 CENT. DIG. Mal. Pros. § 111; 35 CENT. DIG. Mon. Recd. § 60; 38 CENT. DIG. Partit. § 182; 41 CENT. DIG. Quiet. T. § 77; 41 CENT. DIG. Quo W. § 433; 42 CENT. DIG. Replev. § 209. See, also, 31 Cyc. pp. 769-778.

§ 433 (3). *Nature of defects or objections in general.*

[a] (Sup. 1820)

In an action of assumpsit commenced the 22d day of December, 1818, the promise was alleged to have been made "some time about the 10th of December, 1817." *Held*, that the declaration was sufficient after verdict.—*John v. Clayton*, 1 Blackf. 54.

[b] (Sup. 1835)

A verdict will cure an ambiguity in the declaration.—*Dickerson v. Hays*, 4 Blackf. 44.

[c] (Sup. 1838)

A variance between the writ and declaration is cured by verdict.—*Peltier v. Britton*, 4 Blackf. 502.

[d] A defect in a petition which should be taken advantage of by motion or demurrer is cured by a verdict or judgment.—(Sup. 1860) *Vawter v. Ohio & M. R. Co.*, 14 Ind. 174; (1893) *Farneman v. Mt. Pleasant Cemetery Ass'n*, 135 Ind. 344, 35 N. E. 271.

[e] (Sup. 1860)

In replevin begun before a justice of the peace, the complaint stated "that such property had not been taken on any legal tax, assessment, fine, or execution, or other legal writ," etc. *Held*, that the defect, if any, was healed by the verdict.—*McPhelomy v. Solomon*, 15 Ind. 189.

[f] (Sup. 1866)

In a suit to recover the price of hay destroyed by defendant's cattle, the complaint alleged that defendant's cattle unlawfully destroyed the hay. *Held*, that after verdict the complaint must be construed to charge the destruction of the hay to the unlawful acts of defendant.—*Tomlinson v. Hamilton*, 27 Ind. 139.

[g] (Sup. 1871)

Where the complaint in an action to recover the possession of real estate describes the land as "six — of lot number five," and the finding was "six acres of lot number five," the finding did not cure the defect in the description in the complaint.—*Unversaw v. Myers*, 37 Ind. 487.

[h] (Sup. 1872)

Where the plaintiff in an action for slander had been the agent of the defendant, and as

such agent had received money, and on an attempted settlement the defendant said of the plaintiff, "You stole my money; yes, you kept my money," the word "stole" would import larceny, were it not that the other set of words and the relation existing between the parties, of which relation the conversation was had, justified the finding of the jury that the intention was to charge embezzlement; and the special finding of the jury to the effect supplied any defect in the averment that this relation was the subject of the charges.—*Taylor v. Short*, 40 Ind. 506.

[I] (Sup. 1876)

On the appeal of a cause to the Supreme Court where the assignment of error was insufficiency of the complaint, the record showed that the parties thereto, by their attorneys, appeared in the cause, and, issues of fact having been formed and the evidence heard, "by consent the court" found for the plaintiff and rendered judgment accordingly, without the defendant's having interposed any demurrer, motion in arrest, or exception. *Held*, such complaint having been on an appeal bond, that defective allegations therein as to the fixing of the penalty and approval of such bond, and as to the perfecting of the appeal, to secure which such bond was executed, were cured by such finding and judgment.—*Hudson v. Allison*, 54 Ind. 215.

[J] (Sup. 1881)

A complaint which alleged that defendant promised to marry plaintiff in consideration that she "would" promise to marry him, and not in consideration that she "did" promise, is cured by verdict.—*Felger v. Etzell*, 75 Ind. 417.

[k] (Sup. 1881)

There are many cases in which objections to the complaint which would have been considered as well taken if they had been presented by demurrer will be regarded as obviated and cured by the subsequent trial and verdict.—*Roberts v. Porter*, 78 Ind. 130.

[l] (Sup. 1882)

A complaint not demurred to, which states a cause of action, although stating conclusions only, will be deemed sufficient after verdict.—*Jenkins v. Rice*, 84 Ind. 342.

[m] (Sup. 1884)

The allegation that defendant is indebted to plaintiff implies that plaintiff's claim is mature, and is good after verdict.—*Pittsburgh, C. & St. L. Ry. Co. v. Thornburgh*, 98 Ind. 201.

[n] Where a complaint is not attacked in the trial court, and the defects, although fatal, are such as may be obviated by evidence, they are cured by a verdict and judgment.—(Sup. 1885) *Burkett v. Holman*, 104 Ind. 6, 3 N. E. 406; (App. 1891) *Bronnenburg v. Rinker*, 2 Ind. App. 391, 28 N. E. 568; (1896) *Harter v. Parsons*, 14 Ind. App. 331, 42 N. E. 1025.

[o] (App. 1894)

The complaint in an action for the death of a minor, killed by a street car, alleging that the child's mother was sick in bed, and com-

pelled to send him on an errand across the street along which was the railroad; that the child was intelligent, of strong health, and that he was too young to be capable of rightly appreciating danger, or to have proper discretion,—will not, on attack after verdict, be held to show negligence on the part of the mother.—*Citizens' St. R. Co. v. Stoddard*, 10 Ind. App. 278, 37 N. E. 723.

[p] (App. 1897)

Where the words spoken were susceptible of an innocent meaning and of a criminal meaning, the court, after verdict for the plaintiff upon a motion in arrest of judgment, or upon an assignment of error, will adopt the latter meaning, and, where the language is rendered actionable by extrinsic circumstances defectively averred, the verdict will aid them, though language not actionable per se, in the absence of extrinsic circumstances, will not be so regarded, even after verdict.—*Alcorn v. Bass*, 46 N. E. 1024, 17 Ind. App. 500.

[q] (Sup. 1898)

Rev. St. 1894, § 670 (Rev. St. 1881, § 658), under which amendments for any defect of form are, after verdict, deemed to have been made, does not apply to a complaint which is deficient in matters of substance.—*Sheffer v. Hines*, 49 N. E. 348, 149 Ind. 413.

[r] (App. 1903)

A complaint for work and labor averred that the amount due was \$238.91. The jury returned a verdict for \$258.08. There was evidence authorizing a finding that defendant was indebted to plaintiff in a sum which, with interest to the date of verdict, was the amount found. *Held*, that the demand in the complaint would be deemed amended.—*Noyes Carriage Co. v. Robbins*, 67 N. E. 959, 31 Ind. App. 300.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1451-1477, 1485; 1 CENT. DIG. Account, § 37; 1 CENT. DIG. Action on the Case, § 46; 7 CENT. DIG. Bills & N. § 1473; 12 CENT. DIG. Corp. § 2030; 22 CENT. DIG. Ex. & Ad. § 1857; 23 CENT. DIG. Forc. E. & D. § 133; 32 CENT. DIG. Libel, §§ 241, 243-245; 33 CENT. DIG. Mal. Pros. § 111; 35 CENT. DIG. Mon. Recd. § 69; 38 CENT. DIG. Partit. § 182; 41 CENT. DIG. Quiet. T. § 77; 41 CENT. DIG. Quo W. § 433; 42 CENT. DIG. Replev. § 209.

See, also, 31 Cyc. pp. 769-778.

§ 433 (4). *Technical or formal defects.*

[a] (Sup. 1884)

The omission of formal averments from a complaint is cured by verdict.—*Louisville, N. A. & C. Ry. Co. v. Peck*, 99 Ind. 68.

[b] (Sup. 1888)

A complaint alleging, although not with technical accuracy, that the defendant publish-

ed that the plaintiff, an unmarried woman, was guilty of an act of sexual intercourse, is sufficient after verdict.—*Binford v. Young*, 115 Ind. 174, 16 N. E. 142.

[c] (App. 1893)

Where the facts show a party entitled to relief, he should not be debarred therefrom by any undue technicality, and, in considering the right of plaintiff to judgment on the facts, many defects in the complaint will be regarded as cured by the evidence and the facts found.—*Town of Monticello v. Kennard*, 34 N. E. 454, 7 Ind. App. 135.

[d] (Sup. 1907)

Informality in a complaint may be cured and rendered harmless by a special finding of facts and by the conclusions of law.—*Daly v. Gubbins*, 170 Ind. 105, 82 N. E. 659.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1451-1477. 1485; 1 CENT. DIG. Account, § 37; 1 CENT. DIG. Action on the Case, § 46; 7 CENT. DIG. Bills & N. § 1473; 12 CENT. DIG. Corp. § 2030; 22 CENT. DIG. Ex. & Ad. § 1857; 23 CENT. DIG. Forci. E. & D. § 133; 32 CENT. DIG. Libel, §§ 241, 243-245; 33 CENT. DIG. Mal. Pros. § 111; 35 CENT. DIG. Mon. Recd. § 69; 38 CENT. DIG. Partit. § 182; 41 CENT. DIG. Quiet. T. § 77; 41 CENT. DIG. Quo W. § 433; 42 CENT. DIG. Replev. § 209. See, also, 31 Cyc. pp. 769-778.

§ 433 (5). *Failure to state cause of action or defense.*

[a] A verdict will not cure an entire failure to state a ground of action.—(Sup. 1835) *Dickerson v. Hays*, 4 Blackf. 44; (1858) *Indianapolis C. R. Co. v. Davis*, 10 Ind. 398.

[b] (Sup. 1881)

Where there is not merely an imperfect statement, but no statement at all, the defect is not cured by a verdict, whether a demurrer were interposed or not, unless the omitted matter be implied in, or fairly inferable from, the facts alleged and proved.—*Home Ins. Co. of New York v. Duke*, 75 Ind. 535.

[c] (Sup. 1892)

If a declaration omits to allege any substantial fact which is essential to a right of action, and which is not implied in or inferable from the findings of those which are alleged, it is defective, and will not be cured by verdict.—*Reed v. Browning*, 30 N. E. 704, 130 Ind. 575.

[d] (App. 1897)

Where the error assigned on appeal is that the complaint does not state facts sufficient to constitute a cause of action it cannot be available for the reversal of a judgment upon default, unless some fact essential to the existence of the cause of action has been wholly omitted from the complaint.—*Albany Furniture Co. v.*

Merchants' Nat. Bank, 47 N. E. 227, 17 Ind. App. 531, 60 Am. St. Rep. 178.

[e] (App. 1908)

A special finding of facts does not take the place of and aid a complaint, demurred to for want of facts.—*Radebaugh v. Scanlan*, 41 Ind. App. 109, 82 N. E. 544.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1451-1477. 1485; 1 CENT. DIG. Account, § 37; 1 CENT. DIG. Action on the Case, § 46; 7 CENT. DIG. Bills & N. § 1473; 12 CENT. DIG. Corp. § 2030; 22 CENT. DIG. Ex. & Ad. § 1857; 23 CENT. DIG. Forci. E. & D. § 133; 32 CENT. DIG. Libel, §§ 241, 243-245; 33 CENT. DIG. Mal. Pros. § 111; 35 CENT. DIG. Mon. Recd. § 69; 38 CENT. DIG. Partit. § 182; 41 CENT. DIG. Quiet. T. § 77; 41 CENT. DIG. Quo W. § 433; 42 CENT. DIG. Replev. § 209. See, also, 31 Cyc. pp. 769-778.

§ 433 (6). *Nature of omission in general.*

[a] (Sup. 1823)

The want of venue in an information in quo warranto against a corporation for a violation of its charter is cured by verdict.—*President, etc., of Bank of Vincennes v. State*, 1 Blackf. 267, 12 Am. Dec. 234.

[b] (Sup. 1832)

In debt on an executor's bond against the administrators of the surety, the declaration did not aver that the relators were entitled to recover as heirs, legatees, or creditors of the testator, nor that assets subject to the claim had come to the hands of the executor, but stated that a decree had been recovered by the relators in a suit against the executor. *Held*, that the defects in the declaration were cured by the verdict.—*Nicholson v. Carr*, 3 Blackf. 104.

[c] (Sup. 1838)

Where the declaration leaves a blank as to the damages claimed or sum due, the defect is cured by verdict.—*Peltier v. Britton*, 4 Blackf. 502.

[d] (Sup. 1853)

A declaration, defective because it does not show that the next friend therein named was admitted by the court, nor that he filed his consent to act as such, agreeably to the statute, cannot be objected to on that account, after verdict.—*Wortman v. Ash*, 4 Ind. 74.

[e] (Sup. 1854)

In assumpsit against a surviving partner, if the deceased partner is noticed the declaration must negative a payment by him; but the failure to make such negation cannot be objected to after verdict.—*Culbertson v. Townsend*, 6 Ind. 64.

[f] Where it is necessary to prove a fact on the trial and the complaint omits to aver it, the defect is cured by the verdict if the general

terms of the declaration are sufficient to comprehend it.—(Sup. 1862) *Shimer v. Bronnenburg*, 18 Ind. 363; (1885) *Harris v. Harris*, 101 Ind. 498.

[g] (Sup. 1865)

A mortgagee who had purchased the mortgaged premises at a foreclosure sale filed a complaint against A. and B., alleging that the legal title was in A., that A. had executed a title bond to B., that B. had executed a title bond to the mortgagor, that the purchase money had been paid to A., and that plaintiff "was entitled to a conveyance in fee simple." *Held*, that the omission to file a copy of each of the title bonds with the complaint was cured by a verdict for plaintiff.—*Westfall v. Stark*, 24 Ind. 377.

[h] (Sup. 1875)

In an action on a guardian's bond given in cases of an order to sell the ward's land, a complaint which does not allege that the money was a part of the proceeds of the land is good after verdict, if otherwise sufficient.—*Gander v. State ex rel. Rasure*, 50 Ind. 539.

[i] (Sup. 1878)

A complaint in an action for foreclosure failing to allege that copies of the mortgage and notes had been filed therewith is sufficient after verdict.—*Scott v. Zartman*, 61 Ind. 328.

[j] (Sup. 1880)

Alleged defects in a complaint for damages resulting from the construction of a railroad in a street along plaintiff's property, that the complaint does not show that plaintiff's lot adjoins or abuts on the street, nor that plaintiff owned the fee therein, nor a cause of action for a consequential injury to plaintiff's property, are cured by verdict for plaintiff; the defendant having gone to trial without demurring to the complaint.—*Indianapolis & V. R. Co. v. McCaffery*, 72 Ind. 294.

[k] (Sup. 1881)

A verdict in favor of a plaintiff having a beneficial personal interest cures a complaint defective in not alleging a refusal of the proper party to bring the action; there being no demurrer to the same.—*Cleaveland v. Vajen*, 76 Ind. 146.

[l] (Sup. 1881)

In an action on an administrator's bond, the failure of plaintiffs to allege that they were the heirs of the deceased is cured by verdict in their favor.—*Beal v. State ex rel. Beal*, 77 Ind. 231.

[m] (Sup. 1881)

Allegations of fact in a complaint necessary and material to the maintenance of the suit cannot be supplied by evidence, nor can their omission be cured by verdict.—*Cox v. Hunter*, 79 Ind. 500.

[n] (Sup. 1882)

The defect arising on failure to file the note or mortgage with the complaint in an ac-

tion to foreclose is cured by the finding of the court.—*Martin v. Holland*, 87 Ind. 105.

[o] (Sup. 1885)

A complaint to set aside a judgment rendered by default, which is defective in omitting to give the date of the rendition of the judgment, is cured by verdict.—*Overton v. Rogers*, 99 Ind. 595.

[p] (Sup. 1885)

Failure, in an action to recover the possession of real estate, to aver in the complaint, in terms, that plaintiff is entitled to possession, or to state facts from which his right to possession arises by necessary implication, is not cured by verdict or judgment.—*Mansur v. Streight*, 103 Ind. 358, 3 N. E. 112.

[q] (Sup. 1890)

A complaint setting up an agreement to compromise conflicting claims to land by conveying to a trustee, who should quiet title as against third persons, when defendant was to pay plaintiff a certain sum for his interest, and alleging that defendant conveyed to the trustee, and the title was so quieted by the trustee, and the land conveyed to defendant, and plaintiff tendered a deed to the trustee, and seeking to foreclose a mortgage given by the trustee in pursuance of the agreement, and to recover an alleged balance of the price agreed to be paid, cannot be objected to after judgment as not showing that plaintiff had any interest in the land.—*Hatfield v. Miller*, 123 Ind. 463, 24 N. E. 330.

[r] (Sup. 1892)

A complaint alleged that plaintiff leased of the owner for a term of years one of two apartments, entrance to which was had through a common hall, and water for which was supplied by a common pipe, and that defendant, to whom the other apartment was subsequently devised, shut off the water, and was about to stop access to plaintiff's apartment, and prayed an injunction. There was no averment as to the amount of damages sustained. *Held*, that the complaint was sufficient after judgment.—*Brauns v. Glesige*, 130 Ind. 167, 29 N. E. 1061.

The omission of an averment as to the amount of damages sustained is cured by the verdict.—*Id.*

[s] (Sup. 1894)

Where, in an action to establish a will alleged to have been destroyed by the testatrix's husband, such husband's administrator is made a party, and there is no allegation that he was such administrator, or in any way connected with the action, the insufficiency of the complaint as to him is not cured by the verdict.—*Jones v. Casler*, 139 Ind. 382, 38 N. E. 812, 47 Am. St. Rep. 274.

[t] (App. 1896)

The statutes providing that no objection taken by demurrer and overruled shall be sufficient to reverse the judgment if it appears from

the whole record that the merits of the case have been fairly determined, and that technical errors or mere defects in form shall not be ground for reversal, do not cure the error in overruling a demurrer to a complaint by a receiver which fails to show that the leave of court required by Horner's Rev. St. 1897, § 1228, was obtained, though the record shows that the case was fairly tried, and the proper result was reached.—Rhodes v. Hilligoss, 45 N. E. 666, 16 Ind. App. 478.

[u] (App. 1897)

A verdict and judgment will not cure a defective complaint, though the question is first raised on appeal, if the averment of an essential fact has been entirely omitted.—Western Assur. Co. v. Koontz, 46 N. E. 95, 17 Ind. App. 54.

[v] (App. 1897)

Where a fact must necessarily have been proved at the trial to justify the verdict, and the complaint omits it, the defect is cured by the verdict, if the general terms of the complaint are otherwise sufficient to comprehend the proof.—Alcorn v. Bass, 46 N. E. 1024, 17 Ind. App. 500.

[w] (App. 1898)

Unless the averment of an essential fact is omitted from a complaint, it will be held sufficient after verdict.—Bertha v. Sparks, 40 N. E. 831, 19 Ind. App. 431.

[ww] (App. 1898)

Where a necessary and material averment is wholly omitted from a complaint, such defect cannot be cured by a special finding.—Cleveland, C., C. & St. L. R. Co. v. Edward C. Jones Co., 50 N. E. 319, 20 Ind. App. 87.

[x] (App. 1898)

Failure of petition, demurrer to which is overruled, to aver a material fact, is not cured by general finding, under Burns' Rev. St. 1894, § 348 (Horner's Rev. St. 1897, § 345), declaring that "no objection taken by demurrer, and overruled, shall be sufficient to reverse the judgment, if it appears from the whole record that the merits of the cause have been fairly determined."—Smith v. Miller, 51 N. E. 508, 21 Ind. App. 82.

[xx] (Sup. 1900)

Where a complaint is demurrable for want of an allegation of fact, it is not cured by a special verdict finding the fact omitted.—Cleveland, C., C. & St. L. Ry. Co. v. Parker, 56 N. E. 86, 154 Ind. 153.

[y] (App. 1903)

Where, in an action against executors to compel payment of a legacy, the complaint omits material averments to the effect that the executors have personal property sufficient to pay the legacy, or that there is real estate which was charged with such payment, findings and judgment in favor of plaintiff do not cure

the defect.—Coulter v. Bradley, 66 N. E. 184, 30 Ind. App. 421.

[yy] (App. 1904)

In an action against executors to enforce payment of a legacy, the omission in the complaint to allege that there was property of testator applicable to the payment of the legacy is cured by a special finding showing that fact.—Coulter v. Bradley, 37 Ind. App. 697, 71 N. E. 61.

[z] (Sup. 1905)

Where, in a suit to enjoin a nuisance, plaintiff's property was described with particularity, and it was charged that the property of the other plaintiffs lay contiguous thereto, and between plaintiff's property and that of defendants, all within P. township, in a certain county, an alleged defect in the complaint for failure to describe the premises on which the nuisance was created and continued with sufficient certainty was cured by the finding in favor of complainants.—Major v. Miller, 75 N. E. 159, 165 Ind. 275.

[zz] (App. 1909)

While special findings may show such a state of facts that errors, if any, in ruling on the pleadings, were harmless, they cannot supply any necessary or essential averments of the pleadings.—Shank v. Trustees of McCordsville Lodge No. 338, I. O. O. F., 88 N. E. 83.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1451-1477, 1485; 1 CENT. DIG. Account, § 37; 1 CENT. DIG. Action on the Case, § 46; 7 CENT. DIG. Bills & N. § 1473; 12 CENT. DIG. Corp. § 2030; 22 CENT. DIG. Ex. & Ad. § 1857; 23 CENT. DIG. Forc. E. & D. § 133; 32 CENT. DIG. Libel, §§ 241, 243-245; 33 CENT. DIG. Mal. Pros. § 111; 35 CENT. DIG. Mon. Recd. § 69; 38 CENT. DIG. Partit. § 182; 41 CENT. DIG. Quiet. T. § 77; 41 CENT. DIG. Quo W. § 433; 42 CENT. DIG. Replev. § 209.

See, also, 31 Cyc. pp. 769-778.

§ 433 (7). *Omissions in actions ex contractu.*

[a] (Sup. 1868)

An objection to a complaint on a note that it does not allege that the note is unpaid comes too late after verdict.—Howorth v. Scarce, 29 Ind. 278.

[b] (Sup. 1876)

Failure of the complaint, in an action on a note by the indorsee against an indorser, to set out a copy of the note and indorsement, is cured by a finding in favor of plaintiff.—Purdue v. Stevenson, 54 Ind. 161.

[c] (Sup. 1877)

The failure to file with the complaint a copy of the note in suit is cured by verdict.—Eigenmann v. Backof, 56 Ind. 594.

[d] (Sup. 1877)

In a complaint to recover for money paid for defendant by plaintiff, averring that it was paid to a third person at defendant's request, the want of an averment that such payment was for the use or on account of defendant, is cured by a finding in plaintiff's favor, without any objection having been made in the lower court.—*Wilson v. Kelly*, 58 Ind. 586.

[e] (Sup. 1879)

A failure to demur to a substituted complaint for not containing a copy of the note sued on is a waiver of objection, and the defect is cured by the verdict.—*Galvin v. Woollen*, 66 Ind. 464.

[f] (Sup. 1880)

A complaint alleging that defendant was indebted to plaintiff in a certain sum for keeping the defendant's horse, feeding and caring for the same for a stated period, which services it was alleged were worth a certain sum per week, while not directly alleging that the horse was kept and fed by plaintiff, was sufficient in that respect after verdict.—*Parker v. Clayton*, 72 Ind. 307.

[g] (Sup. 1882)

A complaint in an action on account, which fails to allege that the account is due, is cured by verdict.—*Heshion v. Julian*, 82 Ind. 576.

[h] (Sup. 1882)

An objection to a complaint that it contained no reference to the account thereto annexed is cured by verdict.—*Lassiter v. Jackman*, 88 Ind. 118.

[i] (Sup. 1885)

The defect in the complaint of failure to set out the note sued on, or file a copy thereof, is not cured by verdict.—*Rairden v. Winstanley*, 99 Ind. 600.

[j] (Sup. 1890)

It is settled by many decisions that a complaint that is defective on account of the failure of the pleader to set out the original or a copy of the written instrument upon which a pleading is founded will be cured by a verdict or finding.—*Old v. Mohler*, 23 N. E. 967, 122 Ind. 594.

[k] (App. 1894)

A complaint which alleges that plaintiff deeded to defendant, who was his surety on certain notes, certain lots as security, which were sold by defendant, that plaintiff paid the notes when due, and that defendant owed him a certain sum, which defendant refused to pay, is sufficient after verdict, though it may have been subject to demurrer for failure to state that plaintiff owned the lots.—*Warder v. Nolan*, 10 Ind. App. 334, 37 N. E. 821.

[l] (App. 1898)

The failure of a complaint on a note against maker and indorsers to set out the indorsements may be supplied by the evidence, and, when questioned for the first time in the appellate court, will be held cured by the findings and

judgment, if the complaint contains enough to bar another action for the same cause.—*Cummings v. Girtton*, 49 N. E. 360, 19 Ind. App. 248.

[m] (Sup. 1901)

Where an averment essential to the sufficiency of a pleading is omitted therefrom, but a special finding is made on such point, the defect in the complaint will not be cured by such finding, since the finding is outside the issues, and must be disregarded.—*Goodwine v. Cadwalader*, 61 N. E. 939, 158 Ind. 202.

[n] (App. 1905)

A defect in a complaint, in failing to allege that the contract counted on was supported by a consideration, is not cured by verdict.—*Taylor v. Lesson*, 74 N. E. 907, 35 Ind. App. 620.

[o] (App. 1905)

Where a contract for broker's services provided that, when the broker found a purchaser that would pay a sum specified for the land, defendant, the owner, would convey the land, or that on the deposit or tender by the broker of such sum the owner would make a warranty deed to the broker, or to whomsoever he might direct, a complaint alleging that the purchaser presented a check for the amount stipulated to defendant and requested a conveyance of the land, but that the defendant refused and delayed to make the deed, though the purchaser stood ready at all times to pay the cash for the land, and was still ready and willing to do so, and that by defendant's failure to perform plaintiff was deprived of his commission, to his damage in a specified sum, sufficiently alleged defendant's breach of the contract after verdict, though it failed to aver the nonpayment by defendant of the money demanded.—*McAfee v. Bending*, 76 N. E. 412, 36 Ind. App. 628.

A complaint for broker's services alleged the procurement of a purchaser, who presented a check payable to the order of such purchaser to defendant in payment of the purchase price, and that such check was "in all things in accordance with the request of the defendant." Held, that the complaint was sufficient after verdict, though it failed to allege the indorsement of the check or its execution in such form as would have enabled defendant to have obtained the money thereon.—Id.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1451-1477, 1485; 1 CENT. DIG. Account, § 37; 1 CENT. DIG. Action on the Case, § 46; 7 CENT. DIG. Bills & N. § 1473; 12 CENT. DIG. Corp. § 2030; 22 CENT. DIG. Ex. & Ad. § 1957; 23 CENT. DIG. Forc. E. & D. § 133; 32 CENT. DIG. Libel, §§ 241, 243-245; 33 CENT. DIG. Mal. Pros. § 111; 35 CENT. DIG. Mon. Recd. § 69; 38 CENT. DIG. Partit. § 182; 41 CENT. DIG. Quiet. T. § 77; 41 CENT. DIG. Quo W. § 433; 42 CENT. DIG. Replev. § 209. See, also, 31 Cyc. pp. 769-778.

§ 433 (8). *Omissions in actions ex delictu.*

[a] (Sup. 1823)

In an action of slander for words actionable by statute, but not at common law, the declaration did not aver the cause of action to be *contra formam statuti*. *Held*, that after verdict this is no objection.—*Wilcox v. Webb*, 1 Blackf. 258.

[b] (Sup. 1829)

A declaration in slander charged the defendant with having said that the plaintiff had sworn falsely on a certain trial before a justice of the peace, but there was no averment that the testimony alleged to be false was material. *Held*, that the declaration could not be objected to, after verdict, for the want of that averment.—*Wilson v. Harding*, 2 Blackf. 241.

[c] (Sup. 1850)

Where a complaint for slander for charging a house to be a house of prostitution, by using the words "house of ill fame," erroneously neglects to allege that the speaker usually meant "house of prostitution" by such words, the error is not cured by verdict.—*Dodge v. Lacey*, 2 Ind. 212.

[d] (Sup. 1862)

A complaint for slander set out that in a suit before a justice, P. W. was a witness to material matter; that defendant, in a conversation concerning said trial and concerning the plaintiff, being guilty of subornation of perjury, uttered and published in the hearing of several persons the words, "P. F. swore to a lie, and you [plaintiff] hired him." It was objected to the complaint that it did not allege that the conversation was of and concerning the testimony of P. F. on the trial. *Held*, that after verdict the complaint was good.—*Shimer v. Bronnenburg*, 18 Ind. 363.

[e] (Sup. 1863)

A complaint against a railroad company for stock killed by the machinery of the company will be bad, even after verdict, if it fail to aver negligence, or that the road was not fenced.—*Indianapolis, P. & C. R. Co. v. Brucey*, 21 Ind. 215.

[f] (Sup. 1873)

In an action against a railroad for the killing of stock resulting from the railroad's failure to fence its tracks, it will be presumed after verdict or finding that it was proven that the animals entered upon the road at a point where it was not securely fenced, although the complaint did not so allege.—*Toledo W. & W. Ry. Co. v. Stevens*, 63 Ind. 337.

[g] (Sup. 1883)

A complaint in an action against the owner of a steam threshing machine for damages caused by a fire set by sparks emitted from the engine alleged that, while defendant was engaged in threshing plaintiff's grain, he negligently conducted himself in and about plaintiff's premises by employing an incompetent and neg-

ligent person in charge of the engine, and furnishing the engine with an insufficient and defective spark arrester, and by taking off or throwing up the spark arrester, whereby sparks of fire were permitted to escape from the smoke-stack of the engine, which were communicated to the stacks of grain, wholly consuming the same, etc. *Held*, that the complaint was good after verdict, though it would have been more in accordance with the rules of good pleading to have charged that the sparks were negligently permitted to escape from the engine.—*Haywood v. Hedrick*, 94 Ind. 340.

[h] (Sup. 1884)

A complaint against a railroad company, under Rev. St. 1881, § 4025, making a railroad company liable for stock killed by its locomotives, cars, or other carriages, averring that defendant "ran against and over said mare and killed her," but not charging that the injury was done by the locomotive, cars, or carriages, is good after verdict.—*Louisville, N. A. & C. Ry. Co. v. Harrington*, 92 Ind. 457.

[i] (Sup. 1884)

A complaint charging that defendant's servants negligently ran defendant's train on plaintiff's mare is sufficient after verdict, though there was no allegation of defendant's negligence, or that the servants were in the line of their employment.—*Pennsylvania Co. v. Rusie*, 95 Ind. 236.

[j] (Sup. 1884)

Where, in an action for injuries inflicted by a vicious dog, there is no more than a charge of negligence against the defendant, a verdict will not cure an omission to show in some form that the plaintiff was free from contributory negligence.—*Eberhart v. Reister*, 96 Ind. 478.

[k] (Sup. 1885)

A complaint against a railroad company for killing stock, that would be bad on demurrer for not averring that the railroad was not properly fenced at the place where the animals entered, will be held good after verdict.—*Louisville, N. A. & C. Ry. Co. v. Goodbar*, 102 Ind. 596, 2 N. E. 337, 3 N. E. 162.

[l] (Sup. 1886)

Where, in an action for negligence there were facts stated in the complaint from which negligence might be fairly inferred, the complaint was good after verdict, though it might have been bad on demurrer for failure to characterize the conduct of defendant as "negligent" by the use of that epithet.—*Board of Com'rs of Knox County v. Montgomery*, 9 N. E. 500, 109 Ind. 69.

[m] (App. 1891)

A complaint in an action for the loss of services of plaintiff's minor son, whose death was caused, while in defendant's employ, by the alleged negligence of defendant in keeping a defective boiler, is not insufficient, after verdict, for failure to allege that deceased had no opportunity of informing himself of the dangerous

condition of the boiler, where it avers his youth, inexperience, and ignorance, and the fact that the injury occurred without his fault, and that he had no knowledge of the dangerous condition of the work he was asked to do.—*Louisville, E. & St. L. Consol. R. Co. v. Berry*, 2 Ind. App. 427, 28 N. E. 714.

[n] (App. 1892)

In an action for personal injuries, the only ground of negligence stated in the complaint was that the precipitation of a trip hammer on plaintiff's hand was caused by the falling of a pair of tongs through plaintiff's inability to hold them, or by "some cause unknown to plaintiff." *Held* that, though the complaint was insufficient, in that it did not state facts from which defendant's negligence was a necessary legal inference, the defects were cured by the verdict.—*Noblesville Foundry & Mach. Co. v. Yeaman*, 3 Ind. App. 521, 30 N. E. 10.

[o] (App. 1894)

Rev. St. 1894, § 348 (Rev. St. 1881, § 345), provides that no objection taken to an overruled demurrer shall be sufficient to reverse the judgment, if the merits of the cause were fairly determined; section 401, Rev. St. 1894 (section 398, Rev. St. 1881), provides that defective pleadings, not affecting substantial rights, must be disregarded; and section 670, Rev. St. 1894 (section 658, Rev. St. 1881), provides that no judgment shall be reversed for defects in the pleadings which might have been amended in the lower court. *Held*, in an action against a railway company for personal injuries caused by a defective brake, that a special finding that such defect was the immediate cause of the injury does not cure a complaint defective by reason of not alleging knowledge thereof on the part of the company.—*Lake Shore & M. S. Ry. Co. v. Kurtz*, 10 Ind. App. 60, 35 N. E. 201, 37 N. E. 303.

[p] (App. 1894)

A complaint, in an action against a warehouseman for injuries caused by his negligence in leaving an elevator shaft in the warehouse unguarded, which fails to state that plaintiff was on the premises by defendant's invitation, or that defendant owed him any duty, is insufficient, though first attacked after verdict.—*South Bend Iron Works v. Larger*, 11 Ind. App. 367, 39 N. E. 209.

[q] (App. 1899)

In an action for personal injuries from falling through a coal hole, failure to make proper allegations that defendant owned, used, and controlled the coal hole was cured by special findings as to ownership.—*Gaston v. Bailey*, 53 N. E. 1021, 24 Ind. App. 24.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1451-1477, 1485; 1 CENT. DIG. Account, § 37; 1 CENT. DIG. Action on the Case, § 46; 7 CENT. DIG. Bills & N. § 1473; 12 CENT. DIG. Corp. § 2030; 22 CENT. DIG. Ex.

& Ad. § 1957; 23 CENT. DIG. Ford. E. & D. § 133; 32 CENT. DIG. Libel, §§ 241, 243-245; 33 CENT. DIG. Mal. Pros. § 111; 35 CENT. DIG. Mon. Recd. § 69; 38 CENT. DIG. Partit. § 182; 41 CENT. DIG. Quiet. T. § 77; 41 CENT. DIG. Quo W. § 433; 42 CENT. DIG. Replev. § 209.

See, also, 31 Cyc. pp. 769-778.

§ 433 (9). *Uncertainty indefiniteness, and argumentativeness.*

[a] (Sup. 1832)

In case for obstructing a navigable river, to plaintiff's injury, etc., the declaration averred that on, etc., at the county of M. (in which the suit was brought), defendant built a dam across East Fork of White river in said county; the said river being then and there a navigable stream. *Held*, that after verdict the declaration could not be objected to for not stating more explicitly that the river was a public highway.—*Tyrrell v. Lockhart*, 3 Blackf. 136.

[b] (Sup. 1876)

Where, in a complaint in a creditor's action to subject to execution property fraudulently conveyed by his debtor to a third person, a description of the property as "a tobacco factory in the city of Logansport, situate at the lock foundry, worth, with the fixtures and appurtenances, seven thousand dollars," was sufficient on motion in arrest of judgment to let in proof which might render the identity of the property certain, and such description was therefore good after verdict for plaintiff.—*Alford v. Baker*, 53 Ind. 279.

[c] (Sup. 1831)

A complaint cannot be attacked after verdict or judgment for mere indefiniteness, uncertainty, or obscurity.—*City of Huntington v. Mendenhall*, 73 Ind. 460.

[d] (Sup. 1881)

An allegation in a complaint to recover real estate that the same was sold to plaintiff in pursuance of a judgment of foreclosure means that it was sold by the sheriff as provided by law; and the allegation is sufficiently certain after verdict.—*Allen v. Shannon*, 74 Ind. 161.

[e] (Sup. 1881)

Objections to a complaint for partition that the same failed to state specifically the title of the parties to the land, and that they held the same as tenants in common,—is cured by the finding of the trial court that the parties owned their respective interests in fee simple as tenants in common.—*Lewis v. Bortsfeld*, 75 Ind. 390.

[f] (Sup. 1831)

A defect in a complaint that it states a material fact inferentially by way of recital, and not by positive allegation, is waived by going to trial, and cured by a general verdict for plaintiff.—*Evansville & T. H. R. Co. v. Willis*, 80 Ind. 225.

[g] (Sup. 1882)

Though the complaint is obscure in the allegations as to defendants' connection with the acts constituting the cause of action, if it contains such facts as enables the court to remedy the defect by reasonable intendment, it is good after verdict.—*Puett v. Beard*, 86 Ind. 104.

[h] (Sup. 1883)

In an action of replevin, the description of the goods as "one stock of dry goods, notions, fancy articles, and so forth, now in store occupied by them on Main Street, in the city of Valparaiso," is sufficiently definite after verdict.—*Malone v. Stickney*, 88 Ind. 594.

[i] (Sup. 1884)

Where a contractor assigned to his codefendant all his interest in the estimates for certain grading and the codefendant was to proceed to collect the same and pay all claims on material due for the work, an objection that the complaint failed to aver that the estimates had been collected by such codefendant, and that an allegation therein that he had proceeded to collect the same was insufficient, was not well taken, for, if the averment as to the collection of the estimates by such codefendant was indefinite and uncertain, the defect was remedied and cured by the finding of the court.—*Smith v. Flack*, 95 Ind. 116.

[j] (Sup. 1884)

In a suit to enjoin a city treasurer from selling certain real estate for taxes that had been assessed against it, if the averments of the complaint as to the nature, value, and location of the personal property were indefinite and uncertain, the court on proper motion would have required them to have been made more specific and certain, and, no such motion having been made, the defects were cured by the finding of the court.—*City of Logansport v. Carroll*, 95 Ind. 150.

[k] (Sup. 1893)

Indefiniteness of a complaint may be cured by a finding.—*Garard v. Garard*, 34 N. E. 442, 800, 135 Ind. 15.

[l] (Sup. 1895)

Where the jury, by special verdict, make explicit findings as to matters generally alleged in the complaint, its indefiniteness in regard thereto is cured.—*Chicago, St. L. & P. R. Co. v. Wolcott*, 141 Ind. 267, 39 N. E. 451.

[m] (Sup. 1906)

Where a complaint is attacked for the first time on appeal, it is sufficient unless there is a total absence of essential allegations; mere uncertainty of allegations such as might have been amended on motion being insufficient to render it bad.—*Indianapolis St. R. Co. v. Ray*, 107 Ind. 236, 78 N. E. 978.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1451-1477, 1485; 1 CENT. DIG. Account, § 37; 1 CENT. DIG. Action on the Case, § 46; 7

CENT. DIG. Bills & N. 1473; 12 CENT. DIG. Corp. § 2030; 22 CENT. DIG. Ex. & Ad. § 1857; 23 CENT. DIG. Forci. E. & D. § 133; 32 CENT. DIG. Libel, §§ 241, 243-245; 33 CENT. DIG. Mal. Pros. § 111; 35 CENT. DIG. Mon. Recd. § 69; 38 CENT. DIG. Partit. § 182; 41 CENT. DIG. Quiet. T. § 77; 41 CENT. DIG. Quo W. § 433; 42 CENT. DIG. Replev. § 209. See, also, 31 Cyc. pp. 760-778.

§ 434. — Defects in or want of plea or answer.

[a] (Sup. 1818)

The omission of a similiter is cured by verdict.—*Jared v. Goodtitle ex dem. Hill*, 1 Blackf. 29.

[b] (Sup. 1830)

In an action for false imprisonment against a justice of the peace and a constable, a plea in justification that an affidavit had been made before the justice, charging plaintiff with having violently assaulted, beaten, and wounded deponent, wherefore the justice had issued the warrant, was not objectionable, after a verdict in favor of defendants, for failure to show that the assault and battery were charged to have been "unlawfully" made.—*Cooper v. Adams*, 2 Blackf. 294.

[c] (Sup. 1852)

The omission of a similiter to the general issue is immaterial after verdict.—*Templin v. Krahn*, 3 Ind. 373.

[d] (Sup. 1873)

Where the parties to an action, without objection, go to trial without an issue formed on the complaint, the defendant cannot, after verdict, complain of the want of an issue.—*Stingley v. Second Nat. Bank of Lafayette*, 42 Ind. 580.

[e] (App. 1895)

The failure of a vendor of land, in his cross complaint asking for the assignment of certain stock in compliance with the contract of sale of the land, to allege that he has assigned to the vendee certain gas leases and privileges, as provided in the contract of sale, or that he is ready and willing to do so, is cured by verdict.—*McCloy v. Cox*, 12 Ind. App. 27, 39 N. E. 901.

[f] (App. 1900)

Where an answer in an action on an insurance policy, defective because it does not set out the policy, is not demurred to, but a reply is filed thereto, the defect is cured by the verdict.—*Fidelity Mut. Life Ass'n of Philadelphia v. McDaniel*, 57 N. E. 645, 25 Ind. App. 608.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1478-1480; 22 CENT. DIG. Ex. & Ad. § 1857; 32 CENT. DIG. Libel. § 243. See, also, 31 Cyc. p. 774.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

§ 435. — Defects in set-off or counter-claim or cross-complaint.

[a] (App. 1901)

In foreclosure, where a cross-complaint was filed averring that the land had been conveyed to a third person in trust for plaintiff, and that in the deed of conveyance the trustee assumed a mortgage on the land held by the cross-complainant, failure to file a copy of the conveyance containing the assumption, there being no demurrer to the cross-complaint, was cured by a finding of the court that the mortgage was assumed.—*State Building & Loan Ass'n v. Brackin*, 62 N. E. 91, 27 Ind. App. 677.

[b] (App. 1904)

The failure to file with the cross-complaint a contract, or copy thereof, which is the foundation of the cause of action, is cured by verdict in favor of the cross-complainant.—*Coppes v. Union Nat. Sav. Loan Ass'n*, 69 N. E. 702, 33 Ind. App. 367.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. § 1481.

See, also, 31 Cyc. p. 778.

§ 436. — Defects in or want of replication or reply.

[a] (Sup. 1826)

The addition of the similliter to a replication is only a matter of form, and the want of it is aided by a verdict.—*Hays v. McKee*, 2 Blackf. 11.

[b] (Sup. 1881)

A mere failure of plaintiff to reply to the answer or to answer a counterclaim will not avoid the verdict.—*Jones v. Hathaway*, 77 Ind 14.

[c] (Sup. 1882)

An objection that new matter in a reply constituted a departure cannot be made after verdict.—*Beard v. Hand*, 88 Ind. 183.

[d] (App. 1901)

The erroneous overruling of a demurrer to a reply, which was bad for departure, could not be cured by special findings of fact and correct conclusions of law thereon.—*Midland Steel Co. v. Citizens' Nat. Bank*, 59 N. E. 211, 26 Ind. App. 71.

[e] (App. 1905)

Where, in an action for services, the complaint stated a substantial cause of action on which judgment could be rendered, and the reply contained allegations of fraud barring a special defense of settlement pleaded in the answer, which facts were sufficient to bar another action for the same cause, any defects in the reply were cured by the finding and judgment.—*George v. Robinson*, 75 N. E. 607, 36 Ind. App. 310.

FOR CASES FROM OTHER STATES,

SEE 39 CENT. DIG. Plead. §§ 1482, 1483.

See, also, 31 Cyc. p. 774.

PLEADING AND PRACTICE.

Construction of phrase as used in statute, see STATUTES, § 199.

PLEADING OVER.

See—

Waiver of objections to declaration, complaint, petition, or statement. PLEADING, §§ 405-408.

To plea or answer. PLEADING, § 409.

To rulings on demurrer. PLEADING, § 418.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

PLEDGES.

Scope-Note.

[INCLUDES delivery of possession of personal property as security for payment of money or performance of contracts or other obligations in general; nature, requisites, incidents, operation, and effect of such delivery; evidence relating thereto; rights, duties, and liabilities of the parties as between themselves and as to others; extinguishment, waiver, or release of lien; sale of property for enforcement of pledge; and redemption.]

[EXCLUDES pawnbrokers, and regulation of their business and dealings with them (see *Pawnbrokers*); pledges by or to particular classes of persons (see *Infants*; *Insane Persons*; and other specific heads), partners (see *Partnership*), unincorporated associations and companies (see *Associations*; *Joint-Stock Companies*), and corporations (see *Corporations*); by persons in representative or fiduciary capacities (see *Guardian and Ward*; *Executors and Administrators*; *Principal and Agent*; *Factors*; *Trusts*); rights and liabilities of pledgors and pledgees of corporate stock (see *Corporations*); rights of pledgees of negotiable securities as bona fide holders thereof (see *Bills and Notes*; *Bonds*; *Municipal Corporations*; and other specific heads); and transfers fraudulent as to creditors and subsequent purchasers (see *Fraudulent Conveyances*). For complete list of matters excluded, see cross-references, post.]

Analysis.

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- § 56. — Sale of property.
- § 57. — Actions to foreclose.
- § 58. — Actions to enforce right of action pledged.
- § 59. — Proceeds and surplus.

*Cross-References.**See—*

Assignment of judgment as collateral security. JUDGMENT, § 847.

Of note by insolvent bank as collateral. BANKS AND BANKING, § 74.

CHATTEL MORTGAGES.

Collateral securities as entitling creditor of bankrupt to hold preference. BANKRUPTCY, § 164.

As passing by assignment of debt. ASSIGNMENTS, § 78.

Equitable assignment of proceeds of life insurance policy assigned as security. ASSIGNMENTS, § 48.

Executor pledging assets of estate for individual debt. EXECUTORS AND ADMINISTRATORS, § 115.

Garnishment of property pledged. GARNISHMENT, § 29.

Married woman as surety. HUSBAND AND WIFE, § 87.

Married woman's separate property. HUSBAND AND WIFE, §§ 168-172.

PAWNBROKERS.

Power of partner to bind firm. PARTNERSHIP, § 142.

Of pledgee to replevy property. REPLEVIN, § 8.

Rights and liabilities of pledgors and pledgees of corporate stock. CORPORATIONS, § 123.

Stock in building and loan associations. BUILDING AND LOAN ASSOCIATIONS, § 10.

Taking collateral security as waiver of right to mechanic's lien. MECHANICS' LIENS, § 212.

Warehouse receipts. WAREHOUSEMEN, § 15.

§ 1. Nature and essentials in general.

[a] (Sup. 1858)

On a sale of chattels to a firm on six months' credit, the seller subsequently took the note of one of the partners, maturing at the same time as the expiration of the credit and bearing no interest. Before the maturity of the note the firm dissolved, and the seller did not sue on the note at maturity, but waited till the maker of the note failed. *Held*, in an action for the price of the chattels against both partners, that the note was not aken as collateral security, so as to require the seller to be diligent in collecting, under penalty of discharging the other partner, since the seller only took the note of one for a debt on which both partners were liable, received no additional security for the debt thereby, and did not extend the time of payment.—*Tyner v. Stoops*, 11 Ind. 22, 71 Am. Dec. 341.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PLS. §§ 1, 4, 5.

See, also, 31 Cyc. pp. 785, 786; note, 49 Am. Dec. 730.

§ 4. Pledge distinguished from other transactions.

Chattel mortgages distinguished from pledges, see CHATTEL MORTGAGES, § 8.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PLS. §§ 6-13, 30.

See, also, 31 Cyc. pp. 788-793.

§ 5. Property which may be subject of pledge.

[a] (Sup. 1849)

An act of the Legislature provided that certificates issued by the commissioner of the New Albany & Vincennes Road should be paid from the tolls received, and pledged all mon-

ey, not otherwise appropriated, arising from said road, for the redemption of said certificates. *Held*, that the act did not make the holder of some such certificates a pledgee of the net amount of tolls received, since the tolls had not then accrued and the debts to be paid out of them did not then exist, so that the alleged pledge amounted only to a promise by the state to apply the tolls in that way.—*Clen-denin v. Frazier*, 1 Ind. 553, Smith, 348.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PLS. §§ 14, 15.

See, also, 31 Cyc. pp. 793, 794.

§ 6. Title or interest of pledgor.

Right of carrier by water to pledge goods carried, see SHIPPING, § 111.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PLS. § 6.

See, also, 31 Cyc. p. 794.

§ 9. Consideration.

[a] (Sup. 1886)

A pre-existing debt is a sufficient consideration for the pledge of collaterals as security for its payment.—*Spencer v. Sloan*, 108 Ind. 183, 9 N. E. 150, 58 Am. Rep. 35.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PLS. § 20.

See, also, 31 Cyc. pp. 795, 796.

§ 10. Delivery and possession.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PLS. §§ 28-40.

See, also, 31 Cyc. pp. 799-807; note, 25 L. R. A. 577.

§ 11. — In general.

[a] (Sup. 1883)

It is essential to a pledge that the pledgee should have possession of the thing pledged.—*State ex rel. Koons v. First Nat. Bank*, 89 Ind. 178.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PLS. §§ 28-35; 4 CENT. DIG. ASSIGN. § 75.

See, also, 31 Cyc. pp. 799, 800.

§ 14. Equitable pledge.

[a] (Sup. 1848)

A., the holder of a bond for a conveyance of land, assigned the same to B. as collateral security for money advanced, and afterwards B. permitted the same bond to be assigned to C. as security for debts due from A., and to be placed in C.'s hands. While there, the assignment to B. was stricken out, without his consent, and a further assignment made to C., D., and E. as security for debts due them from A. A. paid the purchase money of the land, and the same was conveyed to C., D., and E. and the bond canceled. After the first assignment to B., A. continued in possession of the land, and offered to sell it, with the knowledge and consent of B. Upon a bill in equity filed by B. to set aside the conveyance and vest the title in himself, it was held that the assignment to B. was an equitable security, upon which he was entitled to be paid the money advanced, but not to have the land conveyed to him.—*St. John v. Freeman*, 1 Ind. 84.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PLS. § 22.

See, also, 31 Cyc. p. 797.

§ 16. Evidence as to character of transaction.

[a] (Sup. 1840)

A bill of sale absolute on its face may, in an action by the vendee for possession of the property, be shown by parol to have been given as security.—*Hayworth v. Worthington*, 5 Blackf. 361, 35 Am. Dec. 126.

[b] (Sup. 1878)

Parol evidence is admissible to show that an assignment of notes, secured by mortgage, absolute in form, was in reality intended as collateral security.—*Hazzard v. Duke*, 64 Ind. 220.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PLS. §§ 24-26; 20 CENT. DIG. EVID. § 2136.

See, also, 31 Cyc. pp. 797, 798.

§ 19. Parties and debts or liabilities secured.

[a] (App. 1892)

A note pledged as collateral security for a debt due to the plaintiffs from the pledgor continues valid and effectual until such debt is paid, notwithstanding the evidence of it has

been changed from a promissory note to a judgment of a court of record.—*Everman v. Hyman*, 3 Ind. App. 459, 29 N. E. 1140.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PLS. §§ 58-63.

See, also, 31 Cyc. pp. 819-824.

§ 21. Title to property pledged.

[a] (Sup. 1829)

The delivery of a note payable to order, without indorsement, as collateral security, does not pass title.—*Elliott v. Armstrong*, 2 Blackf. 198.

[b] (Super. 1871)

A person holding collaterals to secure the payment of a debt holds them simply as a special trustee.—*Kemp v. Dickson*, Wils. 42.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PLS. § 45; 7 CENT.

DIG. BILLS & N. §§ 480, 494.

See, also, 31 Cyc. p. 808.

§ 26. Possession or control of property.

Actions for possession or proceeds of property, see post, §§ 32, 33.

[a] (Sup. 1873)

Where a bank, holding notes pledged to it as collateral security, had collected payments thereon and given credit on its books to the pledgor, he could not compel the bank to pay over the money thus received until he paid or satisfied his indebtedness.—*O'Brien v. Flanders*, 41 Ind. 486.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PLS. §§ 64-66; 47

CENT. DIG. TROVER, § 140.

See, also, 31 Cyc. pp. 824, 825.

§ 29. Sale or other disposition of property and failure to sell or convert.

Pleading matter in avoidance in action for, see PLEADING, § 136.

Sale for enforcement, see post, §§ 56, 57.

[a] (Sup. 1909)

In absence of special agreement or action, the holder of collateral securities need not watch the market and sell at the highest price at his peril, but may remain wholly passive, though he may have notice of a probable decline in their value.—*Hunter v. First Nat. Bank*, 172 Ind. 62, 87 N. E. 734.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PLS. §§ 64, 74.

See, also, 31 Cyc. pp. 828, 829; notes, 53 L. R. A. 857, 3 L. R. A. (N. S.) 1199.

§ 30. Enforcement of right of action pledged and failure to collect or fix liability.

[a] (Sup. 1817)

A judgment debtor deposited with the judgment creditor's attorney certain claims as

security, taking receipts therefor, in which the attorney engaged to apply so much of the proceeds as he should be able to collect to the payment of the judgment. *Held*, in a suit for an accounting by the debtor, that he was not entitled to a credit for said claims until they were collected, unless they had been lost or had remained uncollected through the creditor's negligence.—*Kiser v. Ruddick*, 8 Blackf. 382.

[b] (Sup. 1853)

Where a creditor, holding notes of third parties as collateral security, to be applied in payment of his claim, fails to realize on them through his own laches, his debtor has a right to consider it satisfied.—*Slevin v. Morrow*, 4 Ind. 425.

Where a debtor indorsed notes to his creditor as collateral security, and the creditor failed to realize anything on them, it is incumbent on the creditor to show reasonable diligence in attempting to collect, or some excuse for failure so to do.—*Id.*

[c] (Sup. 1860)

A note was given by defendant to plaintiff, 12 days before the first day of the term, to be collected and accounted for or left with an attorney for collection. The maker lived several miles distant, across an intervening county. To enforce judgment service must have been had 10 days before the first day of the term. *Held*, that plaintiff was not negligent in failing to bring suit at the first term after delivery to him of the note.—*Hall v. Junction R. Co.*, 15 Ind. 362.

[d] (Sup. 1862)

The holder of a note as collateral security may sue on it, and hold the money, when collected, in place of the note or other evidence of that debt.—*Jones v. Hawkins*, 17 Ind. 550.

[e] (Sup. 1872)

The pledgee of choses in action is answerable for reasonable, but not extraordinary, diligence in their collection.—*Reeves v. Plough*, 41 Ind. 204.

The mere fact that notes pledged as collateral security remain uncollected is not presumptive evidence of want of reasonable diligence in the pledgee.—*Id.*

[f] (Sup. 1882)

One to whom a note is delivered as collateral security is not bound to sue thereon, if it is certain that the suit would be fruitless.—*Smith v. Felton*, 85 Ind. 223.

[g] (Sup. 1896)

One who has assigned all his right under a contract as security for a debt cannot, before the maturity of the debt, require the assignee to sue to enforce the contract.—*Reynolds v. Louisville, N. A. & C. Ry. Co.*, 143 Ind. 579, 40 N. E. 410.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PLS. §§ 75-85.

See, also, 31 Cyc. pp. 829, 836; note, 62 L. R. A. 482; note, 34 Am. Dec. 451.

§ 32. Actions for possession or proceeds of property.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PLS. §§ 89-91.

See, also, 31 Cyc. pp. 840-844.

§ 33. — Between pledgor and pledgee.

[a] (App. 1909)

On the issue whether the transaction by which plaintiff's husband pledged her stock included her 300 shares or only 290, the statement of the husband to defendants at the time that it was essential that plaintiff retain 10 shares of the stock to enable her to remain a director, and the fact that she did remain a director, are admissible.—*Hill v. Kerstetter*, 43 Ind. App. 431, 86 N. E. 997, 87 N. E. 695.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PLS. §§ 89, 92.

See, also, 31 Cyc. pp. 841, 842.

§ 34. — Against third persons.

Right to replevy property, see REPLEVIN, § 8.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PLS. § 90.

See, also, 31 Cyc. pp. 842-844.

§ 35. Actions for damages.

Evidence of similar facts, see EVIDENCE, § 129.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PLS. §§ 92-96.

See, also, 31 Cyc. pp. 844-848.

§ 36. — Between pledgor and pledgee.

[a] (Sup. 1859)

If the pledgee of a note settles with the maker and surrenders the note, the pledgor may sue him for the value of the pledge without a prior demand.—*Crawford v. Verry*, 12 Ind. 427.

[b] (Sup. 1859)

The pledgee of a note settled with the maker, taking part cash and the balance in a note to his own order. *Held*, that the owner of the note was entitled to recover from the pledgee the full amount of the note settled for, including the note taken in settlement.—*Depuy v. Clark*, 12 Ind. 427.

[c] (Sup. 1878)

In an action by a pledgor against the pledgee for the conversion of notes transferred as collateral for advances, defendant cannot complain of an instruction directing the jury to charge him with interest on the balance due to plaintiff after deducting advances by him, interest thereon, and compensation for collecting the notes.—*Hazzard v. Duke*, 64 Ind. 220.

Plaintiff pledged notes, secured by mortgage, to defendant as security for a loan. Defendant, without plaintiff's consent, sold the notes and refused to pay any part of the proceeds to plaintiff. *Held*, that the measure of damages was the value of the notes at the time

of sale, which was *prima facie* their face and interest.—Id.

[d] (Sup. 1881)

Where the pledgee of personalty converts it to his own use, the pledgor can sue at once without previous demand, and without having tendered the amount of the debt.—Cox v. Albert, 78 Ind. 241.

[e] (Sup. 1882)

Where a watch was pledged to defendant to secure a loan and defendant disposed of it in exchange for another and a sum of money, such sale was unlawful and constituted a conversion, and rendered unnecessary any formal demand by plaintiff before commencing his action.—Rosenzweig v. Frazer, 82 Ind. 342.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Plgs. §§ 92-94.

See, also, 31 Cyc. pp. 844-847.

§ 38. Assignment of pledge or debt.

[a] (Sup. 1898)

A firm executed several notes to a bank, and secured them by collateral, with the right to substitute other collateral. The bank, to escape indorsing one of the notes, which it desired to sell, had the firm execute a new note to its own order, and indorse the same to the bank, which took it in payment of the first note. The bank then sold the second note, and the purchaser took it with knowledge of the transaction whereby the bank had escaped indorsing it, and with the agreement that it was secured by the collateral. At the maturity of the note, it was renewed, and made payable to the purchaser. *Held*, that the purchaser had a lien on the collateral security in the hands of the bank.—Hawkins v. Fourth Nat. Bank, 49 N. E. 957, 150 Ind. 117.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Plgs. §§ 97-102.

See, also, 31 Cyc. pp. 848-851.

§ 44. Payment or other discharge of debt.

[a] (Sup. 1829)

On payment of the debt for which a note was pledged, the absolute property therein vests in the pawnor; and, if the pawnee afterwards converts it to his own use, he is liable to the pawnor's action of trover.—Elliott v. Armstrong, 2 Blackf. 198.

[b] (Sup. 1886)

Where collaterals are given under agreement that, if the pledgor shall reduce the debt, he may select a proportionate amount of the securities for withdrawal, it is a sufficient reduction of the debt, if it is made in part by rents of property voluntarily mortgaged for the debt, or from the sale thereof.—First Nat. Bank v. Root, 107 Ind. 224, 8 N. E. 105.

[c] (Sup. 1893)

Defendant ordered machinery from plaintiffs, which was to be taken on condition that

he should not acquire title until purchase-money notes should be paid, and that, on failure to pay them, plaintiffs might retake the machinery, and retain what had been paid as hire. Defendant failing to meet the notes, further time was given him, in consideration of an additional note, secured by chattel mortgage on other property, to be held as additional security for the purchase-money notes. On defendant's failure to pay the latter notes, plaintiffs surrendered them, and retook possession of the machinery. *Held*, that the additional note was in the nature of collateral to the purchase-money notes, and it was discharged by the disaffirmance of the sale.—Green v. Sinker, Davis & Co., 135 Ind. 434, 35 N. E. 262.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Plgs. §§ 103-107.

See, also, 31 Cyc. pp. 851-854; note, 33 L. R. A. 237.

§ 45. Return of property on payment or other discharge.

[a] (Sup. 1886)

Where collaterals are given under a contract that the pledgor, in the event of a reduction of the indebtedness by him, shall be entitled to select from the securities pledged an amount equal to the reduction, one to whom the pledgor has sold a part of such securities, less than the amount of such reduction, is entitled to the same as against the pledgee, even though no valuable consideration was given therefor.—First Nat. Bank v. Root, 107 Ind. 224, 8 N. E. 105.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Plgs. §§ 108-117.

See, also, 31 Cyc. pp. 854-857; note, 43 L. R. A. 759.

§ 47. — Recovery of property by pledgor.

[a] (Sup. 1859)

If the pledgee of a note on settlement surrender it to the maker, in consideration of a sum of money equal to the debt for which it was pledged, and a reasonable compensation for collecting the same and another note for the balance, the pledgor may demand either such other note, or the full amount of the original pledge, after deducting the sum which it was pledged, and such reasonable compensation.—Depuy v. Clark, 12 Ind. 427.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Plgs. §§ 111, 112.

See, also, 31 Cyc. pp. 856-858.

§ 49. Redemption.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Plgs. §§ 118-128.

See, also, 31 Cyc. pp. 858-862.

§ 51. — Actions to redeem and for accounting.

[a] (Sup. 1847)

A judgment debtor deposited with the judgment creditor's attorney certain claims as security, taking receipts by which the attorney promised to apply so much of the proceeds as he could collect to the payment of the judgment. *Held* that, had the receipts purported to be for actual payments, an allegation in the answer to the debtor's suit against the creditor for an accounting that the claims were deposited only as security would have been an allegation of new matter, which must have been supported by proof.—*Kiser v. Ruddick*, 8 Blackf. 382.

[b] (Sup. 1853)

If the pledgee of a note settle with the maker and surrender it to him for a sum of money equal to, or greater than, the debt thereby secured, and another note for the balance, the pledgor may maintain suit for the amount of the pledge without first having made a demand.—*Depuy v. Clark*, 12 Ind. 427.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PLS. §§ 122-128.

See, also, 31 Cyc. pp. 860-862.

§ 52. Enforcement.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PLS. §§ 129-194.

See, also, 31 Cyc. pp. 862-890.

§ 55. — Actions on debt or liability secured.

[a] (Sup. 1851)

The taking of collateral security does not bar action on the principal debt.—*Dugan v. Sprague*, 2 Ind. 600.

If the debtor pledge notes as collateral security, he cannot obtain credit therefor in a suit on the principal debt unless he can show that the notes pledged have been or could have been collected.—*Id.*

[b] (Sup. 1860)

Taking collaterals does not bar a suit on the debt secured. To avail as a defense it must appear that the creditor agreed to realize first on the collaterals or that his neglect in that regard has injured the debtor.—*Mills v. Gould*, 14 Ind. 278.

[c] (Sup. 1878)

In an action against an administrator by the holder of a promissory note made by the intestate, it appeared that the plaintiff held as collateral security therefor a judgment in the intestate's favor, secured by a mortgage upon the judgment debtor's property, which judgment had been assigned to him by the intestate at the time of making the note, and that the collateral was good and could be collected, and was more than sufficient to pay the plaintiff's claim against the estate. The answer, in addition to the above facts, alleged that there

was not enough personal property belonging to the estate, other than the judgment thus held by the plaintiff as collateral, after deducting the amount to which the widow was entitled, and other debts and expenses, to pay the plaintiff's claim, and that, if the plaintiff's claim were allowed, real estate would have to be sold to pay it. *Held*, that the answer was sufficient, and that the plaintiff ought to proceed first to realize upon the collateral.—*Alexander v. Alexander*, 64 Ind. 541.

[d] (Sup. 1880)

Bonds received by a creditor from his debtor as collateral only are not required to be returned or tendered before bringing suit on indebtedness, irrespective of whether they were of any value.—*Grant v. School Town of Monticello*, 71 Ind. 58.

[e] (Sup. 1886)

The holder of worthless promissory notes given as collateral security for the performance of a contract may sue at once on the contract without demand, or return of or action upon the notes.—*Olvey v. Jackson*, 106 Ind. 286, 4 N. E. 149.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PLS. §§ 140-151.

See, also, 31 Cyc. pp. 868-871.

§ 56. — Sale of property.

For protection of interests of pledgor, see ante, § 29.

[a] (Sup. 1840)

In the absence of any agreement on the subject, a pledgee of stock cannot sell it without notice of the time and place of sale.—*Evans v. Darlington*, 5 Blackf. 320.

Where a payee of a note pledged it as security to his bail, and the bail, after the maker of the note had been garnished in an attachment action against the payee by a creditor, made a sale thereof, without giving notice to the pledgor to redeem, the maker was liable to the attachment plaintiff for the amount due on the note, and not to the payee for the use of the purchaser from the bail.—*Id.*

[b]* (Sup. 1866)

A stockholder of a bank, being indebted to it, assigned to B., its cashier, certain of its shares in trust to secure the debt. B. was not described in the assignment as cashier, nor did he sign the same as such. On default in payment of the debt, B. sold the stock as provided by the assignment, and the bank became the purchaser. *Held*, that the assignment was to B. personally as trustee, and not as an officer of the bank; and hence the sale to it was valid as against a subsequent purchaser from the assignor.—*Crescent City Bank v. Carpenter*, 26 Ind. 108.

[c] (Sup. 1882)

Where a pledgee unlawfully sells the property pledged otherwise than at public auction,

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no demand nor tender is necessary before bringing suit for conversion.—*Rosenzweig v. Frazer*, 82 Ind. 342.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PLS. §§ 152-183.

See, also, 31 Cyc. pp. 871-883.

§ 57. — Actions to foreclose.

[a] (Sup. 1864)

In a suit to subject to sale a contract for the sale and purchase of land, held as collateral security for the payment of promissory notes, the owner of the legal title to the land is not a necessary party defendant.—*Vaughn v. Cushing*, 23 Ind. 184.

[b] (Sup. 1865)

If the pledgee cannot for any reason demand the payment of the debt from the pledgor and give him notice of the time and place of sale, he must resort to a judicial foreclosure of the lien.—*Indiana & I. C. Ry. Co. v. McKernan*, 24 Ind. 62.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PLS. §§ 184, 185.

See, also, 31 Cyc. pp. 883-885.

§ 58. — Actions to enforce right of action pledged.

[a] (Sup. 1849)

A holder of commercial papers assigned as collateral security can recover no more than the debt actually due him, if any part of such debt has been previously paid.—*Valette v. Mason*, 1 Ind. 288, *Smith*, 89.

[b] (Sup. 1869)

A debtor deposited with his creditor, as collateral security for the debt, a note and mortgage executed to the pledgor by a third person on the express condition that the note should not be sued on until every effort had been made by the pledgee to recover of the pledgor. In a suit on the note by the pledgee against the maker, an answer by the pledgor set forth these facts, and alleged that the pledgor at the time of said deposit and ever since had owned property sufficient to pay the debt out of which it could be made, but that no effort had been made to collect said indebtedness. Held to show a good defense as to the note and mortgage.—*Barr v. Kane*, 32 Ind. 416.

[c] (Sup. 1870)

A creditor who has obtained judgment on a note held by him as collateral security is not thereby prevented from availing himself of his entire claim of another note held by him as collateral security for the same thing.—*Smith v. Hunter*, 33 Ind. 106.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PLS. §§ 186-194.

See, also, 31 Cyc. pp. 885-888; note, 44 L. R. A. 243.

§ 59. — Proceeds and surplus.

Enforcement for protection of pledgor, see ante, § 30.

[a] (Sup. 1851)

Where a debtor gave his creditor collateral security upon the aggregate amount of several separate claims, the proceeds of such collateral security must be applied, pro rata, upon each of the claims.—*Beach v. State Bank*, 2 Ind. 488.

[b] (Sup. 1886)

A creditor who receives collateral security from his debtor, under an agreement to apply it to a specified debt, is bound to apply the avails to the payment of the debt specified.—*Keller v. Orr*, 106 Ind. 406, 7 N. E. 195.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PLS. §§ 134-138.

See, also, 31 Cyc. pp. 864-867.

PLENE ADMINISTRATIVIT.

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PLUMBERS.

Trusts and other combinations to control plumbers' supplies, see MONOPOLIES, § 12.

PLURALITY.

Subjects of acts, see STATUTES, §§ 105-120.

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Criminal responsibility, see WEAPONS, § 14.

POISONS.

See—

Administering as criminal assault. ASSAULT AND BATTERY, § 52.

Judicial notice of. EVIDENCE, § 7.

Murder and attempt to murder by poison. HOMICIDE.

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Sale by druggists. DRUGGISTS, §§ 7-9.

Words imputing crime of poisoning as constituting libel or slander. LIBEL AND SLANDER, § 7.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Poisons.

See, also, 31 Cyc. pp. 896-899.

POLES.

Electric companies, see ELECTRICITY, § 9.

POLICE COURTS.*See—*Jurisdiction. **CRIMINAL LAW**, § 90.Of prosecutions for violations of municipal ordinances. **MUNICIPAL CORPORATIONS**, § 636.**POLICE DEPARTMENT.**See **MUNICIPAL CORPORATIONS**, §§ 179-190.**POLICE JUSTICES.**Criminal jurisdiction, see **CRIMINAL LAW**, § 90.**POLICEMEN.***See—***MUNICIPAL CORPORATIONS**, §§ 179-190.Injuries to. **RAILROADS**, § 381.Trespassers on railroad track. **RAILROADS**, § 355.**POLICE POWER.***See—*Exercise of, as impairing obligation of contracts. **CONSTITUTIONAL LAW**, § 117.As interference with interstate commerce. **COMMERCE**, § 12.Distinguished from power of eminent domain. **EMINENT DOMAIN**, § 2.Municipality. **MUNICIPAL CORPORATIONS**, §§ 589-645.Of state. **CONSTITUTIONAL LAW**, § 81.**Particular subjects of regulation.***See—***ANIMALS**, §§ 49, 91.**BANKS AND BANKING**, §§ 3, 4.**CARRIERS**, § 1.**DRAINS**, § 2.**FISH**, §§ 8, 9.**GAS**, § 1.**HEALTH**, §§ 20, 21.**HIGHWAYS**, §§ 105, 165.**HOSPITALS**, § 3.**INTOXICATING LIQUORS**, §§ 1-12.**LICENSES**, §§ 2-6.**MONOPOLIES**, §§ 9, 10.**NAVIGABLE WATERS**, § 2.Payment of wages of servant. **MASTER AND SERVANT**, § 69.**PHYSICIANS AND SURGEONS**, § 1.**RAILROADS**, §§ 5, 6, 236.**SUNDAY**.**TAXATION**, §§ 2-29.**TELEGRAPHS AND TELEPHONES**, § 26.**THEATERS AND SHOWS**, § 2.**WATERS AND WATER COURSES**, § 182.**POLICE STATIONS.**Establishment and maintenance, see **PRISONS**, § 1.**POLICY.***See—*Insurance. **INSURANCE**.Life insurance payable to person designated as trustee. **TRUSTS**, § 378.Statute, construction as to intent of Legislature. **STATUTES**, § 184.**POLITICAL OPINIONS.**Effect in operation of civil service law, see **MUNICIPAL CORPORATIONS**, § 125.**POLITICAL PARTIES.***See—*Civil service laws. **MUNICIPAL CORPORATIONS**, § 125.Judicial notice as to. **EVIDENCE**, § 23.Nominations and primary elections. **ELECTIONS**, §§ 126-158.Party names, emblems, or devices on election ballots. **ELECTIONS**, § 168.**POLITICAL QUESTIONS.**Judicial power to determine, see **CONSTITUTIONAL LAW**, § 68.**POLITICAL RIGHTS.***See—*Constitutional guaranty of. **CONSTITUTIONAL LAW**, §§ 82-89.**OFFICERS**, § 1.Suffrage. **ELECTIONS**.**POLL.***See—*

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PONDS.*See—*Artificial ponds. **WATERS AND WATER COURSES**, §§ 161-179.Drainage. **DRAINS**, § 5.

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EXECUTION, § 186.

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- As affecting right to exemption. **EXEMPTIONS**, §§ 59, 61.
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 - CLERKS OF COURTS**, § 9.
 - JUDGES**, § 12.
 - JUSTICES OF THE PEACE**, § 11.
 - OFFICERS**, §§ 79-88.
- Purchaser at execution sale. **EXECUTION**, §§ 277-280.
 - At judicial sales. **JUDICIAL SALES**, § 51.
 - At sale on foreclosure of mortgage. **MORTGAGES**, §§ 541-544.
 - At tax sale. **TAXATION**, § 735.
- Railroad as affecting liability for injuries from operation. **RAILROADS**, §§ 256-273.
 - By receiver as possession of company. **RAILROADS**, § 211.
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 - Remedies for recovery—
 - ASSISTANCE, WRIT OF. EJECTMENT.**
 - FORCIBLE ENTRY AND DETAINER**, §§ 1-43.
- Receiver. **RECEIVERS**, §§ 72, 207.
- Recovery of possession by vendor of land. **VENDOR AND PURCHASER**, § 299.
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- Reduction of wife's property to possession by husband. **HUSBAND AND WIFE**, § 11.
- Retention by grantor, element of fraud as to creditors or subsequent purchasers. **FRAUDULENT CONVEYANCES**, §§ 131-154.
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 - EJECTMENT**, §§ 17, 65.
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- Of defendant or third person as defense to action of trespass. **TRESPASS**, § 27.
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- Separate property of wife by husband. **HUSBAND AND WIFE**, § 136.
- Stolen property, evidence of in prosecution for burglary. **BURGLARY**, §§ 38, 42.
- Evidence of in prosecution for larceny. **LARCENY**, §§ 51, 64.
- Instructions, in prosecutions for larceny, as to effect. **LARCENY**, § 77.
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 - Title or claim as ground of estoppel in pais. **ESTOPPEL**, § 66.
- Weapons by person killed or assaulted, admissibility of evidence. **HOMICIDE**, § 193.
- Writ of assistance. **ASSISTANCE, WRIT OF.**
- Writ of possession. **EJECTMENT**, § 120.
 - Injunction to restrain interference with execution of writ of. **INJUNCTION**, § 3.
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See—

- Recovery of personality founded on right of possession. **REPLEVIN.**
- Of property. **DETINUE.**

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Poss. War.
See, also, 31 Cyc. pp. 955-961.

POSTAL CLERKS.

Railway mail clerks as passengers, see **CARRIERS**, § 241.

POSTHUMOUS CHILDREN.

See—

- Accrual of right to interest on legacy. **WILLS**, § 734.
- Birth of as revocation of will. **WILLS**, § 191.
- Right to contest will. **WILLS**, § 206.

POSTING.

See—

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Of proceedings to establish highway. **HIGHWAYS**, § 30.

POSTING AGREEMENTS.

Between carriers, see **CARRIERS**, § 13.

POSTMASTER.

See **OFFICERS**, §§ 30, 55.

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See—

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Admissibility as evidence in prosecution for homicide. **HOMICIDE**, §§ 222-226.
Compensation of physician for making. **PHYSICIANS AND SURGEONS**, § 24.

POST NUPTIAL CONTRACTS.

See—

Marriage settlements. **HUSBAND AND WIFE**, §§ 26-35.
Operation and effect as to dower. **DOWER**, § 42.

POST OFFICE.

Scope-Note.

[INCLUDES conduct and regulation of communication by mail; constitutional and statutory provisions relating thereto; establishment, organization, and powers of post-office department; establishment, change, and discontinuance of post offices, post roads, postal routes, etc.; appointment and removal, rights, powers, duties, and liabilities of postmasters and other postal officers and agents; carriage of the mails and contracts therefor; mailable matter, rates of postage thereon, and receipt and delivery thereof; and violations of postal laws.

[EXCLUDES presumption as to due transmission and delivery of mail (see *Evidence*); and notice by mail (see *Notice; Bills and Notes*; and other specific heads). For complete list of matters excluded, see cross-references, post.]

Analysis.

- I. Post-Office Department, Post Offices, Postmasters, and Other Officers.
- II. Mailable Matter, Transmission and Delivery of Mail, and Money Orders.
 - § 21. Contracts for carrying mails.
 - § 23. Delivery of mail in general.
- III. Offenses Against Postal Laws.
 - § 30. Mailing obscene matter or matter for indecent or immoral use.
 - § 32. — Sealed letters or packages.
 - § 49. Evidence.

Cross-References.

See—

Judicial notice of regulations of. **EVIDENCE**, § 47.

Liability of railroad company for injuries caused by mail pouch thrown from train. **RAILROADS**, §§ 274, 364, 398.

Mailing writing as publication of libel. **LIBEL AND SLANDER**, § 25.

Presumptions as to mailing and delivery of mail matter. **EVIDENCE**, § 71.

Evidence in rebuttal. **EVIDENCE**, § 89.

Railway mail clerks as passengers. **CARRIERS**, § 241.

Sending notice of drainage assessment by mail. **DRAINS**, § 76.

Slander of postmaster. **LIBEL AND SLANDER**, § 10.

I. POST OFFICE DEPARTMENT, POST OFFICES, POSTMASTERS, AND OTHER OFFICERS.

Act limiting number of employes on trains as infringing power of Congress to regulate post-roads, see **RAILROADS**, § 230.

Incompatibility of offices of postmaster and school trustee, see **OFFICERS**, § 30.

Incompatibility of offices of postmaster and township trustee, see **OFFICERS**, § 30.

Right of letter carriers to carry weapons, see **WEAPONS**, § 11.

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Validity of ordinance regulating speed of trains as affected by carriage of mail, see **RAILROADS**, § 236.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. P. O. §§ 1-19.

See, also, 31 Cyc. pp. 974-987.

II. MAILABLE MATTER, TRANSMISSION AND DELIVERY OF MAIL, AND MONEY ORDERS.

§ 21. Contracts for carrying mails.

[a] (Sup. 1887)

In an action for a breach of a contract for carrying the mail, it appeared that the defendant, who was the contractor for carrying the mail triweekly over a certain route, sublet the contract at a stated price for a term of years to the plaintiff. The agreement stipulated for a discharge of the contract on the removal of the defendant before the expiration of the term, and for an increase or decrease of compensation on an increase or decrease of the service. The government subsequently changed the service to a daily one, and the defendant, being dissatisfied with the price, refused to take the contract, and was discharged. *Held*, that the action could not be maintained. The contract between the parties did not require the defendant to enter into a new contract with the government, but gave him the liberty to take or refuse it for such increased service as he might elect.—*Wingate v. McNamar*, 28 Ind. 481.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. P. O. §§ 27-39.

See, also, 31 Cyc. pp. 990-993.

§ 23. Delivery of mail in general.

[a] (App. 1906)

A failure to receive the registry return receipt is notice that the registered letter or package has not been delivered.—*Carr v. First Nat. Bank of Jeffersonville*, 35 Ind. App. 216, 73 N. E. 947, 111 Am. St. Rep. 159.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. P. O. §§ 42, 43.

See, also, 31 Cyc. p. 999.

III. OFFENSES AGAINST POSTAL LAWS.

§ 30. Mailing obscene matter or matter for indecent or immoral use.

Evidence, see post, § 49.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. P. O. §§ 50-52.

See, also, 31 Cyc. pp. 1003-1005; note, 24 L. R. A. 110.

§ 32. — Sealed letters or packages.

[a] (Sup. 1885)

The word "paper," in Rev. St. § 1997, making it an offense to deposit in any post office,

etc., any obscene paper, etc., includes a letter. The construction of such a statute should be reasonable, and the legislative intent considered.—*Thomas v. State*, 103 Ind. 419, 2 N. E. 808.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. P. O. § 51.

See, also, 31 Cyc. p. 1004.

§ 49. Evidence.

Competency of corroborative evidence, see **WITNESSES**, § 414.

[a] (Sup. 1885)

Where, on a prosecution for sending an obscene letter through the mail, there was no direct evidence of defendant's guilt, it is competent for the state to give the next best proof by showing that the letter and address on the envelope were in the handwriting of the defendant.—*Thomas v. State*, 2 N. E. 808, 103 Ind. 419.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. P. O. §§ 84-86.

See, also, 31 Cyc. pp. 1023-1026.

POSTPONEMENT.

See—

Continuance of civil actions. **CONTINUANCE.**

Of criminal prosecutions. **CRIMINAL LAW**, §§ 574-608.

Execution sale. **EXECUTION**, § 223.

Hearing by arbitrators. **ARBITRATION AND AWARD**, § 33.

On application for appointment of receivers. **RECEIVERS**, § 40.

On motion for new trial. **NEW TRIAL**, § 150.

Judgment lien. **JUDGMENT**, §§ 789, 790.

POUNDS.

See—

ANIMALS, §§ 103, 104.

Liability of city for negligence of officers in constructing or maintaining. **MUNICIPAL CORPORATIONS**, § 747.

Power of city to establish. **MUNICIPAL CORPORATIONS**, § 604.

POVERTY.

See **PAUPERS**.

POWDER.

Gunpowder, see **EXPLOSIVES**.

POWER.

See—

Motive power used on railroads. **RAILROADS**, § 115.

On street railroads. **STREET RAILROADS**, §§ 45, 47.

POWERS.

Scope-Note.

[INCLUDES authority reserved by or limited to one or more persons to dispose of property or an estate therein vested in another or others; operation, execution, revocation, and extinguishment of the powers reserved or granted; rights and liabilities of donors or grantors, donees or grantees, and appointees or other beneficiaries of such powers in general; and remedies relating thereto.

[EXCLUDES powers of sale in mortgages and trust deeds (see *Mortgages; Chattel Mortgages*); powers in trust (see *Trusts*); powers granted to mere agents or attorneys, by letters of attorney or otherwise (see *Principal and Agent*); and validity and construction of particular instruments reserving or granting powers (see *Deeds; Wills; Trusts*). For complete list of matters excluded, see cross-references, post.]

Analysis.

I. Creation, Existence, and Validity.

- § 7. To what persons powers may be granted.
- § 10. Validity of powers in general.
- § 12. Modification or revocation.
- § 13. Duration.

II. Construction and Execution.

- § 17. Extent of power granted.
- § 19. — Appointment or revocation.
- § 20. — Sale, exchange, or mortgage.
- § 22. — Management and improvement.
- § 24. Interest of donee or grantee.
- § 25. — In general.
- § 27. Power coupled with an interest.
- § 30. Persons authorized to execute.
- § 31. Time of execution.
- § 32. Mode of execution.
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I. CREATION, EXISTENCE, AND VALIDITY.

Particular testamentary powers, see WILLS, § 689.

§ 7. To what persons powers may be granted.

[a] (App. 1909)

Power to convey a fee may be given to the holder of a life estate.—*Foudray v. Foudray*, 89 N. E. 499.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Powers, § 7.

See, also, 31 Cyc. pp. 1039, 1040.

§ 10. Validity of powers in general.

[a] (Sup. 1900)

A gift of power to dispose of the whole estate annexed to an estate for life with remainder over in fee to a third person is not void for repugnancy and confers on the life tenant plenary power to convey the fee on the terms of the powers granted.—*Rinkenberger v. Meyer*, 56 N. E. 913, 155 Ind. 152.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Powers, §§ 21, 22.

See, also, 31 Cyc. p. 1049.

§ 12. Modification or revocation.

Revocation by death of principal, see post, § 13.

[a] (Sup. 1856)

An order by a corporation directing that certain land be placed in the hands of one of its creditors for the purpose of settling the amount due such creditors and other liabilities of the corporation, such creditors to account to the court for the balance, does not vest in the creditor a power coupled with an interest, so as to prevent its revocation by the corporation.—*Jeffersonville Ass'n v. Fisher*, 7 Ind. 699.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Powers, §§ 24, 25.

See, also, 31 Cyc. pp. 1051–1056.

§ 13. Duration.

[a] (Sup. 1856)

In case of a naked power, the death of the principal puts an end to it, but if by virtue of the power the title to the thing has passed to the agent, it is irrevocable either by the death or act of the principal.—*Jeffersonville Ass'n v. Fisher*, 7 Ind. 699.

[b] (Sup. 1873)

A power to sell, coupled with an interest in the thing to be sold, survives the grantor of the power; otherwise, where the interest is in the proceeds only of the thing.—*Hawley v. Smith*, 45 Ind. 183.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Powers, §§ 26–29.

See, also, 31 Cyc. pp. 1051–1056.

II. CONSTRUCTION AND EXECUTION.

Particular testamentary powers, see WILLS, §§ 690–694.

§ 17. Extent of power granted.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Powers, §§ 36–GS.

See, also, 31 Cyc. pp. 1058–1088.

§ 19. — Appointment or revocation.

[a] (Sup. 1884)

A will gave testator's widow his entire property for her life, with power to specifically dispose of the "remaining part" by will, and also gave her his "stock, personal property, and money during her natural life." *Held*, that she could not create any charge on the property for her last sickness and funeral expenses, to operate after her death.—*Hopkins v. Quinn*, 93 Ind. 223.

[b] (Sup. 1884)

A will devising all the testator's property to his wife during life, and directing that at her death it should be equally divided between his four children, also authorized her to divide such property or any portion of it among said children during her life. *Held*, that it did not authorize her to advance to one of the children \$2,000, without any division among the other children.—*Farmer v. Farmer*, 93 Ind. 435.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Powers, §§ 36–47.

See, also, 31 Cyc. pp. 1058–1073.

§ 20. — Sale, exchange, or mortgage.

[a] (Sup. 1874)

Testator, after bequeathing to his wife certain personal property, directed his executor to convert the residue of the estate into money, to place the same at interest, and to pay the interest in semiannual installments, \$600 annually, to the widow during her life. The will provided that if the annual rents and profits of the realty, in the opinion and discretion of the executor, should exceed the interest at 10 per cent. of the moneys which might be realized from the sale of the real estate, then the real estate should not be sold during the life of the widow without her consent, and that, if the rents of the real estate and the income of the investments were not sufficient to produce the annuity, the deficiency should be made out of the principal. *Held* that, when the funds had been invested so as to produce \$600, the executor could not sell the real estate unless required by the widow.—*Mack v. Mulcahy*, 47 Ind. 68.

[b] (Sup. 1888)

A testator bequeathed to his wife all the residue of his personalty, and provided that whatever was undisposed of after her death should descend to his heirs. *Held* that, the widow having at least an absolute power of disposition, the assignment without consideration of a note for money received by her under the

will and loaned, was an effectual exercise of her power, and testator's administrator with the will annexed had no right to the note.—*Tower v. Hartford*, 115 Ind. 186, 17 N. E. 281.

[c] (Sup. 1890)

Under a will empowering the executors to settle, adjust, and compromise all debts of the testator, to make settlements with his former partners without authority from any court, and to sell and convey at public or private sale any of testator's land in order to pay his debts, the executors have power to convey the testator's interest in a firm whose assets are chiefly land, in consideration of an agreement by the purchaser to pay the firm debts, and also certain individual debts of the testator.—*Valentine v. Wysor*, 123 Ind. 47, 23 N. E. 1076, 7 L. R. A. 788.

[d] (Sup. 1894)

Under a will which gives and bequeaths to the wife of the testator "all the property, money, and effects" belonging to testator, "to dispose of at her own discretion, and if she see cause to sell the real estate I hereby authorize her to do so, to make, execute a deed without order of court," and providing that after the death of the wife the remaining property shall be divided between testator's daughters, the widow has power to convey the fee of testator's land.—*McMillan v. William Deering & Co.*, 139 Ind. 70, 38 N. E. 398.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Powers, §§ 48-65.

See, also, 31 Cyc. pp. 1074-1082; notes, 12 Am. Dec. 102, 87 Am. Dec. 209; note, 50 Am. Rep. 548.

§ 22. — Management and improvement.

[a] (Sup. 1874)

Testator bequeathed to his wife certain personal property, directing that the residue of his estate should be converted into money by his executor, who was directed to place the proceeds at interest, and to pay the interest in semiannual installments, \$600 annually, to the widow during her life; such annuity to be in lieu of her right of dower. The will provided that, if the annual rents and profits of the real estate were not sufficient to produce the annuity, the deficiency should be paid out of the principal, so that the widow should be secured a sufficient support, not to exceed \$600 annually. *Held*, that it was not necessary to convert the entire real estate into money, but the annuity was to be paid to the wife from rents of the real estate and interest on investments, and, if not realized therefrom, the deficiency was to be made up from the principal estate.—*Mack v. Mulcahy*, 47 Ind. 68.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Powers, §§ 66-68.

See, also, 31 Cyc. p. 1087.

§ 24. Interest of donee or grantee.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Powers, §§ 71-77.

See, also, 31 Cyc. pp. 1088-1094; note, 41 Am. Dec. 704.

§ 25. — In general.

[a] (Sup. 1861)

A naked power of disposition given by will to an executor gives him no title to the land.—*Thompson v. Schenck*, 16 Ind. 194.

[b] (Sup. 1910)

A power of appointment in a grantee is not an estate.—*Beatson v. Bowers*, 91 N. E. 922.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Powers, §§ 71-75.

See, also, 31 Cyc. pp. 1088, 1089.

§ 27. Power coupled with an interest.

[a] (Sup. 1856)

A power coupled with an interest is created by an instrument which vests the title to the subject of the agency in the agent, in such manner that he may execute the power in his own name.—*Jeffersonville Ass'n v. Fisher*, 7 Ind. 609.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Powers, § 78.

See, also, 31 Cyc. p. 1043.

§ 30. Persons authorized to execute.

[a] (Sup. 1884)

Where powers were conferred by will on one as executor and as trustee, and it was contended that the term "executor" was used in certain instances in the sense of trustee, the fact that the power given in that connection was one not within the power of an executor as such—as, for instance, to sell land without application to the court—tended to show that the power vested in the donee as trustee and not as executor.—*Munson v. Cole*, 98 Ind. 502.

[b] (Sup. 1887)

2 Rev. St. 1876, p. 529, § 92, provides that when real estate is devised by will to be sold to pay legacies or debts, the executor shall proceed to sell according to the provisions of the will. A testator provided by will that his real estate should be sold, and the proceeds invested for the benefit of his wife. No executor being named in the will, an administrator was appointed. *Held*, that the administrator with will annexed could sell the real estate without an order of court.—*Davis v. Hoover*, 112 Ind. 423, 14 N. E. 468.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Powers, §§ 82-88.

See, also, 31 Cyc. pp. 1096-1110; note, 80 Am. St. Rep. 96.

§ 31. Time of execution.

[a] (Sup. 1887)

The first clause of a will provided that the widow should receive the rents of certain real estate; the last clause, that it should be sold, and the proceeds invested, and the income paid to the widow. *Held*, that it was the duty of the executor to sell in a reasonable time.—*Davis v. Hoover*, 112 Ind. 423, 14 N. E. 468.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Powers, §§ 99-103.

See, also, 31 Cyc. pp. 1111-1115.

§ 32. Mode of execution.

[a] (Sup. 1868)

Where a power is coupled with an interest, the law is satisfied with a substantial compliance with the terms of the power.—*Rowe v. Becket*, 30 Ind. 154, 95 Am. Dec. 676; *Rowe v. Lewis*, 30 Ind. 163.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Powers, §§ 104-109, 128-132.

See, also, 31 Cyc. pp. 1115-1117.

§ 33. Intent to execute.

[a] (Sup. 1874)

Where a testator devised to his wife all his real and personal property, to settle his debts, expenses, and claims, to have and to hold during her life, and to dispose of at her death at her pleasure, a warranty deed in fee simple, executed by the devisee, which made no reference to the will by which the power of disposition was given, and contained no evidence of the intention to execute the power, conveyed only the life estate of the devisee.—*Dunning v. Vandusen*, 47 Ind. 423, 17 Am. Rep. 709.

[b] (Sup. 1881)

Where a life estate, with the power to convey the fee, is devised to one who sells and conveys in fee, the deed, containing no express reference to the power, conveys only the life estate of the grantor.—*Axtel v. Chase*, 77 Ind. 74.

[c] (Sup. 1882)

Where testator devised to his wife all his property, real and personal, during her life, with power of disposition, and, if anything should remain, the same to be divided among his heirs at law, the execution of a deed by the wife to the whole of the real estate, with a covenant that she was lawfully seised of the same in fee simple, was such an execution of the power to convey as to vest in the purchaser the whole estate in fee.—*Clark v. Middlesworth*, 82 Ind. 240.

[d] (Sup. 1883)

In executing a power by mortgage, will, or otherwise, the power need not be referred to.—*South v. South*, 91 Ind. 221, 46 Am. Rep. 591.

[e] (Sup. 1887)

Where an estate is devised with power of disposition, the deed of the devisee will carry

the fee, and will be referred to the power contained in the will.—*Silvers v. Canary*, 109 Ind. 267, 9 N. E. 904.

[f] (Sup. 1891)

A power may be executed without a reference to the instrument creating it.—*Crew v. Dixon*, 27 N. E. 428, 129 Ind. 85.

[g] (Sup. 1894)

Where testator bequeathed to his wife "all property, money and effects" belonging to him to dispose of at her own discretion, and, if she saw cause to sell the real estate, authorized her to do so, and to make and execute a deed without order of court, and providing that, after the wife's death, the remaining property should be divided between testator's daughters, it would be presumed that a conveyance made by the widow was made in the exercise of the power, though there was no statement that such was the intention in the deed, but such presumption could obtain only from considerations entirely independent of the price paid, and, if the consideration paid was entirely disproportionate to the value of the fee and proportionate to the value of the life estate, that fact would be a circumstance in rebuttal of the presumption.—*McMillan v. William Deering & Co.*, 38 N. E. 398, 139 Ind. 70.

[h] (Sup. 1900)

Where a donee of a power to sell land, possessing a life estate in the subject of the power, executes a general warranty deed conveying the fee, for a consideration equal to the value of the fee, without reciting the power in the deed, it is a valid execution of the power.—*Rinkenberger v. Meyer*, 56 N. E. 913, 155 Ind. 152.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Powers, §§ 110-120; 16 CENT. DIG. Deeds, § 406.

See, also, 31 Cyc. pp. 1121-1131.

§ 34. Instrument of execution.

Description of property in devise or bequest in execution of power, see WILLS, § 589.

[a] (Sup. 1884)

Where a will gave to testator's wife all his property, real and personal, to use, sell, and dispose of as she might see fit "for her own comfort and convenience," with power to convey the real estate in fee simple, and a subsequent clause directed that the residue of his property or moneys, if any should be left after her death and full payment of her funeral expenses, be equally divided between his children, the wife could not dispose of such property by will.—*John v. Bradbury*, 97 Ind. 263.

[b] (Sup. 1894)

Where a testator gave to his wife a power to convey real estate devised to her for life and she conveyed the same by deed purporting to convey the fee, the title of the purchaser was not derived from the wife, but through her, and it was therefore immaterial that she was under

legal disabilities at the time.—*McMillan v. William Deering & Co.*, 38 N. E. 398, 139 Ind. 70.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Powers, §§ 121-127.

See, also, 31 Cyc. pp. 1117-1120.

§35. Supervision of execution by courts.

[a] (Sup. 1879)

Under an express trust, with power to sell and convey, it is not necessary that the trustee should apply to a court to authorize the sale, nor to give bond, unless required, for the execution of the trust; nor can the title in the vendee be questioned for want of consideration.—*Iles v. Martin*, 69 Ind. 114.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Powers, §§ 133-136.

See, also, 31 Cyc. pp. 1133-1135.

§36. Validity and sufficiency of execution.

[a] (Sup. 1864)

Where a testatrix devised land to her husband for life, on condition that he should suitably provide for his daughter, and gave him power to sell the property in fee simple in case such sale became necessary for the support of either himself or his daughter, and the husband, acting erroneously but honestly, conveyed such property, any defect in such sale was cured by Act March 7, 1863 (Acts 1863, p. 16), providing that all sales of real estate heretofore made in good faith by trustees in conformity with the provision of any deed of trust or will, and for which a full consideration has been paid to the party entitled thereto, are confirmed and made valid, and declared to vest a lawful title to the land in the purchasers thereof.—*Price v. Huey*, 22 Ind. 18.

[b] (Sup. 1910)

The donee of a power cannot derive any pecuniary or private benefit direct or indirect, by executing the power.—*Beatson v. Bowers*, 91 N. E. 922.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Powers, §§ 137-149, 155.

See, also, 31 Cyc. pp. 1135-1143; note, 64 L. R. A. 849.

§42. Rights and liabilities of purchasers.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Powers, §§ 157-164.

See, also, 31 Cyc. pp. 1150, 1151.

§43. — In general.

[a] (Sup. 1884)

Where a testatrix by her will gave certain property to her husband for and during his natural life, on condition that he should suitably provide for their daughter during their joint lives, and empowered him to sell and convey the same in fee simple, should it become necessary

either for his support or for the support of his daughter, in which case the avails of the property were to be applied in part or in whole as the circumstances of the husband or daughter might require, there was a full power in the husband to sell the real estate, and bona fide purchasers from the husband would take a valid title.—*Price v. Huey*, 22 Ind. 18.

[b] (Sup. 1884)

A testator by his last will gave all his estate to his mother, "to hold and enjoy the same during life, with full power to sell the same or any part thereof and appropriate the proceeds to her own benefit; and all deeds and conveyances of real estate by her made shall pass a title in fee to the purchaser, it being my will that she shall enjoy the same as if it were devised to her in fee." A second item of the will stated, "After the death of my mother I devise all the said estate to my brother C." The mother afterwards executed a warranty deed of a portion of the land so devised to her, receiving full consideration for the conveyance. *Held*, that the mother intended to execute the power of disposition conferred on her by testator's will, and that by such deed she conveyed, not merely her life estate in the real estate described in the deed, but also the absolute title in fee simple in and to such real estate.—*Downie v. Buennagel*, 94 Ind. 228.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Powers, §§ 157, 159-163.

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PRINCIPAL AND AGENT.

Scope-Note.

[INCLUDES the relation of agency created by letters of attorney or other express appointment, or arising by implication; extent and exercise of the authority conferred and ratification of assumed authority; rights, powers, duties, and liabilities of the parties as between themselves and as to others incident to the relation; and legal proceedings relating thereto.

[EXCLUDES agency implied from or incident to the marital or parental relations (see *Husband and Wife*; *Parent and Child*); agency involved in the exercise of a particular vocation or occupation (see *Attorney and Client*; *Brokers*; *Factors*; *Insurance*; and other specific heads); and corporate or public officers and agents (see *Corporations*; *Officers*; and titles of particular officers). For complete list of matters excluded, see cross-references, post.]

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Validity of agency created on Sunday, see **SUNDAY**, § 11.

§ 3. Agency distinguished from other relations.

Sale distinguished from agency, see **SALES**, § 7.

[a] (*Sup.* 1866)

Where an owner of land warrants agrees with another that he shall locate the same, and after payment of all expenses should receive an interest in the land for his services, it creates the relation of principal and agent, and not a partnership.—*Ellsworth v. Pomeroy*, 26 Ind. 158.

[b] (*Sup.* 1887)

One who is employed by the purchasers of goods at sheriff's sale to dispose of the goods for

them, and who deposits the proceeds of sales made from time to time in bank to his account as "trustee," using the word "trustee" because he has another account with the bank as "agent," is nevertheless only an agent, and not a trustee, as to the fund so deposited.—*Rowe v. Rand*, 111 Ind. 206, 12 N. E. 377.

[c] (App. 1894)

There is in legal contemplation a difference between an agent and a servant. Agency relates to commercial or business transactions, and always imports commercial dealing between two parties by or through the medium of another, while service has reference to actions on and concerning things and deals with matters of manual or mechanical execution.—*Kingan & Co. v. Silvers*, 37 N. E. 413, 13 Ind. App. 80.

[d] (App. 1900)

Under an instrument in the form of a lease a party named as lessee was to have control of a factory, and was to return to the company owning the plant the profits of the business over a fixed amount. The lessee was to have authority to employ and discharge servants to work in the factory, and no restrictions as to the management of the business were reserved by the lessor. *Held*, that the relation of landlord and tenant, and not that of partnership or agency, was created by such instrument.—*Ault Wooden-Ware Co. v. Baker*, 58 N. E. 265, 26 Ind. App. 374.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 3-12;

32 CENT. DIG. Land. & Ten. § 10.

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§ 7. Appointment of agent.

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FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 16-25.

See, also, 31 Cyc. pp. 1215, 1216.

§ 10. — Letters or powers of attorney under seal.

Authority conferred, see post, § 97.

Contract of employment by corporation, power to make, see CORPORATIONS, § 456.

[a] (Sup. 1861)

A written power of attorney to sell land need not be acknowledged or recorded.—*Moore v. Pendleton*, 16 Ind. 481.

[b] (Sup. 1888)

A power of attorney is valid as between the parties, and for all ordinary purposes, with-

out being recorded. Its recording is only material when notice to third parties is requisite.—*Caley v. Morgan*, 114 Ind. 350, 16 N. E. 790.

[c] (Sup. 1890)

A power of attorney to sell land and receive payment, though ineffectual, because the officer who took the acknowledgment was not authorized thereto, confers authority to make an executory contract for the sale of land, which is not affected by the subsequent marriage of the principal.—*Joseph v. Fisher*, 122 Ind. 399, 23 N. E. 856.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 19-23.

See, also, 31 Cyc. pp. 1216, 1217, 1229, 1230.

§ 11. — Instruments in writing not under seal.

[a] (Sup. 1897)

A contract of sale by an agent could not be enforced against the principal, where it appeared that the letter granting authority to the agent to make the contract was written without the authority of the principal, and his name signed without authority, and that he promptly repudiated the letter when it came to his knowledge and never ratified the act of the agent.—*Campbell v. Galloway*, 47 N. E. 818, 148 Ind. 440.

FOR CASES FROM OTHER STATES,

See, also, 31 Cyc. pp. 1216, 1217, 1227.

§ 14. Implied agency.

Implied authority of agent, see post, §§ 98-114.

[a] (Sup. 1877)

Where a creditor prepared a note payable to himself, and a mortgage on real estate belonging to his debtor's wife to secure such note, and sent them to the debtor to sign and to procure his wife's signature, he thereby constituted the debtor his agent for such purpose, and was bound by the representations which the husband made in order to secure the wife's signature.—*Haskit v. Elliott*, 58 Ind. 493.

[b] (Sup. 1850)

Where a son consented to and did receive an instrument evidencing an obligation from his father, and agreed to deliver it to the obligee, who had no notice thereof, on the father's death, the son became the trustee or agent to accept delivery for the third person.—*Hockett v. Jones*, 70 Ind. 227.

[c] (Sup. 1881)

A debtor, who has received from his creditor a note, either in blank or filled up, with a request that he get security thereon, is not thereby made the creditor's agent for that purpose.—*Helms v. Wayne Agricultural Co.*, 73 Ind. 325, 38 Am. Rep. 147.

[d] (Supp. 1881)

Plaintiff gave a banker some money to pay certain notes held by him for collection, which he misappropriated. *Held*, that the right of action was in the creditor as against the banker, who was his agent, and not in plaintiff.—*Worley v. Moore*, 77 Ind. 567.

[e] (Supp. 1886)

Where a person assumes to bind another in respect to the purchase of property in his absence, some relation must be shown to exist between the person contracting and the one contracted for, and, unless such authority is shown, or unless it appears that the person for whom it was made afterwards ratifies it on a sufficient consideration, it created no obligation against him.—*Carnahan v. Hughes*, 9 N. E. 79, 108 Ind. 225.

[f] (App. 1892)

An instruction that if defendant corporation authorized H. to erect a house for them with their money, and he, having done so for the purpose of selling their beer or keeping the same, thereafter printed in large letters on the side of the house the name of defendant with the words "L. H., Agent," and such fact came to defendant's knowledge, but it did nothing to prevent him from keeping the sign where the public would see it, that would constitute a holding out of H. as their agent, was not error.—*Foss-Schneider Brewing Co. v. McLaughlin*, 31 N. E. 838, 5 Ind. App. 415.

[g] (App. 1893)

Though the payee of a note told the maker to get a certain person as surety thereon, this would not constitute the maker the payee's agent, so as to charge the payee with notice that the signature of such person was a forgery.—*Wheeler v. Barr*, 7 Ind. App. 381, 34 N. E. 591.

[h] (App. 1897)

A complaint which alleges that defendant, as a general loan agent, had an arrangement with a local agent to procure and forward applications, dividing the commissions on the loans; that such local agent procured an application from plaintiff, which he forwarded to defendant, who returned to the local agent a draft for the amount of the loan, and the papers to be executed, with instructions to him to see that all prior liens were paid therefrom; that plaintiff thereupon indorsed the draft to the local agent, who converted to his own use the amount of a prior lien, which he claimed to have paid,—states a cause of action for the recovery of the amount from defendant.—*Day v. Dages*, 46 N. E. 589, 17 Ind. App. 228.

[i] (App. 1905)

A contractor for public work, who sublets his contract with an agreement that a subcontractor shall pay all debts contracted in the construction of the work, and that the contractor shall collect the pay and retain enough to pay such debts in case such subcontractor fails or refuses to pay same, does not thereby con-

stitute such subcontractor his agent for the performance of such work, and the debts contracted in such work are those of the subcontractor.—*Miller v. State ex rel. Prather*, 35 Ind. App. 379, 74 N. E. 280.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 26-33.
See, also, 31 Cyc. pp. 1217-1218; note, 42 C. C. A. 221.

§ 18. Evidence of agency.

As preliminary to admission of declarations against interest of principal, see EVIDENCE, § 258.

Competency of agent to prove agency, see WITNESSES, § 100.

Evidence as to authority of agent, see post, §§ 118-123.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 36-41.
See, also, 31 Cyc. pp. 1638-1667.

§ 19. — Presumptions and burden of proof.

[a] (App. 1908)

Where it appeared that one owning money, handled and loaned for her by another, had given to such agent a power of attorney, in an action to enjoin the collection of omitted taxes assessed against such property, the burden of proving a revocation of the power of attorney was on plaintiff.—*Hathaway v. Edwards*, 42 Ind. App. 22, 85 N. E. 28.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. § 36.
See, also, 31 Cyc. pp. 1638-1650; note, 1 L. R. A. (N. S.) 891.

§ 20. — Admissibility in general.

[a] (Supp. 1869)

As steps in proving the authority of one as an agent in the transaction in controversy, evidence of his similar transactions with different persons and one of his declarations therein was admissible.—*Morehead v. Murray*, 31 Ind. 418.

[b] (App. 1892)

Proof that the principal permitted the person alleged to be his agent to perform similar acts and transactions with other persons is competent to establish agency.—*Barnett v. Gluting*, 3 Ind. App. 415, 29 N. E. 154, 927.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 37, 38.
See, also, 31 Cyc. pp. 1650-1667.

§ 21. — Testimony of agent.

Competency of husband or wife to prove agency for the other, see WITNESSES, § 56.

[a] (App. 1902)

One assuming to act as a subagent cannot establish his right to represent the principal by

his own testimony.—*Lucas v. Rader*, 64 N. E. 488, 29 Ind. App. 287.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & A. § 39.

See, also, 31 Cyc. pp. 1651-1652.

§ 22. — Declarations and acts of agent.

Order of proof, see TRIAL, § 60.

Striking from deposition, see DEPOSITIONS, § 83.

[a] (Sup. 1872)

Evidence of the mere statement of a conductor or agent of a railroad company that he is such conductor or agent should not be received as proof of the fact; but one who has control of a train, and exercises the authority of a conductor, may rightfully be presumed to be such, aside from his declarations.—*Columbus, C. & I. C. Ry. Co. v. Powell*, 40 Ind. 37.

[b] (Sup. 1882)

Agency cannot be proved by the mere acts and declarations of one assuming to act in that capacity.—*Johnston Harvester Co. v. Bartley*, 81 Ind. 406.

[c] (App. 1889)

Where the fact of agency is otherwise proved, it is not error to overrule an objection to the admission of a telegram pertaining to the business of the agency upon the ground that it is a paper prepared by the agent to prove his agency.—*Phenix Ins. Co. v. Jacobs*, 55 N. E. 778, 23 Ind. App. 509.

[d] (App. 1904)

Plaintiff sued for injuries sustained in a collision between a vehicle, in which she was riding, and a horse negligently ridden by defendant's minor son, "while performing services for him and under his direction." On the trial, to prove agency, a witness testified to a conversation had with the son on the day of the accident, in which the boy said that he had been to his grandfather's, and that his father told him to go there on an errand. *Held*, that the evidence was hearsay and inadmissible.—*Broadstreet v. Hall*, 69 N. E. 415, 32 Ind. App. 122.

[e] (Sup. 1905)

Declarations of an alleged agent to a third party, in the absence of his principal, are insufficient to establish the agency.—*Blair-Baker Horse Co. v. First Nat. Bank*, 72 N. E. 1027, 164 Ind. 77.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & A. § 40.

See, also, 31 Cyc. pp. 1652-1656.

§ 23. — Weight and sufficiency.

Writing another's name to a contract at his request as appointment of agent within statute rendering testimony against a deceased party to the contract incompetent, see WITNESSES, § 141.

[a] (Sup. 1888)

Proof that an engineer of a railroad company was openly superintending the construction of a culvert on the line of its road, under such circumstances as imply knowledge on the part of the company, makes a prima facie case of agency.—*Indiana, B. & W. Ry. Co. v. Adamson*, 114 Ind. 282, 15 N. E. 5.

[b] (App. 1896)

In an action for the statutory penalty for being deprived of the privileges of an inn, evidence that the plaintiff was one of a football team, which by invitation was visiting another team and had accepted its proffered entertainment, and that the manager of the home team contracted with defendant for their entertainment, is sufficient to establish the agency of said manager.—*Fruchey v. Eagleson*, 15 Ind. App. 88, 43 N. E. 146.

[c] (App. 1902)

Evidence in an action to recover law books sold to defendant by one who claimed to act as plaintiff's subagent examined, and *held* to show neither agency for the particular sale, nor subagency, and hence to be insufficient to sustain a verdict for defendant.—*Lucas v. Rader*, 64 N. E. 488, 29 Ind. App. 287.

[d] (App. 1908)

The relation of principal and agent may be shown by circumstantial evidence alone, and relationship between the principal and agent may be considered as one of the circumstances; and hence the authority of a father to sign his son's name to a note as surety may be shown by a business custom, whereby the father was in the habit of signing both their names to notes, which the son would honor.—*Broadstreet v. McKamey*, 41 Ind. App. 272, 83 N. E. 773.

[e] (App. 1908)

In an action to foreclose a mechanic's lien for the erection of a furnace, evidence examined, and *held* to show that defendant acted as agent for those holding the legal title in contracting with plaintiff for the installation of the furnace.—*Beach v. Huntsman*, 42 Ind. App. 205, 85 N. E. 523.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & A. § 41.

See, also, 31 Cyc. pp. 1667-1668.

§ 24. Questions for jury.

[a] (App. 1908)

Whether, upon a given state of facts, a person is or is not an agent of another is a question for the court.—*Michigan Mut. Life Ins. Co. v. Thompson*, 86 N. E. 503.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & A. §§ 722, 723.

See, also, 31 Cyc. pp. 1672-1674.

§ 25. Estoppel to assert or deny agency.

[a] (Sup. 1882)

Where one represents to another that a certain person is his agent and thereby induces

the other to act on the belief that the agency exists, an action may be maintained against him for the agent's negligence, though the agency did not in fact exist.—*Growcock v. Hall*, 82 Ind. 202.

[b] (App. 1892)

A person who holds out another as his agent, by placing him in control of his property, is bound by the contracts of such agent, made within the scope of such ostensible authority, with third persons relying on such appearances, though the agent in fact had no authority.—*Barnett v. Gluting*, 3 Ind. App. 415, 29 N. E. 154, 927.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 42-45.

See, also, 31 Cyc. pp. 1234-1245.

§ 26. Scope and extent of agency.

Scope of agency as affecting imputation to principal of knowledge of agent, see post, § 178.

[a] (Sup. 1888)

Authority to assign a judgment can be conferred by power of attorney.—*Caley v. Morgan*, 114 Ind. 350, 16 N. E. 790.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 46, 47.

See, also, 31 Cyc. pp. 1322-1404.

§ 27. Assignment of contracts of agency.

[a] (Sup. 1904)

Assent by the principal to the assignment of a contract of agency is equivalent to an agreement to substitute the assignee as agent.—*Albany Land Co. v. Rickel*, 70 N. E. 158, 162 Ind. 222.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. § 40.

See, also, 31 Cyc. pp. 1425, 1426.

§ 28. Duration.

[a] (Sup. 1890)

Where authority is delegated to an agent to transact certain business which requires continuous negotiations or which is not fully ended by a single act, but requires a series of acts to complete it according to the intention of the parties and commercial usages, the authority of the agent does not expire with the performance of one act, though that act may be of prime and controlling importance.—*Cleveland, Columbus, Cincinnati & Indianapolis Ry. Co. v. Closser*, 26 N. E. 159, 126 Ind. 348, 22 Am. St. Rep. 593.

[b] (App. 1909)

Authority in a continuous transaction does not expire with performance of one act in course of negotiations, however important it may be.—*Wolcott v. Hayes*, 43 Ind. App. 578, 88 N. E. 111.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. § 50.

See, also, 31 Cyc. p. 1292.

(B) TERMINATION.

Acting after termination of authority, see post, § 151.

§ 31. Fulfillment of purpose.

[a] (Sup. 1864)

The authority of an agent appointed for a special purpose ceases when that purpose is accomplished.—*Bragg v. Bamberger*, 23 Ind. 198.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. § 53.

See, also, 31 Cyc. pp. 1292, 1293.

§ 32. Revocation by principal.

Burden of proving revocation, see ante, § 19.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 54-63.

See, also, 31 Cyc. pp. 1294-1305.

§ 33. — Right to revoke in general.

[a] (Sup. 1856)

Where a party has directed another to execute and deliver a mortgage on his own property to a third person, such party cannot revoke his act after others have acquired vested rights under it.—*Mallett v. Page*, 8 Ind. 364.

[b] (Sup. 1860)

A power of attorney to confess a judgment is not revocable by act of the party giving it.—*Kindig v. March*, 15 Ind. 248.

[c] (Sup. 1862)

A power of attorney to one, giving no interest to the attorney, and executed by an infant, may be revoked at pleasure.—*Pickler v. State ex rel. Brickley*, 18 Ind. 266.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. § 54.

See, also, 31 Cyc. pp. 1300, 1301.

§ 36. — Acts constituting revocation in general.

[a] (Sup. 1887)

Where two principals jointly appoint an agent to sell certain real estate bought in by both at sheriff's sale, and to divide the proceeds according to an agreed ratio, a severance of the joint interest revokes the agency.—*Rowe v. Rand*, 111 Ind. 206, 12 N. E. 377.

[b] (Sup. 1894)

B., who owned land mortgaged by his grantor at the time it was defectively sold to satisfy the mortgage, gave T. a power of attorney to recover the land, and empowered him to sell and convey it, receiving at the time a contract from T. to purchase the land for a certain sum. The land was recovered by T. in a suit in B.'s name, but ordered to be resold to satisfy the mortgage. *Held*, that the recovery

of the land under the power of attorney, and the determination by the court of the proportion of the surplus to be paid B. when the land should be resold, did not annul T.'s power to convey.—*Bell v. Corbin*, 136 Ind. 269, 36 N. E. 23.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & A. §§ 57-58½.
See, also, 31 Cyc. pp. 1302-1304.

§ 38. — Notice of revocation.

[a] (Sup. 1859)

In a suit for specific performance, it appeared that A., as agent of B., sold to C. and took his notes. Afterwards B. appointed D. his agent to sell the land. C. thereupon agreed to give up his first contract, and buy of D. for a larger sum, and afterwards C. paid the original notes to A., in whose hands they had remained. *Held*, that C. had notice of the revocation of the first agency by the creation of the second.—*Clark v. Mullenix*, 11 Ind. 532.

[b] (App. 1893)

Where, after a local agent sells a machine with warranty that it shall do good work, and provision that, if it is not made to do so, it may be returned, acts of his relative to a compliance with such warranty, done after termination of his agency, bind his principal, the purchaser having no knowledge of such termination.—*Springfield Engine & Thresher Co. v. Kennedy*, 7 Ind. App. 502, 34 N. E. 856.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & A. §§ 60, 62.
See, also, 31 Cyc. p. 1304.

§ 39. — Time of taking effect.

[a] (App. 1892)

The revocation of an agency becomes operative as to the agent from the time it is actually made known to him. Third parties dealing bona fide with one who has been accredited to them as an agent are not affected by the revocation of his agency, unless notified of such revocation.—*Miller v. Miller*, 30 N. E. 535, 4 Ind. App. 128.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & A. § 61.
See, also, 31 Cyc. p. 1305.

§ 40. — Evidence of revocation.

Burden of showing revocation of power of attorney by mutual agreement, see EVIDENCE, § 91.

[a] (Sup. 1855)

If an agent continues to act within the scope of his agency, the burden of proof is upon the principal to show that the act complained of was done after the agency was terminated, and, by permitting another to hold himself out to the world as his agent, the principal adopts his acts, and will be bound to the person who gives credit thereafter to the other in

his capacity of agent.—*Pursley v. Morrison*, 7 Ind. 356, 63 Am. Dec. 424.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & A. § 63.

§ 41. — Damages for revocation.

[a] (Sup. 1881)

Where one has paid a consideration for an agency, under an agreement that he is to be allowed to hold it for a reasonable time, and he is wrongfully dismissed before the expiration of such time, he is entitled, as a part of his damages, to have a part of the consideration refunded, and is not confined merely to nominal damages.—*Niagara Fire Ins. Co. v. Greene*, 77 Ind. 590.

§ 43. Death of principal.

[a] (Sup. 1873)

The death of the principal revoked an agency for the purchase of lands with the principal's money to be cared for by the agent who was to be compensated from any surplus from sales over the amount invested and interest thereon.—*Hawley v. Smith*, 45 Ind. 183.

[b] (App. 1904)

The death of the principal revokes the authority of his agent.—*Supreme Lodge Knights of Honor v. Jones*, 35 Ind. App. 121, 69 N. E. 718.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & A. §§ 67-71.
See, also, 31 Cyc. pp. 1312-1317; note, 23 L. R. A. 707; note, 39 Am. Dec. 81.

II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

See—

Attorneys. ATTORNEY AND CLIENT, §§ 105-192.

BROKERS, §§ 21-90.

Corporate officers and agents. CORPORATIONS, §§ 307-324.

FACTORS, §§ 15, 20-26, 29, 32, 42, 47.

Insurance agents. INSURANCE, §§ 80, 84, 103.

(A) EXECUTION OF AGENCY.

§ 47. Duties of principal.

Breach of contract with insurance agent, see INSURANCE, § 85.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & A. §§ 76, 79.
See, also, 31 Cyc. p. 1486.

§ 48. Nature of agent's obligation.

[a] (App. 1892)

Where an agent has entered on the performance of a service, it is his duty to conform to his principal's instructions given, though the

service be gratuitous.—*Criswell v. Riley*, 5 Ind. App. 496, 30 N. E. 1101, 32 N. E. 814.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. § 78.

See, also, 31 Cyc. pp. 1430-1484.

§ 49. Authority conferred as between principal and agent.

Agents of counties, see COUNTIES, § 86.

Powers of agent as to third persons, see post, §§ 91-137.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 82-86.

See, also, 31 Cyc. pp. 1335-1338.

§ 51. — Construction of letters or powers of attorney.

Construction as to third persons, see post, § 97. Distinction from deed, see DEEDS, § 5.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. § 83.

See, also, 31 Cyc. pp. 1407-1411.

§ 54. Delegation or substitution.

By insurance agent, see INSURANCE, § 85.

[a] (Sup. 1886)

While a railroad company may be liable for medical services of a physician employed by a conductor in an absolute emergency to attend an injured brakeman, it is not liable to an assistant afterwards employed by such physician, even though the conductor had authorized him to secure such assistance as seemed necessary; and especially is this true where it is not shown that the brakeman was himself unable to pay.—*Terre Haute & I. R. Co. v. Brown*, 107 Ind. 336, 8 N. E. 218.

[b] (App. 1902)

An attorney with whom a brother attorney leaves a set of law books to be sold cannot delegate his authority to another.—*Lucas v. Rader*, 64 N. E. 488, 29 Ind. App. 287.

[c] (Sup. 1908)

A power involving exercise of judgment or discretion by an agent cannot be redelegated.—*New v. Germania Fire Ins. Co.*, 171 Ind. 33, 85 N. E. 703, 131 Am. St. Rep. 245.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 87-90.

See, also, 31 Cyc. pp. 1425-1429.

§ 61. Skill and care required.

[a] (Sup. 1886)

An agent is not responsible for an error in judgment in transacting the business of his principal, but he would be held responsible for conducting the business negligently or failing to use proper skill and knowledge.—*Union Mut. Life Ins. Co. v. Buchanan*, 100 Ind. 63.

[b] (Sup. 1890)

An agent who had no knowledge of a mortgage on land which he purchased for his prin-

cipal, and had not agreed to examine the title, is not liable to the purchaser for loss occasioned by the existence of the mortgage.—*Sears v. Forbes*, 122 Ind. 358, 23 N. E. 773.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 96-98.

See, also, 31 Cyc. pp. 1456-1469.

§ 62. Custody and care of principal's property.

[a] (Sup. 1881)

An agent, having no authority beyond the possession and duty to keep safely certain money, had no right to loan it on the individual note of the borrower, however responsible he may be.—*Benson v. Liggett*, 78 Ind. 452.

A. without authority received money for B., who refused to accept it. A. then loaned it on personal security and lost it. Held, that A.'s administrator was liable to B. therefor.—*Id.*

[b] (Sup. 1886)

An agent who loans the money of his principal, and by neglect fails to collect it when he might have done so by proper proceedings, is chargeable therewith.—*Rochester v. Levering*, 104 Ind. 562, 4 N. E. 203.

[c] (Sup. 1887)

Although the contract of a mortgage company with its agents requires them to pay all interest on loans made by them which remains in arrears 10 days after becoming due, yet where the mortgage securing a loan provides that on failure to pay one installment of interest within a specified time after due, the whole debt shall become due, and the mortgage may be foreclosed, and the company does foreclose accordingly, and thus elects to treat the whole debt, principal and interest, as due, and merges it in a judgment, it cannot hold its agents liable either for the installments more than 10 days overdue when the foreclosure suit was begun, or for the interest subsequently accruing.—*United States Mortg. Co. v. Henderson*, 111 Ind. 24, 12 N. E. 88.

[d] (App. 1893)

Where money is placed by the principal in an agent's hands, with directions to loan it on unincumbered real-estate security, the agent, who disregards his instructions, and loans the money with a pre-existing mortgage still on the land, is liable to the principal, if loss results, in a sum not exceeding the amount of the pre-existing mortgage.—*Welsh v. Brown*, 8 Ind. App. 421, 35 N. E. 921.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 99-104.

See, also, 31 Cyc. pp. 1389-1404.

§ 63. Sale or other disposition of principal's property, and proceeds thereof.

Implied or apparent authority as to third persons, see post, §§ 103, 104.

[a] (Sup. 1881)

A power of attorney to lease, mortgage, and sell real estate does not authorize the attorney to hold the land in opposition to the wishes of the grantor of the power, though irrevocable by its terms without the attorney's consent.—*Goss v. Meadors*, 78 Ind. 528.

[b] (Sup. 1894)

Under an agreement whereby A. is to consign goods to B., to be sold by him as his agent, and B. is to guaranty all sales, and to settle for the same each month by giving his note, the proceeds of the sales are the property of B., and, upon his insolvency, A. has only a claim therefor as a common creditor, though B. failed to give his note.—*Ætna Powder Co. v. Hildebrand*, 137 Ind. 462, 37 N. E. 136, 45 Am. St. Rep. 194.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 105–112.

See, also, 31 Cyc. pp. 1349–1368.

§ 64. Collection of debts due principal.

Collection of investments, see ante, § 62.

Implied or apparent authority as to third persons, see post, § 105.

[a] (App. 1899)

One appointed to sell goods on commission, who agreed in the contract to conform to all rules the employer might make for the conduct of his business, is bound to comply with a rule requiring him to collect the money for goods he himself has sold.—*Durand & Kasper Co. v. Rockwell*, 54 N. E. 771, 23 Ind. App. 11.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 113–122.

See, also, 31 Cyc. pp. 1368–1380.

§ 67. Liability for interest.

[a] (Sup. 1836)

An agent is liable for interest, on money received by him for his principal, from the time of its being demanded.—*Hackleman v. Moat*, 4 Blackf. 164.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 127, 128.

See, also, 31 Cyc. pp. 1479–1481.

§ 69. Individual interest of agent.

As against third persons, see post, § 160½.

Right of agent to charge principal rent, see LANDLORD AND TENANT, § 7.

[a] (Sup. 1848)

An agent to sell cannot himself be the purchaser.—*Gage v. Pike, Smith*, 145.

[b] (Sup. 1849)

If an agent, appointed to sell and convey lands, cause part of them to be conveyed to himself, a court of equity will, upon application within reasonable time by the heirs of the principal, decree reconveyance to them, unless the transaction is shown to have been ratified by the principal.—*Sturdevant v. Pike*, 1 Ind. 277.

[c] (Sup. 1853)

Where an agent of a nonresident owner of land mortgaged to the school fund, empowered to renew the mortgage, ascertained that he could not renew it without an affidavit of the owner for that purpose, it was his duty to give notice thereof to the owner, and a purchase by the agent on a sale for nonpayment of the mortgage had the effect of making the agent liable to the owner for the profits made by the agent on a resale to an innocent purchaser.—*Beckett v. Bledsoe*, 4 Ind. 256.

[d] (Sup. 1857)

Transactions between principal and agent are ordinarily governed by the same rules of evidence that apply to transactions between other persons.—*Swofford v. Gray*, 8 Ind. 508.

[e] (Sup. 1864)

As a general rule, in all cases where a person is, either actually or constructively, agent for another, all profits and advantages made by him in the business of the agency, beyond his ordinary compensation, will belong to his principal.—*Lafferty v. Jelley*, 22 Ind. 471.

[f] (Sup. 1868)

An indebtedness of a railroad company to a town was assigned in writing to one who purchased with his own money, but was acting at the same time as the agent of the company. *Held*, that the company could not have the benefit of the purchase without an offer to pay, and that it was immaterial in what light the town council regarded the transaction.—*Ridenour v. Whertritt*, 30 Ind. 485.

[g] (Sup. 1871)

Where an agent, employed in purchasing and shipping tobacco to his principal for a specified compensation, uses the funds of his principal in making purchases on his own account, the profits arising from such purchases belong to the principal, in the absence of anything to show that the purchases were made with the consent and approbation of the principal.—*Acckenburgh v. McCool*, 36 Ind. 473.

[h] (Sup. 1880)

A. assigned to B. for collection a note secured by mortgage on real estate; B. giving a written agreement that if the mortgage should be foreclosed, and the property sold to satisfy the note and mortgage, he would assign the judgment, or convey the property to A. Afterwards B. foreclosed the mortgage and purchased at the sale. A. afterwards assigned B.'s agreement, and such assignee sued B.'s heirs to compel an assignment to him of the sheriff's certificate and the judgment, and to quiet title. Defendants answered that B. had, prior to his death, purchased the note and mortgage from A. *Held*, that the answer was sufficient, as B. might have become a bona fide purchaser from A., even if he had been, in fact, A.'s agent, and, such purchase, if made, would terminate the agency, and divest A. and his assignee of all claim to the note and mortgage, provided that B., when he made the purchase, had no notice of A.'s assign-

ment to plaintiff.—*Haynie v. Johnson*, 71 Ind. 394.

[i] (Sup. 1884)

An agent managing his principal's property cannot acquire any title against the latter by purchase at a sheriff's sale.—*Fountain Coal Co. v. Phelps*, 95 Ind. 271.

A mere formal surrender of the agency is not sufficient to give the agent a right to purchase his principal's property at sheriff's sale.—*Id.*

Where an agent purchases his principal's property at sheriff's sale, the burden of proof is on the agent to show that the agency has ceased, or that the principal has acquiesced in the purchase.—*Id.*

[j] (Sup. 1886)

Where an agent buys land from the principal and the transaction has remained unchallenged for a large number of years, and the value of the real estate has fluctuated from time to time, resulting in a final increase, it is sufficient for the agent to show, as regards the original price paid by him, with certainty to a common intent that it was fair and equitable, when called to account with his principal.—*Rochester v. Levering*, 104 Ind. 562, 4 N. E. 203.

While an agent to sell property cannot, either directly or indirectly, purchase the same from himself, yet a general confidential business agent, in the line of whose duty it is to sell certain real estate, may, if he acts in good faith and discloses all the facts, purchase the same from his principal; but when such a transaction is seasonably challenged, the burden is on the agent to show that he dealt fairly with his principal, and imparted to him all the information concerning such property possessed by himself.—*Id.*

The sale of the land to the agent by the principal, when the agent acts in good faith, is not affected by independent subsequent transactions, having no relation to the principal transaction.—*Id.*

[k] (Sup. 1886)

Where an agent invests the property of his principal in his own name, the principal is entitled to the profits arising from such investment.—*National Bank of Rising Sun v. Seward*, 106 Ind. 264, 6 N. E. 635.

[l] (App. 1895)

Where it appears that the interests of the agent and those of his principal conflict, the courts will subject the acts of the former to the closest scrutiny and infer that he acted corruptly and from a self-interest in all cases of doubt, thus casting upon the agent the burden of proving the good faith and honesty of the transaction. And it will not suffice simply to show that the principal has received all that he directed the agent to ask, or that the amount received was all that could have been procured from a stranger, for here, again, the rule applies that the agent cannot act in the transac-

tion in the dual position of both agent and principal.—*Hammond v. Bookwalter*, 30 N. E. 872, 12 Ind. App. 177.

[m] (App. 1905)

All profits and advantages procured by an agent in the transaction of agency affairs inure to the benefit of the principal, whether such profit or advantage be the result of the performance or of the violation of the duty of the agent.—*Indiana Trust Co. v. Byram*, 36 Ind. App. 6, 72 N. E. 670, 73 N. E. 1094.

[n] (Sup. 1906)

Where an agent's duty is to introduce his principal to a proposed purchaser, the agent, after disclosing his interest in the transaction, may sell directly to himself or sell his property directly to the principal and be entitled also to his commission as agent.—*Pomeroy v. Wimer*, 167 Ind. 440, 78 N. E. 233, 79 N. E. 446.

An agent with power to buy and sell property cannot without a disclosure to his principal of all the facts buy from or sell to himself.—*Id.*

[o] (App. 1909)

Loyalty to his trust is the first duty which an agent owes his principal, and he must not put himself into such a position that his interests become antagonistic to his principal's.—*Bedford Coal & Coke Co. v. Parke County Coal Co.*, 89 N. E. 412.

A contract of sale of coal by the general manager of a coal company to a partnership of which he is a member, or to a corporation into which the partnership is converted, may be repudiated by his principal.—*Id.*

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Princ. & A. §§ 130-145.

See, also, 31 Cyc. pp. 1430-1450; note, 80 Am. St. Rep. 555.

§ 70. Acting for parties adversely interested.

[a] (Sup. 1906)

An agent cannot serve two principals whose transactions may be antagonistic.—*Cheney v. Unroe*, 166 Ind. 550, 77 N. E. 1041, 117 Am. St. Rep. 391.

[b] (App. 1909)

An agent will not be permitted to serve two masters without the consent of each.—*Bedford Coal & Coke Co. v. Parke County Coal Co.*, 89 N. E. 412.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Princ. & A. § 146.

See, also, 31 Cyc. pp. 1447-1449; note, 2 L. R. A. (N. S.) 657; note, 46 Am. Rep. 37.

§ 72. Conversion or embezzlement.

[a] (Sup. 1862)

On August 18, 1856, the common council of the city of Indianapolis adopted a resolution by which S. was appointed the agent of said

city to negotiate certain city bonds at a rate not less than 97 cents on the dollar, and the mayor of the city was directed to take proper security from S. for the discharge of the trust. S. accepted the trust, and on the same day executed his bond with securities, conditioned that he should well and truly execute said trust, and pay over to the city all moneys that might come to his hands, as such agent. *Held* that S., having, by his misconduct, obtained the money by a pledge of the bonds of the city, was responsible to his principal for the loss sustained on account of such misconduct, and whether the bonds were properly or improperly pledged in the first instance cannot be inquired into by the agent, as his act was so far adopted by his principal as to redeem the bonds pledged by him.—*City of Indianapolis v. Skeen*, 17 Ind. 628.

[b] (Sup. 1885)

A bookkeeper or salesman who receives the money of his employer by virtue of his employment receives it in a fiduciary capacity, and, if he fraudulently appropriates it to his own use, he is guilty of a breach of trust.—*Riehl v. Evansville Foundry Ass'n*, 3 N. E. 633, 104 Ind. 70.

[c] (App. 1900)

An agent's refusal to deliver wheat purchased for his principal as his agent constitutes a conversion thereof.—*Nading v. Howe*, 55 N. E. 1032, 23 Ind. App. 690.

[d] (App. 1909)

Where a purchasing agent did not claim title to wool sued for, but only claimed the right to hold the wool until his advances and commissions were paid, his refusal to deliver the wool on demand was not a conversion.—*Welker v. Appleman*, 90 N. E. 35.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Princ. & A. §§ 148, 149; 47 CENT. DIG. Trover, § 70.

See, also, 31 Cyc. pp. 1484, 1485.

§ 73. Subagents.

Authority of insurance agent to appoint, see INSURANCE, § 88.

Authority to employ subagent, see ante, § 54.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. § 151.

See, also, 31 Cyc. pp. 1519, 1520; note, 50 Am. St. Rep. 110.

§ 75. Repudiation or ratification of agent's acts.

As relating to creation of judgment lien, see JUDGMENT, § 754.

Ratification as to third persons, see post, §§ 163-176.

Repudiation as to third persons, see post, § 161.

[a] (Sup. 1848)

A. employed B. to make sales of land. B. made sales and conveyances of portions of the

land, and took a conveyance of a tract to himself. B. settled his agency with A., who gave B. a writing discharging him from further duties as agent, and certifying that he had well performed all the duties of his agency, and that he approved of the sales made and conveyances made by B., and moneys received, and that they have settled and discharged each other from all obligations in the premises. A. soon after died, and on a bill by his heirs for a conveyance of the land to which B. obtained a conveyance, it was *held* that the deed to him was void, unless subsequently ratified by A., and that such writing was not such ratification, without proof that A. knew when he made it that B. had received such deed.—*Gage v. Pike, Smith*, 145.

[b] (Sup. 1881)

Where, in a suit for the alleged conversion of certain bonds by an attorney, he set up a claim for services rendered, and the replication was that the services of the attorney, in obtaining a legislative act by means of which the bonds were got, were illegal, it was *held* that the principal, after knowledge of the corruption charged, might have refused to receive any more of the bonds, and might have rendered them valueless in the hands of his agent, but that, having failed so to do, he could not now avail himself of the benefit of his agent's acts, and cast aside the burdens and the expense thereof.—*Judah v. Trustees of Vincennes University*, 16 Ind. 56.

[c] (Sup. 1880)

The acceptance by the obligee of an instrument from one to whom the same is delivered by the obligor for the obligee constitutes a ratification by the obligee of such person's agency for the delivery of the instrument.—*Hockett v. Jones*, 70 Ind. 227.

[d] (Sup. 1881)

Plaintiff, by suing for money collected by defendant without authority, ratifies defendant's act in making the collection, but does not confirm his act in turning it over to another, nor ratify expenses incurred in making the collection.—*Knowlton v. School City of Logansport*, 75 Ind. 103.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 152-157.

See, also, 31 Cyc. pp. 1456, 1468-1469; note, 59 Am. St. Rep. 638.

§ 76. Estoppel as between principal and agent.

Estoppel of principal by acts of agent as to third persons, see post, § 137.

[a] (Sup. 1857)

In a suit by a principal, an agent cannot set up in defense transactions unauthorized and not within the scope of his employment.—*Earnhart v. Robertson*, 10 Ind. 8.

[b] (Sup. 1876)

One who has undertaken to collect, and has collected, money, as agent, cannot resist his prin-

principal's claim to it, on the ground that the principal was not entitled to receive it from the debtor.—*Reed v. Dougan*, 54 Ind. 306.

[c] (App. 1902)

Burns' Rev. St. 1901, § 4202a, provides that refunding bonds of a city or town may be sold for not less than par. Refunding bonds of a city were sold by an agent for less than par, and, in a suit by the city against him for the proceeds of the sale, the agent sought to defend on the ground that it was not shown the bonds were issued for the purposes authorized by the statute, and that, as they were sold below par, they were illegal. *Held*, that the question as to the validity of the bonds was immaterial; the defendant being estopped to deny his employer's authority in the transaction, and his contract to pay arising from the receipt of the money by him.—*Wilt v. Town of Redkey*, 64 N. E. 228, 29 Ind. App. 199.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. PRINC. & A. §§ 158-161.

See, also, 31 Cyc. pp. 1481-1483.

§ 78. Actions for accounting.

Accrual of cause of action as affecting limitations, see LIMITATION OF ACTIONS, § 60.

Burden of showing agent's good faith in purchasing principal's property, see ante, § 69.

Concealment of cause of action as affecting limitation of action, see LIMITATION OF ACTIONS, § 104.

[a] An agent is not liable to a suit for money collected for his principal, unless it has been previously demanded.—(Sup. 1833) *Armstrong v. Smith*, 3 Blackf. 251; (1833) *Judah v. Dyott*, Id. 324, 25 Am. Dec. 112; (1850) *Phillips v. Wills*, 2 Ind. 325.

[b] (Sup. 1841)

An account should be demanded before action is brought by the principal against his agent to recover money collected.—*English v. Devarro*, 5 Blackf. 588.

Where one receives money for another by virtue of a power of attorney, it may be recovered from him as money had and received.—*Id.*

In assumpsit by a principal against his agent to recover money collected, the agent is entitled to a deduction for his commissions and expenses.—*Id.*

[c] (Sup. 1846)

Where the nature of the principal's business requires the agent to keep various accounts of purchases and sales or of receipts and expenditures, the agent may be called upon for an account.—*Coquillard v. Suydam*, 8 Blackf. 24.

[d] (Sup. 1850)

An agent is not liable to a suit for money collected for his principal, unless it has been previously demanded.—*Phillips v. Wills*, 2 Ind. 325.

[e] (Sup. 1873)

An action to recover from defendant money received by him on a sale of plaintiff's land, in which he acted as plaintiff's agent, is not an action on a sale of land, and the complaint therein need not allege writing.—*Ferguson v. Ramsey*, 41 Ind. 511.

[f] (Sup. 1874)

In a complaint by a principal against his agent to recover money collected by the latter and not paid over, it is essential to aver a demand of payment before suit.—*Heddens v. Younglove*, 46 Ind. 212.

[g] (Sup. 1873)

Where a debtor delivers to his creditor a note in his favor against a third person, which the creditor is to collect, and after paying himself the debt due from the debtor to pay the residue over to the debtor, such creditor must be regarded as the agent of the debtor for the purpose of collecting the money, and the debtor could not sue for a failure to pay over the residue until he had made a demand of payment.—*Dodds v. Vannoy*, 61 Ind. 89.

[h] (Sup. 1882)

An agent cannot be sued for money collected by him until demand has been made on him by his principal; but an excuse for failure to make a demand is, if a sufficient one, equivalent to a demand, and, where an agent had fled the county and the principal had no knowledge of his tarrying place, a sufficient excuse was shown.—*Wilson v. Town of Monticello*, 85 Ind. 10.

[i] (App. 1906)

A complaint which declares on an agreement between a principal and an agent, whereby the agent was to sell goods of the principal, that the agent sold a certain quantity, collected therefor a specified sum, and accounted for and paid over a part thereof, but failed to pay the balance, for which judgment is prayed, does not state an action based on the fact of the principal's delivery to the agent of a quantity of goods of a certain value and the conversion by him, but seeks to hold the agent for the money collected for the goods sold and unaccounted for, regardless of whether the agent sold the same for more or less than their value; and evidence of the value of the goods is immaterial.—*Green v. Macy*, 76 N. E. 264, 36 Ind. App. 560.

In an action against an agent for a balance due for stone sold for his principal on proof of the sale of the stone and the receipt of the money by the agent, it will be presumed that he received the market value of the stone where sold.—*Id.*

In an action against an agent for a balance due for stone sold for his principal, the undisputed evidence showed that the agent sold the stone to a county. *Held*, that the amounts received were matters of record and not exclusively within the knowledge of the agent, and the

principal was not relieved from the obligation of proving the facts in order to recover.—Id.

An agent, sued for a balance due on stone sold for his principal, admitted that the bill of particulars filed with the complaint showed the correct amount of the shipment of stone, and that on the trial the amounts shown thereby were to be taken as the correct amounts without further proof. *Held*, that the admission did not necessarily go any further than an admission that the bill showed the amount of stone shipped, and was not an admission that it showed the amounts for which the sales were made.—Id.

In an action against an agent for a balance due for stone sold for his principal, the evidence showed the value of the stone at the principal's quarry, without showing the amount of freight charges which the agent was required to pay, nor showing that he was required to sell for any particular price. The agent sold the stone to a county under competition bids, and the county paid for the stone by measurements in bridge abutments, which was less than the car measurement. There was no proof of the amount of stone sold. *Held* insufficient on which to found a verdict for the principal.—Id.

In an action against an agent for the balance due for goods sold, the amount due must be shown with reasonable certainty.—Id.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 162-177.

See, also, 31 Cyc. pp. 1609-1613.

§ 79. Actions for negligence or wrongful acts of agent.

Arrest of judgment, see JUDGMENT, § 263.
Burden of showing agent's good faith in purchasing principal's property, see ante, § 69.
Establishment of trust, extent of relief, see TRUSTS, § 374.

[a] (Sup. 1846)

The remedy for a breach by an agent of an agency for a single transaction is exclusively at law.—Coquillard v. Suydam, 8 Blackf. 24.

[b] (Sup. 1848)

Where an agent for the sale of lands purchased them himself, the court, in directing a reconveyance, should not decree that the purchase money be refunded, without further evidence that the purchase price had been paid over by the agent than the agent's account with the principal, showing that money for lands previously sold by him to others had been paid over.—Gage v. Pike, Smith, 145.

[c] (Sup. 1850)

If there has been a tortious conversion of goods by an agent, or a refusal to deliver them on demand when they might have been delivered, trover will lie.—Lindley v. Downing, 2 Ind. 418.

[d] (Sup. 1853)

A nonresident owner of land mortgaged to the school fund appointed a resident agent with power to renew the mortgage. The agent did not renew the mortgage; an affidavit of the owner being necessary for that purpose. The land was sold for the nonpayment of the mortgage and the agent became the purchaser. More than nine months elapsed after the agent knew he could not renew the mortgage before the sale. The agent afterwards sold the land to an innocent purchaser for a larger sum than the price paid by him, and then left the state. *Held*, that the residence of the agent in another and distant state, and the owner's ignorance of the fraud practiced on him, excused what otherwise would have been an improper delay in bringing a suit by the owner against the agent and innocent purchaser.—Beckett v. Bledsoe, 4 Ind. 256.

[e] (Sup. 1861)

Plaintiff furnished defendant with lumber under a contract by which defendant was to work it up into sash and pay plaintiff the usual price of such manufactured articles, deducting the cost of manufacturing. *Held*, that as the lumber was held by defendant simply as agent of plaintiff, so much of it as was not so manufactured continued the property of the plaintiff, and he could not maintain an action for it without a previous demand.—Jones v. Gregg, 17 Ind. 84.

[f] (Sup. 1883)

Where money is wrongfully appropriated by an agent, an action for conversion against him will lie without demand.—Terrell v. Butterfield, 92 Ind. 1.

[g] (Sup. 1885)

An agent to sell machines agreed in writing to deliver none, "until settled for as herein provided," under a penalty of becoming personally responsible for the price, the agent "waiving all claim under warranty on said machinery, and insuring settlement for the same under the terms of the contract." It was also agreed that no machine should be sold except on a certain written order to be signed by the purchaser. The complaint alleged a sale and delivery by the agent without an order signed by the purchaser, and also contained a common count for a machine sold and delivered by the principal to the agent. *Held* that, the delivery provided against was a delivery in pursuance of a contract of sale, and that there could be no recovery on proof of a delivery by the agent on trial with a view to a future sale, though this may have been in violation of the agent's instructions, making him liable in a proper action for the actual damages sustained.—Hasselman v. Carroll, 102 Ind. 153, 26 N. E. 202.

[h] (Sup. 1886)

Under section 577, Rev. St. 1881, providing that "judgments recovered * * * against any person for money received or collected in a fiduciary capacity, or for money held in trust

for another, shall be collectible without stay of execution or benefit of the appraisement laws," the judgment against an agent who has collected money for his principal, and has lost the same through his own neglect, or who is liable for it as for a trust fund, should be rendered without relief from valuation or appraisement laws.—*Rochester v. Levering*, 104 Ind. 562, 4 N. E. 203.

[1] (App. 1891)

In a suit for money deposited with defendant to be loaned on good security for plaintiff, but which he loaned to an insolvent person without any security, the complaint need not allege that defendant agreed to be personally responsible for the loan, as the gist of the action is the negligence of defendant in making the loan as the agent of plaintiff.—*Bronnenburg v. Rinker*, 2 Ind. App. 391, 28 N. E. 568.

Where the complaint avers that the borrower was and is entirely insolvent, and that the note is utterly worthless, it need not aver a demand of the money either from the maker of the note or from defendant.—Id.

The failure to allege that the note was unpaid, or that plaintiff was injured by defendant's negligence in making the loan, is of no consequence when the complaint alleges that the loan was made to an insolvent person, and that the note is utterly worthless.—Id.

Where the complaint alleges that defendant falsely represented that the loan was secured by a mortgage, it need not allege that defendant knew such representation to be false.—Id.

A complaint alleged that defendant at his own request obtained from plaintiff certain money, which, for a reasonable compensation, he agreed to loan on good security; that defendant negligently loaned it to a person who was insolvent, without security, and afterwards delivered such insolvent's note to plaintiff, and falsely represented to her that it was secured by mortgage on real estate, and that it was utterly worthless, and that plaintiff had sustained damages by reason of defendant's negligence, in a certain sum, for which he demanded judgment. *Held*, that such complaint stated a valid cause of action.—Id.

[2] (App. 1900)

Where plaintiff's agents purchased wheat for him as such agents, which they subsequently refused to deliver, title to the wheat passed to plaintiff immediately on its purchase, and he was, therefore, entitled, in an action against such agents, to recover such profit as he might have made by a subsequent sale thereof.—*Nading v. Howe*, 55 N. E. 1032, 23 Ind. App. 690.

Where plaintiff's agents agreed to purchase wheat for him, and plaintiff was to furnish money for the purchase whenever called upon to do so, but defendants refused to deliver the wheat purchased, and did not call for the purchase money, plaintiff was not required, in an

action against them for loss of profits on the wheat purchased, to make a tender of the purchase price, and hence his failure to include interest in an averment of tender of such amount did not render his complaint demurrable.—Id.

Where defendants purchased wheat for plaintiff as his agents, which they subsequently refused to deliver, whereupon plaintiff sued for profits he would have made in the sale thereof, and alleged that he was buying and selling wheat in various markets, and knew the market price, and that immediately after the purchase of the wheat the market price in such markets advanced 20 cents a bushel over the price defendants paid, which amount was over and above expenses of taking the same to such markets, and that he would have sold the wheat there, such averments were sufficient to show that the profits which plaintiff would have made were 20 cents a bushel.—Id.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 178-193; 1 CENT. DIG. Action, § 59.

See, also, 6 Cyc. p. 51; 31 Cyc. pp. 1608-1681.

(B) COMPENSATION AND LIEN OF AGENT.

See—

BROKERS, §§ 39-90.

FACTORS, § 47.

Insurance agents. INSURANCE, § 84.

§ 81. Right to compensation in general.

[a] (Sup. 1860)

Where a note was given for services rendered by the payee as agent of the company to procure subscriptions of stock, and in the exercise of such agency he fraudulently and without knowledge of the company received rewards from persons subscribing lands for stock for procuring their lands to be taken by the company, the agency in behalf of the subscribers was inconsistent with the agency of the company and worked a forfeiture of all rights to compensation from the company, and the same principle would apply, though the agency for the company extended only to the procuring of propositions for subscriptions of stock.—*Cleveland & St. L. R. Co. v. Pattison*, 15 Ind. 70.

[b] (Sup. 1871)

Where an agent does not perform his duties, or is guilty of gross negligence or gross misconduct, he forfeits all claims to his commissions.—*Porter v. Silvers*, 35 Ind. 295.

[c] (Sup. 1881)

Where a contract for the sale of sewing machines by plaintiff, as defendant's agent, on commission, provided that, when a note should be taken for a machine, plaintiff should not receive any commission for the sale, until defendant had become satisfied that the person giving the note was responsible for the amount, and had signed a certificate that he was satisfied

with the machine, and that all promises made by plaintiff had been faithfully fulfilled, plaintiff was not entitled to recover commissions on a sale without proving that the purchaser's note taken therefor had been accepted by defendant, and that he had furnished defendant with the required certificate.—*Wheeler & Wilson Mfg. Co. v. Worrall*, 80 Ind. 297.

[d] (Sup. 1887)

Although the agent of an loan company may have been instructed to foreclose only for the accrued interest, yet if he in good faith believed, from circumstances arising after the suit had been begun according to instructions, that the interests of the company required a foreclosure of all the debt, and did so foreclose for the entire amount, notifying the company within a reasonable time, and the company made no objection, but accepted the benefits thereof, and adopted the receivership established thereunder, such acceptance was a ratification of his acts, and he is entitled to reasonable compensation for his services.—*United States Mortg. Co. v. Henderson*, 111 Ind. 24, 12 N. E. 88.

Under a contract of agency providing that the agent should loan money of the principal on mortgage and other security and collect money coming due on such loans, and, further, that the principal should not be liable for any charges, disbursements, or commissions to the agent for services in the agency, the principal is liable to the agent for services rendered by the latter on the principal's request in foreclosing mortgages, collecting moneys by legal proceedings, looking or attending to property bought in by the principal on foreclosure, renting and collecting rents of such property, looking after the payment of taxes and insurance, as such services are different from those comprised by the contract of agency, which relates exclusively to loaning money on bonds and mortgages and collecting money payable on loans made.—*Id.*

[e] (Sup. 1887)

A contract under which the plaintiff had undertaken to find a purchaser for the defendant's real estate, provided for a certain commission if a sale was made through the agency of the plaintiff, and for a less commission if the property was withdrawn from the market, or sold without the assistance of plaintiff, within nine months, and contained a further stipulation that "if a customer is introduced through the agency of the said L., and a sale is afterwards consummated with such customer, I agree to pay the commission before mentioned, whether the time of this agreement shall have expired or not." *Held*, that plaintiff was entitled to commission for effecting a sale either before or after the end of the nine months, and that a complaint on the contract need not allege that the sale was made within nine months from the date of the contract.—*Williams v. Leslie*, 111 Ind. 70, 12 N. E. 102.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 194-214, 219, 223.

See, also, 31 Cyc. pp. 1486-1532; note, 42 Am. Rep. 387.

§ 82. Amount of salary or commission.

[a] (Sup. 1885)

Defendant entered into a written agreement with plaintiff to pay him a certain commission for selling real estate. Subsequently she entered into an oral contract with him, whereby it was agreed that he should enter into her service and manage her general business for a certain compensation per day. *Held*, that the oral contract did not supersede the original agreement; there being evidence that it was not modified or abrogated.—*Smith v. Lane*, 101 Ind. 449.

[b] (Sup. 1887)

That an attorney is employed as an agent to negotiate loans does not preclude him from rendering and receiving compensation for services of a different character, such as legal services, looking after repairs, and renting property bought in by the principal upon foreclosure sales, looking after taxes and insurance upon such property, and upon other property mortgaged to the principal to secure loans, and the like.—*United States Mortg. Co. v. Henderson*, 111 Ind. 24, 12 N. E. 88.

[c] (App. 1896)

A contract with an agent for the sale of the principal's machinery provided for the payment of 20 per cent. commission on sales made on three payments, 27 per cent. on sales on two payments, and 35 per cent. on cash sales. *Held*, that the agent was not entitled to receive 35 per cent. on sales by which a note was given for the price, due in six months.—*Huber Manufg Co. v. Seabold*, 14 Ind. App. 109, 42 N. E. 648.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 216-219.

See, also, 31 Cyc. pp. 1521-1528.

§ 83. Additional compensation.

[a] (Sup. 1885)

A principal agreed to pay his agent a certain commission on the amount for which land was sold, if the agent furnished a buyer within a certain time at not less than a certain price, and the agent furnished a purchaser at more than that price. *Held*, that the agent was not entitled to any surplus above the fixed price.—*Blanchard v. Jones*, 101 Ind. 542.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. § 220.

See, also, 31 Cyc. pp. 1526, 1527.

§ 84. Deductions and forfeitures.

[a] (Sup. 1886)

Where an agent has violated his trust or has been guilty of fraud or gross neglect of

duty, thereby imposing upon his principal the necessity of expensive litigation in order to secure his rights, the penalty for such fraudulent conduct or willful violation of duty is the forfeiture of all compensation; but this rule should never be applied to mere mistakes in the keeping of account or errors of judgment or other omissions which do not amount to misconduct or gross or culpable neglect or disregard of duty.—*Rochester v. Levering*, 4 N. E. 203, 104 Ind. 562.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & A. § 221.

See, also, 31 Cyc. pp. 1524–1526; note, 5 L. R. A. (N. S.) 469.

§ 85. Reimbursement of advances, expenses, and losses.

[a] (Sup. 1857)

Where an agent acts for his principal in transactions with others, the act of the agent is, in contemplation of law, the act of the principal; but, when an agent makes a charge against his principal, he cannot insist that that entry is the act of the principal.—*Swofford v. Gray*, 8 Ind. 508.

[b] (Sup. 1878)

A sale of corn was made by A. for B., the same to be delivered at a certain price per bush, during a certain month. About the middle of the month the price of corn had advanced, and B. thereupon telegraphed to A. to buy enough to fill the balance of the sale. Instead of so doing, A. paid the purchaser, as upon a forfeited contract, the difference between the agreed price and the then market price, and before the end of the month the price fell to very nearly that agreed upon. *Held*, that this payment by A. was unauthorized, and that B. was not liable to him therefor.—*Godman v. Meixsel*, 65 Ind. 32.

[c] (Sup. 1886)

A general confidential business agent who pays insurance premiums on the principal's property, is entitled to credit therefor from his principal, though he may also have been the agent of the insurance company, provided he informed the company that the property was in his control, and they permitted the policies to stand without attempting to avoid them, as in such a case the policies at the most were merely voidable, and it will not be presumed that the insurance companies would elect to avoid.—*Rochester v. Levering*, 104 Ind. 562, 4 N. E. 203.

[d] (App. 1909)

Where an agent contracted to purchase wool with money furnished by the principal, payment of money thus expended and advanced by the agent became due without reference to delivery of the wool purchased.—*Welker v. Appleman*, 90 N. E. 35.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & A. §§ 224–228.

See, also, 31 Cyc. pp. 1532–1541.

§ 89. Actions for compensation.

Bill of particulars, see PLEADING, § 327.

[a] (Sup. 1871)

In a suit to recover for alleged services rendered by plaintiff for defendant as agent of the latter in purchasing, prizing, and shipping tobacco under a contract, whereby, in case the business was extended to other points, plaintiff was to have the choice whether he would take \$800 for his services of a certain commission on all tobacco shipped, plaintiff being bound to devote his time faithfully to the business, an instruction that, if he purchased tobacco on his own account, he was not entitled to the profits thereon, unless expressly assented to by defendant, was not erroneous.—*Ackenburgh v. McCool*, 36 Ind. 473.

An instruction that, if plaintiff had exceeded the limit authorized in making advances on tobacco, he could not recover, was not erroneous.—*Id.*

An instruction that, if plaintiff had not elected to take the fees, he was entitled to recover \$800 on proof of compliance with the contract, was not erroneous.—*Id.*

An instruction that, if the terms of the agreement prohibited plaintiff from purchasing tobacco on his own account, he could not maintain the action if defendant suffered injury therefrom and had not consented to such purchases, was not erroneous.—*Id.*

[b] (Sup. 1877)

A demand for recovery for extra services ought not to be joined in the same paragraph of a complaint for particular services rendered pursuant to a contract therefor.—*Killian v. Eigenmann*, 57 Ind. 480.

[c] (Sup. 1880)

To entitle an agent to recover commissions on the sale of personal property, the sale must have been complete when the suit was begun.—*Thomas v. Lincoln*, 71 Ind. 41.

[d] (Sup. 1881)

A complaint alleging that on a certain date, plaintiff being in defendant's employ, defendant agreed to furnish plaintiff with a horse and wagon suitable for the delivery of sewing machines to be sold by plaintiff, and to deliver machines to plaintiff as fast as he might order the same, that defendant failed, and has ever since failed, to perform its part of the agreement, to the damage of plaintiff in a sum of \$1,000, stated sufficient facts to authorize a recovery of nominal damages only.—*Wheeler & Wilson Mfg. Co. v. Worrall*, 80 Ind. 297.

A complaint alleging that on a certain date plaintiff, as defendant's agent, sold a sewing machine for which he took the purchaser's note, which note defendant accepted, and the plaintiff had at the proper time furnished to defendant a certificate signed by the purchaser, as required by a stipulation of the contract, and that the purchasers had since paid the note to defendant by reason of which plaintiff had become entitled to receive from defendant a commission of \$20 on the sale, was insufficient for failure to aver inferentially, or otherwise, a nonpayment of such commission.—*Id.*

[e] (Sup. 1890)

Defendant made plaintiff his agent to sell certain land, the agency to continue for six months, unless sooner terminated by a sale. Defendant reserved the right to sell the land himself, in which case plaintiff was to receive the same fee as though he had sold it. Within 17 days after making the contract, defendant sold the land himself, and plaintiff sued for his fee. *Held*, that the complaint need not expressly allege that plaintiff had performed the contract on his part.—*Singleton v. O'Brien*, 125 Ind. 151, 25 N. E. 154.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Princ. & A. §§ 229-239.

See, also, 6 Cyc. pp. 46-50, 31 Cyc. pp. 1613, 1614.

§ 90. Lien.

Refusal of agent to deliver goods purchased until payment of advances and commission, as conversion, see ante, § 72.

[a] (App. 1909)

Where moneys advanced by an agent for the purchase of wool were to be repaid as expended, and the agent's commissions were due on delivery, the contract was not inconsistent with the agent's common-law lien to secure satisfaction of his claims.—*Welker v. Appleman*, 90 N. E. 35.

A purchasing agent's lien for advances and commissions may be waived by the agent's absolute surrender of possession of the property after the lien has attached, with no intention on his part to preserve the lien.—*Id.*

Where no time was specified for the payment of an agent's commissions for the purchase of wool for his principal, it would be presumed that payment was to be made on delivery of the wool, and hence the agent by offering delivery f. o. b. cars did not lose his right to retake and retain the wool on the principal's refusal to pay the commissions pursuant to the agent's lien therefor.—*Id.*

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Princ. & A. §§ 240-244.

See, also, 31 Cyc. pp. 1541-1544.

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

See—

Acts and statements of carriers' agents as binding on contract for passage. CARRIERS, § 251.

BROKERS, §§ 93-103.

Liability of master for injuries to third persons by acts or omissions of servants or dependent contractors. MASTER AND SERVANT, §§ 300-332.

Subrogation of agent to rights of principal creditors of principal. SUBROGATION, § 251.

(A) POWERS OF AGENT.

Authority of agent of carrier, see CARRIERS, § 47.

Authority of agent of corporations in general, see CORPORATIONS, §§ 397-432.

Authority of attorney, see ATTORNEY AND CLIENT, §§ 62-103.

Authority of bank's agents or correspondents making collections, see BANKS AND BANKING, § 162.

Authority of insurance agents, see INSURANCE, §§ 86-92.

Authority to make affidavit for attachment, ATTACHMENT, § 88.

Authority to make improvements on principal's lands as affecting right to mechanic's lien, see MECHANICS' LIENS, § 72.

Creation and existence of relation, see ante, §§ 3-28.

Execution of affidavit for continuance, see CONTINUANCE, § 45.

Scope and extent of agency, see ante, § 26.

Scope of authority as affecting imputation of principal of knowledge of agent, see post, § 178.

Termination of relation, see ante, §§ 31-40.

Unauthorized and wrongful acts, see post, § 147-161.

Warrant or power of attorney to confess judgment, see JUDGMENT, §§ 30, 43-46, 53.

§ 91. Representation of principal.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 245-253.

See, also, 31 Cyc. pp. 1322-1326.

§ 92. — In general.

[a] (Sup. 1852)

A bona fide payment of a debt to an agent of the creditor authorized to receive it is payment to the creditor, even though the agent misappropriated the amount received in payment.—*Ward v. Maccoun*, 3 Ind. 407.

[b] (Sup. 1874)

Where it is sought to hold one liable for acts of his agent and the question is asked to the extent of the agent's powers, it must be shown that they extended to the acts and declarations in question.—*Coon v. Gurley*, 49 Ind. 199.

[c] (Sup. 1877)

A payment to the authorized agent of a creditor by the debtor is equivalent to a payment to the creditor himself.—*Bicknell v. Buck*, 58 Ind. 354.

[d] (Sup. 1905)

One paying money to an agent authorized to receive it is entitled to a credit therefor without tracing the fund into the hands of the principal, and the latter cannot avoid the effect thereof because of any delinquency of the agent.—*Indiana Trust Co. v. International Building & Loan Ass'n*, 74 N. E. 633, 36 Ind. App. 685, affirmed 76 N. E. 304, 165 Ind. 597.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 245, 246, 250-253.

See, also, 31 Cyc. pp. 1322-1326.

§ 93. — General agency.

[a] (Sup. 1866)

The acts of a general agent will bind his principal so long as he keeps within the general scope of his authority, though he may act contrary to his private instructions.—*Manning v. Gasharie*, 27 Ind. 399.

A general agency exists where there is a delegation to do all acts connected with a particular business or employment.—*Id.*

[b] (Sup. 1872)

A general agent is one who is authorized to transact all the business of his principal, or all his business of some particular kind or at some particular place.—*Cruzan v. Smith*, 41 Ind. 288.

The distinction between a general and a special agent is that the former, having a wide scope both of duty and authority, represents his principal in all matters within the ordinary limits of the principal's business, and this may be in one or more places; but the latter is one whose authority is definitely limited, and whose duty is specified.—*Id.*

[c] (Sup. 1890)

Where an agent is authorized to conduct a single transaction, he is as to such transaction a general agent invested with authority to perform all acts necessary to fully consummate the same.—*Cleveland, C., C. & I. Ry. Co. v. Closser*, 26 N. E. 159, 126 Ind. 348, 9 L. R. A. 754, 22 Am. St. Rep. 593.

[d] (Sup. 1908)

A person authorized to transact all the business of another at a particular place, and impliedly invested with discretion to determine the proper construction of the contract under which work was being done, is a general agent.—*Cleveland, C., C. & St. L. Ry. Co. v. Moore*, 170 Ind. 328, 82 N. E. 52, 84 N. E. 540.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. § 247.

See, also, 31 Cyc. pp. 1340-1341.

§ 94. — Special agency.

Distinction between general and special agent, see ante, § 93.

[a] (Sup. 1872)

The fact that the authority of an agent is limited to a particular business does not make his agency special. It may be general in regard to that business, as though its range was unlimited.—*Cruzan v. Smith*, 41 Ind. 288.

A special agent is one who is authorized to do one or more specified acts, in pursuance of particular instructions, or within restrictions necessarily implied from the act to be done.—*Id.*

[b] (App. 19'8)

An agency is special when both the end and the means are specific.—*Robinson v. Bank of Winslow*, 42 Ind. App. 350, 85 N. E. 793.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 248, 249.

See, also, 31 Cyc. pp. 1341-1344.

§ 95. Express authority.

Necessity of recording power of attorney to assign judgment, see JUDGMENT, § 840.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 254-376.

See, also, 31 Cyc. pp. 1335-1338; note, 18 L. R. A. 663.

§ 97. — Construction of letter or powers of attorney.

[a] (Sup. 1848)

A power of attorney to transact business with creditors, use the name of the constituent, if necessary, in making arrangements with creditors, sign notes, etc., purchase goods and give notes for them, and "all other business in my line as a merchant," confers no authority to execute a mortgage of the principal's goods to creditors, and no such authority can be proved by parol.—*Reeves v. Baldwin*, 1 Ind. 216, *Smith*, 170.

[b] (Sup. 1862)

A. gave B. a power of attorney to sell, assign, transfer, trade, and dispose of certain lands belonging to A., either for cash or in exchange for other property. B. exchanged some of the lands for a mill property, which he rented to C. C., being dispossessed, brought suit for possession. B.'s compensation was to be one-half of all he could make out of the property over a certain sum, any property received in exchange to be taken at an appraisal. *Held*, that B. had such a power, coupled with an interest, as authorized him to rent at least until he and his principal should close accounts.—*Hitchens v. Ricketts*, 17 Ind. 625.

[c] (Sup. 1862)

An authority under letters of attorney, "to attend to the business of the principal generally" or "to act for him with reference to all his business," does not authorize the agent to sell

real estate, or to sell or dispose of the personality of his principal, unless as a means, necessary and proper, to contract the business to which the agency applies.—*Coquillard's Adm'r's v. French*, 19 Ind. 274.

[d] (Sup. 1890)

Where a power of attorney is defectively acknowledged, in that the acknowledgment was taken before a master of chancery, who under the statute had no authority so to do, the attorney had no authority to convey land, but he did have authority to make an executory contract of sale, and receive the purchase price.—*Joseph v. Fisher*, 23 N. E. 856, 122 Ind. 399.

[e] (App. 1902)

A power of attorney is an instrument by which the authority of one person to act in the place and stead of another as attorney in fact is set out.—*White v. Furgeson*, 64 N. E. 49, 29 Ind. App. 144.

In construing powers of attorney the usual rules of construction of written instruments apply, according to which the obvious meaning of the terms used should not be unnecessarily restricted or extended by implication; and the intention of the parties, as ascertained by the language used, must govern the construction of the instrument, and determine the extent of the authority conferred.—*Id.*

[f] (Sup. 1909)

The construction of powers of attorney is governed by the same rules as written instruments generally, and they should be construed, under the general doctrines of agency, to effectuate the donor's intention as to the object to be accomplished, and, while they should be restricted to such objects and construed against the donor in case of doubt, a construction should not be adopted to defeat the purposes of the power or unduly extend it.—*McClanahan v. Breeding*, 172 Ind. 457, 88 N. E. 635.

When a power of attorney relates to the subject-matter of a statute or to the substantive law, the statute or law enters into and becomes a part of it.—*Id.*

The voters of a township signed a writing empowering and requesting another to sign their names to any and all remonstrance or remonstrances against persons who may give notice of intention to apply for a liquor license, and also to sign their names to remonstrance or remonstrances against the granting of a license to any person to sell intoxicants in the township. *Held*, that the writing was a continuous power of attorney for the purpose stated, and was not limited to the two years during which a remonstrance was effectual under the statute to prevent the granting of a license, and was not discretionary as to its execution, being in the nature of a trust after its acceptance.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & A. §§ 344-376.

See, also, 31 Cyc. pp. 1408-1411.

§ 98. Implied and apparent authority. Liabilities incurred by acts of agent, see pp. §§ 130-136.

Rights acquired by acts of agent, see post, 127, 128.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & A. §§ 2343, 345-347, 350-361, 364-374, 376-381, 384-387, 390-391, 394-395, 398-400, 403-404, 407-408, 411-412, 415-416, 419-420, 423-424, 427-428, 431-432, 435-436, 439-440, 443-444, 447-448, 451-452, 455-456, 459-460, 463-464, 467-468, 471-472, 475-476, 479-480, 483-484, 487-488, 491-492, 495-496, 499-500, 503-504, 507-508, 511-512, 515-516, 519-520, 523-524, 527-528, 531-532, 535-536, 539-540, 543-544, 547-548, 551-552, 555-556, 559-560, 563-564, 567-568, 571-572, 575-576, 579-580, 583-584, 587-588, 591-592, 595-596, 599-600, 603-604, 607-608, 611-612, 615-616, 619-620, 623-624, 627-628, 631-632, 635-636, 639-640, 643-644, 647-648, 651-652, 655-656, 659-660, 663-664, 667-668, 671-672, 675-676, 679-680, 683-684, 687-688, 691-692, 695-696, 699-700, 703-704, 707-708, 711-712, 715-716, 719-720, 723-724, 727-728, 731-732, 735-736, 739-740, 743-744, 747-748, 751-752, 755-756, 759-760, 763-764, 767-768, 771-772, 775-776, 779-780, 783-784, 787-788, 791-792, 795-796, 799-800, 803-804, 807-808, 811-812, 815-816, 819-820, 823-824, 827-828, 831-832, 835-836, 839-840, 843-844, 847-848, 851-852, 855-856, 859-860, 863-864, 867-868, 871-872, 875-876, 879-880, 883-884, 887-888, 891-892, 895-896, 899-900, 903-904, 907-908, 911-912, 915-916, 919-920, 923-924, 927-928, 931-932, 935-936, 939-940, 943-944, 947-948, 951-952, 955-956, 959-960, 963-964, 967-968, 971-972, 975-976, 979-980, 983-984, 987-988, 991-992, 995-996, 999-1000.

See, also, 31 Cyc. pp. 1335-1404; note L. R. A. (N. S.) 843.

§ 99. — In general.

[a] (Sup. 1856)

It is not the name given to an agent, the acts he is authorized to do, which determine the extent of his authority.—*Jeffersonville A. v. Fisher*, 7 Ind. 699.

[b] (Sup. 1882)

If an agent was authorized to get immediate possession of a certain storeroom, and his principal and he understood that a bonus was to be paid for such possession, he was authorized to contract to pay such bonus.—*Shuman v. Little*, 87 Ind. 181.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & A. §§ 2261.

See, also, 31 Cyc. pp. 1335-1337.

§ 100. — Principal's property and business.

Unauthorized dealings with property, see pp. § 152.

[a] (Sup. 1831)

A. contracted to sell land to B., payment to be made by B.'s delivering to A. or to his agent, C., a boat and cargo by the first spring rise of a river. *Held*, that the contract made C. the special agent of A. to receive the boat and cargo at a fixed period, and a subsequent delivery to C. was not binding on A. though C. was also the general agent of A. *Longworth v. Conwell*, 2 Blackf. 469.

[b] (Sup. 1873)

The mere power to collect rent does not confer authority on the agent to make a lease or change an existing one.—*Indianapolis Mfg. & Carpenters' Union v. Cleveland, C. & I. Ry. Co.*, 45 Ind. 281.

[c] (Sup. 1886)

One authorized to receive and take property, to be shipped in a vessel, from the "landing," may take it from a wharfbat, situated at a wharf, onto which the property was charged from the carrying vessel.—*Davis v. Reamer*, 105 Ind. 318, 4 N. E. 857.

[d] (Sup. 1889)

The court properly charged that if the agent who was the duly constituted agent of defendant, and acting within the scope of his

thority, accepted, as to its quality, certain corn, delivered under a contract, or agreed that it was such as would be accepted, then this would be an acceptance, so far as the quality was concerned, and a waiver of any further dispute as regards the quality; but that the jury must believe that the agent was acting within the scope of his authority, and that, if he did undertake to accept the corn as to its quality, he was at the time in full knowledge of all facts with reference thereto, and that he acted in good faith, without fraud or collusion with plaintiff.—*Rahm v. Deig*, 121 Ind. 283, 23 N. E. 141.

[e] (Sup. 1895)

An agent authorized to sell goods at retail cannot mortgage them to secure the purchase price.—*Kiefer v. Klinsick*, 144 Ind. 46, 42 N. E. 447.

[f] (Sup. 1897)

Where an agent to negotiate a sale of lots has no authority to make a contract without the owner's consent, a parol license given a purchaser to use adjoining land as a private way, of which the owner has no knowledge, is not binding on the owner.—*Noftsgen v. Barkdell*, 47 N. E. 900, 148 Ind. 531.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 262-273, 345, 364, 368-374.

See, also, 31 Cyc. pp. 1389-1404; note, 35 Am. St. Rep. 593.

§ 101. — Contracts in general.

Liabilities incurred under contracts of agent, see post, § 132.

Unauthorized contracts, see post, § 155.

[a] (App. 1902)

Authority of agent to ship goods carries with it authority to accept the bill of lading and enter into a contract limiting the carrier's liability.—*Adams Exp. Co. v. Carnahan*, 63 N. E. 245, 64 N. E. 647, 29 Ind. App. 600, 94 Am. St. Rep. 279.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 255, 256, 330.

See, also, 31 Cyc. pp. 1345-1349, 1402-1404.

§ 102. — Contracts of employment.

[a] (Sup. 1851)

A party employed merely to aid in making an arrest has no implied authority to engage others at his employer's expense to assist.—*Pruitt v. Miller*, 3 Ind. 16.

[b] (App. 1893)

The general manager of an ordinary manufacturing business has no authority to bind the owner by the employment of a physician or surgeon to attend an injured employé, in the absence of any facts showing an absolute necessity for such action by the employer.—

Chaplin v. Freeland, 7 Ind. App. 676, 34 N. E. 1007.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 274-277, 347.

See, also, 31 Cyc. pp. 1397-1399; note, 20 L. R. A. 695.

§ 103. — Purchases, sales, and conveyances.

[a] (Sup. 1859)

One employed to drive stock from one town to another has no authority to sell any animal that becomes footsore, and his sale passes no title.—*Reitz v. Martin*, 12 Ind. 306, 74 Am. Dec. 215.

[b] (Sup. 1872)

If one who is the general agent of another in the purchase of wheat, as such agent buys wheat to be paid for on demand at the current price at the time of demand, his principal will be liable, though the principal may have instructed his agent to buy only for cash, and though the principal may have paid the agent for the wheat, if the contract be made in good faith, upon the credit of the principal, and without any knowledge of the private instructions of the principal.—*Cruzan v. Smith*, 41 Ind. 288.

[c] (Sup. 1876)

The power to sell and convey implies a power to deliver possession of the property to the purchaser.—*Indiana Cent. Canal Co. v. State*, 53 Ind. 575.

[d] (App. 1893)

The local agent authorized to sell machines in certain localities is, as to a sale made by him in such territory, a general agent, with authority to waive conditions in the contract of sale as to the manner of giving notice of defects in the machine sold, constituting a breach of the warranty, which, by the terms of the contract of sale, if not remedied by the seller, authorized a return of the machine.—*Springfield Engine & Thresher Co. v. Kennedy*, 7 Ind. App. 502, 34 N. E. 856.

[e] (Sup. 1894)

Plaintiff contracted to sell land to L. and W., after which defendant contracted with L. to buy his interest, which contract L. assigned to W. Plaintiff then deeded the whole tract to W., subject to a mortgage thereon, in which deed was a clause stating that W. assumed and agreed to pay the mortgage. W. then made a deed to one-half of the land to defendant, placed it on record, and notified defendant thereof. The deed contained an assumption clause of half of the mortgage debt, but defendant did not authorize its insertion or see the deed, and, as soon as notified thereof, repudiated it, and made and recorded a deed of his interest back to W. Held that, though W. was a general or special agent of defendant in the care and management of the common prop-

erty, that was not enough in view of W.'s adverse interest to entitle plaintiff to assume that W. was vested with power to assume in defendant's name and to bind him by a personal obligation to pay the mortgage.—*Metzger v. Huntington*, 37 N. E. 1084, 39 N. E. 235, 139 Ind. 501.

An agent authorized to accept a deed of land for his principal has no authority to agree to the insertion of a clause whereby the principal assumes a mortgage on the land.—*Id.*

[f] (App. 1895)

Where a principal informed his agent by letter that he had on hand "about three carloads" of cans, and instructed him to sell the same, the agent was authorized to assume that the principal had three car loads of the cans, and a sale by him of the three car loads bound the principal to the purchaser for that amount, though there were, in fact, but two car loads of the cans.—*Kirwan v. Van Camp Packing Co.*, 12 Ind. App. 1, 39 N. E. 536.

[g] (App. 1895)

Defendant purchased goods from a salesman of plaintiff, and on delivery of a part thereof a considerable amount was found unlike sample, and the salesman directed defendants to retain the unsatisfactory goods until all were in, and then make one reshipment of those defective. *Held*, that a finding that the agent had apparent authority to give such directions was justified by the evidence.—*Ellinger v. Rawlings*, 40 N. E. 146, 12 Ind. App. 336.

[h] (App. 1895)

An agent merely for the storage and shipment of goods has no authority to sell them.—*Cleveland, C., C. & St. L. Ry. Co. v. Moline Plow Co.*, 41 N. E. 480, 13 Ind. App. 225.

[i] (Sup. 1900)

The state agent of the seller of machinery, having general authority, had authority to bind the seller by promise to the purchaser that, if the machinery did not work satisfactorily, it would be taken back.—*Marion Mfg. Co. v. Harding*, 58 N. E. 194, 155 Ind. 648.

[j] (App. 1902)

Where one having the custody of goods for sale has no authority to sell at a certain price, the fact that one claiming to act by his appointment as a subagent in making such sale was a mere clerk, and exercised no independent judgment, is immaterial.—*Lucas v. Itader*, 64 N. E. 488, 29 Ind. App. 287.

One who is informed by an agent that the price of property in the agent's hands for sale is to be fixed by the principal cannot claim that the principal has clothed the agent with apparent authority to sell for a certain price.—*Id.*

[k] (App. 1910)

Where a selling agent was only authorized to solicit orders in writing on a prescribed form, he was not authorized to agree that a

buyer, executing a regular written form of contract, should be entitled under a parole agreement to receive the goods on trial and return them if dissatisfied.—*McCaskey Register Co. Curfman*, 90 N. E. 323.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 27203, 353-359, 367.

See, also, 31 Cyc. pp. 1345-1368; note, Am. Dec. 518.

§ 104. — Warranties.

[a] (Sup. 1846)

A power given by a seller of certain sacks of wool to a third person, to weigh the sacks and deliver them to the buyer, does not authorize the agent to make any warranty on the part of the seller as to the quality of the wool.—*Richmond Trading & Mfg. Co. v. Farquhar*, 8 Blackf. 89.

[b] (Sup. 1864)

When a contract of warranty of a machine provides that, if it does not correspond with the warranty, it shall be returned to the vendor or his agent at a specified place, and stating that no agent is authorized to make any representations of warranty beyond the terms of the contract, an agent has no authority to release the vendee from the performance of the agreement to return the machine as provided in the contract, upon its failure to correspond with the terms of the contract.—*Bragg v. Baumbarger*, 23 Ind. 198.

[c] (Sup. 1882)

Where an agent makes a personal warranty, and in the subsequent written contract of sale a warranty is made for his principal, the first warranty is not merged in the latter.—*Shordan v. Kyler*, 87 Ind. 38.

[d] (Sup. 1885)

An agent authorized to sell is authorized to make a warranty.—*Talmage v. Bierhaus*, 103 Ind. 270, 2 N. E. 716.

[e] (App. 1902)

In an action by a manufacturer of heaters to recover the value of one sold to defendant, the latter pleaded a counterclaim, and alleged that he purchased the same from plaintiff's agents authorized to sell heaters, and that such agents, in effect, warranted that the heater was fit for the purpose for which it was sold. *Held*, that the averments in the counterclaim were sufficient to connect plaintiff with the warranty, since the express warranty was nothing more than that which the law would imply, and therefore the agent's warranty would bind plaintiff, the principal.—*H. Smith Co. v. Williams*, 63 N. E. 318, 29 Ind. App. 336.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 29207.

See, also, 31 Cyc. pp. 1353, 1365, 1366.

§ 105. — Collection of debts due principal.

Receiving payment after expiration of term of lease as renewal of lease, see ante, § 100.

[a] (Sup. 1836)

The possession of a bond by a third person is a strong circumstance to show his authority to collect the amount of it.—*Hackleman v. Moat*, 4 Blackf. 164.

[b] (Sup. 1849)

An agent, employed to collect money due on account, receive payment, and receipt therefor, has no authority to give a discharge on receipt of a note for the money so due.—*Corning v. Strong*, 1 Ind. 329, Smith, 197.

[c] (Sup. 1850)

An agent who has only authority to receive payment of a debt cannot bind his principal by any arrangement short of an actual collection of the money.—*Kirk v. Hiatt*, 2 Ind. 322.

[d] (Sup. 1857)

An agent with power simply to collect cannot, in general, receive payment in anything but money.—*Earnhart v. Robertson*, 10 Ind. 8.

[e] (Sup. 1879)

In an action on a note given for the price of a chattel sold by an agent of the payee, payment made in good faith, and without notice of the revocation of the agency, to the servant of such agent, constituted a valid defense.—*Ulrich v. McCormick*, 66 Ind. 243.

[f] (Sup. 1886)

An agent to collect a debt will not be presumed to have the right to take, as payment, the note of the debtor payable to himself.—*Robinson v. Anderson*, 106 Ind. 152, 6 N. E. 12.

[g] (Sup. 1894)

An agent to collect has only authority to receive payment, and possibly an implied power to sue, but can bind his principal by agreements short of an actual collection.—*Davis v. Talbot*, 36 N. E. 1098, 137 Ind. 235.

[h] (App. 1906)

Where an oil and gas lease provided for a certain annual rental, and stipulated that a deposit in a certain bank to the credit of the lessor should constitute payment, a deposit of a payment after the expiration of the term limited by the lease, which payment was accepted by the bank without notice from the lessor not to do so, was in effect a payment to the lessor.—*American Window Glass Co. v. Indiana Natural Gas & Oil Co.*, 76 N. E. 1006, 37 Ind. App. 439.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 298-310, 374; 7 CENT. DIG. Bills & N. § 1243; 35 CENT. DIG. Mtg. § 838.

See, also, 31 Cyc. pp. 1368-1380; note, 15 Am. Dec. 130.

§ 109. — Negotiable instruments.

Knowledge or notice of extent of authority, see post, § 148.

Power of master of vessel to execute or indorse notes, binding the owners, see SHIPPING, § 62.

Sufficiency of delivery of note to agent, see BILLS AND NOTES, § 63.

[a] (Sup. 1839)

A note may be indorsed by an agent.—*Yeatman v. Cullen*, 5 Blackf. 240.

[b] (Sup. 1843)

An agent for attending to and managing a grocery and provision store, etc., is not, in consequence of such agency, authorized to indorse notes in the name of his principal.—*Smith v. Gibson*, 6 Blackf. 369.

[c] (App. 1906)

An agent, engaged in selling goods and authorized to collect money for goods sold, had no implied authority to bind his principal by the separate original and independent indorsement of a check payable to the principal and delivered to the agent by a customer in payment for goods sold.—*Hamilton Nat. Bank v. Nye*, 77 N. E. 295, 37 Ind. App. 464, 117 Am. St. Rep. 333.

[d] (App. 1908)

An agent cannot indorse negotiable paper, unless he has express and direct authority or some express power which necessarily implies that act, because the power cannot be executed without it.—*Robinson v. Bank of Winslow*, 42 Ind. App. 350, 85 N. E. 793.

[e] (App. 1909)

An agent authorized to make a deposit has no implied authority to draw it out.—*Second Nat. Bank v. Gibboney*, 43 Ind. App. 492, 87 N. E. 1064.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 318-322, 360, 361, 365.

See, also, 31 Cyc. pp. 1381-1383; note, 27 L. R. A. 401.

§ 110. — Guaranty and suretyship.**[a] (Sup. 1884)**

An agent having authority to make contracts for the purchase of wheat generally, such authority embraces all the usual incidents of his business, and authorizes him to guaranty cars for the shipment of the grain purchased.—*Dickson v. Lambert*, 98 Ind. 487.

[b] (Sup. 1910)

That a railroad's agent had authority to settle all matters growing out of a contract with a construction company did not authorize him to agree on the part of the railroad to pay the claim of a third party against the construc-

tion company.—Cleveland, C., C. & St. L. Ry. Co. v. Shea, 91 N. E. 1081.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 323-325.

See, also, 31 Cyc. pp. 1403, 1404.

§ 111. — Release, settlement, compromise, or forbearance.

[a] (Sup. 1823)

A covenant by an obligee not to sue the obligor at all may be pleaded as a release; but, if it appear to have been executed by an agent, his authority must be proved.—Reed v. Shaw, 1 Blackf. 245.

[b] (App. 1898)

An agent procured a customer; assisted in delivering the purchased property; received the notes given therefor, which were secured by mortgage thereon; demanded payment of the debt when due; and took possession of the property, and caused its sale, as stipulated in the mortgage. *Held* insufficient to show authority of the agent, by way of estoppel, to agree to deliver up the notes and cancel the debt, if the mortgagors would give up the property without further cost.—Robinson v. Nipp, 50 N. E. 408, 20 Ind. App. 156.

[c] (App. 1905)

Where defendant's superintendent of quarries, with power to employ and discharge men, and with power coextensive with the business, obtained a release from a servant injured by a blast in a quarry on consideration of payment of wages, doctor's and nurse's bills, future employment, etc., the transaction was within the scope of the superintendent's authority.—American Quarries Co. v. Lay, 73 N. E. 608, 37 Ind. App. 386.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 326-331, 376; 39 CENT. DIG. Paymt. § 128.

See, also, 31 Cyc. pp. 1392-1395.

§ 113. — Conduct of litigation.

[a] (Sup. 1885)

A railroad company employed an agent to arrest and prosecute persons placing obstructions on the track. The agent arrested an innocent man, carried him off, and left him in the woods. *Held*, that the company was liable.—Evansville & T. H. R. Co. v. McKee, 99 Ind. 519, 50 Am. Rep. 102.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 334-337, 351, 352; 39 CENT. DIG. Paymt. § 128.

See, also, 31 Cyc. p. 1395.

§ 114. — Confession of judgment.

[a] (Sup. 1823)

A power of attorney authorizing one in the names of partners of a company to which he was a partner to negotiate, compromise, adjust,

determine, settle, and arrange all differences disputes between them and others, to execute and sign their names to any release, cover or conveyance of all or any part of their estate whether real or personal, and to and receive discharges, receipts, etc., did authorize a confession of judgment by such attorney in the names of the partners.—Lago Patterson, 1 Blackf. 252.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 352.

See, also, 31 Cyc. p. 1395.

§ 115. — Representations.

Declarations by agent as evidence against principal, see EVIDENCE, §§ 240-244.

Declarations by agent as evidence against principal, preliminary proof of existence of agent or authority, see EVIDENCE, § 258.

Unauthorized representations, see post, §

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 343.

See, also, 31 Cyc. p. 1364.

§ 116. Undisclosed limitation of authority.

Of insurance agent, see INSURANCE, §§ 91,

[a] (Sup. 1831)

The authority of a general agent can be secretly limited by his principal so as to affect a third party dealing with such agent in ignorance of the limitation.—Longworth v. Well, 2 Blackf. 469.

[b] (Sup. 1881)

Secret instructions will not affect third persons who rely upon the open conduct and visible acts of a party.—Robbins v. Magee, 76 Ind.

[c] (App. 1892)

Where a written contract for the sale of a machine provided that if the machine was delivered by any agent of the seller or received by the purchasers or their representatives before full and complete settlement had been made therefor, according to the terms of the order equities and claims under the warranty given by the seller should be waived, and a general agent on making the sale waived the provision the waiver was binding on the seller notwithstanding the continued possession by the purchasers, though the agent as between himself and the seller had no authority to make a waiver; the limitation on the power of the agent not having been brought home to the purchaser.—Gaar, Scott & Co. v. Rose, 29 N. E. 616, 3 Ind. App. 269.

[d] (Sup. 1905)

Where an agent does not disclose to another party the extent of his authority in making a contract, the validity of the contract is not affected by the fact that he exceeded

authority.—American Telephone & Telegraph Co. v. Green, 73 N. E. 707, 164 Ind. 349.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 377, 377½.

See, also, 31 Cyc. pp. 1327-1329.

§ 117. Necessity of writing or seal to confer power.

[a] (Sup. 1847)

An authority under seal is necessary to authorize an agent to sign a sealed instrument.—Rhode v. Louthain, 8 Blackf. 413.

[b] (Sup. 1851)

A power of attorney to convey lands in this state must be executed with the same formalities as are required in the execution of a deed of conveyance.—Butterfield v. Beall, 3 Ind. 203.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 378-390.

See, also, 31 Cyc. pp. 1220-1234; note, 81 Am. Dec. 776.

§ 118. Evidence as to authority.

As preliminary to admission of declarations against interest of principal, see EVIDENCE, § 258.

Authority of agent of insurer, see INSURANCE, § 92.

Competency of agent to prove authority, see WITNESSES, § 100.

Evidence of agency, see ante, §§ 18-23.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 391-420.

See, also, 31 Cyc. pp. 1638-1667.

§ 119. — Presumptions and burden of proof.

[a] (Sup. 1855)

Where parties are sought to be charged for the act of a special and not a general agent, it must be shown that the act was done within the scope of the agency.—Pursley v. Morrison, 7 Ind. 356, 63 Am. Dec. 424.

[b] (App. 1892)

Where a party is shown to have been the agent of another in a particular business, and continues to so act within the scope of his authority, it will be presumed that his former authority still continues, and will bind his principal, unless the persons with whom he acts have notice that his agency has ceased.—Miller v. Miller, 30 N. E. 535, 4 Ind. App. 128.

[c] (Sup. 1894)

A party dealing with a special agent is required to know the extent of the agent's authority, and the burden is on the person dealing with such agent outside of the legitimate scope of the agency to show affirmatively the permission, or ratification by, the principal.—Davis v. Talbot, 36 N. E. 1098, 137 Ind. 235.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 391-401.

See, also, 31 Cyc. pp. 1630-1647.

§ 120. — Admissibility in general.

[a] (Sup. 1858)

Evidence that an agent whose authority is denied by the principal has repeatedly performed acts like the one in dispute, which have been ratified by the principal, is admissible.—Jewett v. Lawrenceburgh & U. M. R. Co., 10 Ind. 539.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 402-412.

See, also, 31 Cyc. pp. 1650-1665.

§ 122. — Declarations and acts of agent.

[a] (Sup. 1906)

Evidence of declarations or admissions of an alleged agent, made in the absence of the principal, is not admissible to prove the extent of the agency.—Blair-Baker Horse Co. v. First Nat. Bank, 72 N. E. 1027, 164 Ind. 77.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 416-419.

See, also, 31 Cyc. pp. 1652-1656.

§ 123. — Weight and sufficiency.

[a] (Sup. 1884)

An agreement by a party to be surety on a bond to be executed pursuant to a loan negotiated by a third person does not tend to establish an agency of such third person to bind the other on a parol contract on the same terms whereby such third person subsequently obtains the loan.—Hayes v. Burkam, 94 Ind. 311.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 420-429.

See, also, 31 Cyc. pp. 1667-1670.

§ 125. Acting in principal's name.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 430-450.

See, also, 31 Cyc. pp. 1414-1416.

§ 126. — Execution of written instruments.

[a] (Sup. 1823)

A bond containing recitals in its body showing that it is made by one as agent duly authorized for his principal, and binding the principal for performance of the covenants, and signed by the agent with his own seal, followed by words describing him as agent for his principal, is the bond of the principal.—Deming v. Bullitt, 1 Blackf. 241.

If a bond set forth that A. B. as agent of C. D. legally appointed for the purpose binds the said C. D. to make a title, etc., and it be executed thus, "A. B. [Seal.] Agent for C. D.,"

it is the deed of C. D., provided the agent's authority be sufficient.—Id.

[b] (Sup. 1837)

A contract executed by an agent in his own name, merely describing himself as agent, will bind him individually.—Wiley v. Shank, 4 Blackf. 420.

[c] (Sup. 1851)

Where an attorney in fact executed a deed under the power, and signed and sealed it in the names and seals of his principals, by him as such attorney, the deed was valid.—Butterfield v. Beall, 3 Ind. 203; Beall v. Doe ex dem. Butterfield, Id. 208.

[d] (Sup. 1861)

To bind the principal in a contract and to make it his own, the instrument must purport on its face to be his contract, his name must be inserted in it and signed to it, and not merely the name of the agent, even though he be described as agent in the instrument.—Prather v. Ross, 17 Ind. 495.

A contract made by "G. W., land agent, of the O. & M. R. R. Co.," and signed, "G. W., Land Agent," was *held* to be the contract of G. W. individually, and not of the company.—Id.

[e] (Sup. 1862)

A corporation, and not the treasurer, will be liable upon a draft addressed to "R. T., Treasurer of Terre Haute, etc., Co.," and accepted by "R. T., Treasurer."—Tousey v. Taw, 19 Ind. 212.

[f] (Sup. 1868)

A written contract recited that A. had sold his house and lot to B. for a certain farm, and stipulated that deeds should be executed as soon as possible. The contract was signed by A., and by "P. L., per B., Agent." *Held*, that an action would not lie at the suit of A. against B. upon the contract.—Freese v. Crary, 29 Ind. 524.

[g] (Sup. 1885)

Mere descriptive words in an instrument of writing, such as a lease, are regarded as describing the person; but if the contract itself shows that the words were not used as merely descriptive of the person, they will not be so regarded, but will be assigned their true meaning. So *held* on the question of whether a certain lease was executed by A. in his own behalf, or as agent of B.—Avery v. Dougherty, 102 Ind. 443, 2 N. E. 123, 52 Am. Rep. 680.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 430-450; 7 CENT. DIG. Bills & N. §§ 260-266; 16 CENT. DIG. Deeds, §§ 276, 404. See, also, 31 Cyc. pp. 1414-1421; note, 52 Am. Dec. 775.

§ 127. Rights acquired.

Rights in cases of undisclosed agency, see post, § 143.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 430-457.

See, also, 31 Cyc. pp. 1605-1607.

§ 128. — Agent's acts in general.

[a] (Sup. 1881)

That an agent carries a proposition to principal from another person does not deprive the principal of the right to prove what the proposition was.—Crowder v. Reed, 80 Ind.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 430-457.

See, also, 31 Cyc. p. 1605.

§ 130. Liabilities incurred.

Liabilities in cases of undisclosed agency, see post, §§ 145, 146.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 430-457, 491, 500.

See, also, 31 Cyc. pp. 1645-1680; note, Am. St. Rep. 37.

§ 131. — Agent's acts in general.

[a] (Sup. 1855)

An agent may bind his principal by acts and sometimes by omissions of duty, but he cannot bind others.—Board of Com'rs of Tippecanoe County v. Cox, 6 Ind. 403.

[b] (Sup. 1869)

Delay in giving notice to a principal of the failure of his agent to pay for goods purchased does not discharge the principal's liability to the seller, though the principal has settled with the agent before the notice and given him credit for the goods under the false supposition that he has paid for them.—Stapp v. Spurlin, 32 Ind. 442.

[c] (Sup. 1881)

Where goods are sold and delivered to an agent of a firm upon its order, it is immaterial so far as its liability is concerned, for what purpose or for whose use the same were intended.—Rend v. Boord, 75 Ind. 307.

[d] (Sup. 1887)

Goods were ordered by defendant's son, J. F., Jr., and M. C. F., while acting as his agents; and plaintiffs' agent, who took the order, and charged it to J. F., was told that J. F., Sr., the defendant, "might retire from the firm," and that the order had better be taken in the name of J. & M. C. F., and that plaintiffs would be notified before shipment how the firm would be. Before the goods were received, the stock was transferred to J. F., Jr., who conducted the business as J. F., and gave no notice of the change in the firm. Plaintiffs, before shipment, were informed through a commercial agency that there was no such firm as J. & M. C. F. *Held*, that the goods were ordered under such circumstances as authorized the seller to believe they were ordered for defendant.

ant, and that he was liable therefor.—Foellinger v. Leh, 110 Ind. 238, 11 N. E. 289.

[e] (App. 1897)

Defendant furnished a firm money with which to buy wheat for him for cash. The firm deposited such money in its name as received, and other money, with plaintiffs, who were merchants, and gave checks on them for wheat bought, and for other purchases. Plaintiffs knew the firm was acting for defendant as his agent. During the course of the business, the firm issued a check for wheat bought for \$168. The holder drew only \$68, which plaintiffs indorsed on the check. While the check was outstanding, defendant and such firm had a settlement, and the firm received from plaintiffs all the money the firm had on deposit, and paid it to defendant. The latter knew the firm was depositing the money with plaintiffs, but did not know of the unpaid check when the money was paid him. Plaintiffs were afterwards compelled, by suit, to pay the \$100 due on the check. *Held*, that they could not recover it from defendant.—Allen v. Davis, 17 Ind. App. 338, 45 N. E. 798.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & A. §§ 458-464.

See, also, 31 Cyc. p. 1566.

§ 132. — Agent's contracts.

[a] (Sup. 1823)

In private contracts, when a man describes himself as an agent, but covenants that he himself, or that his principal, will do a certain thing, and executes the deed in his own name, he alone is liable; the term "agent" being a mere descriptive personæ.—Deming v. Bullitt, 1 Blackf. 241.

[b] (App. 1906)

Where an agent has authority to make investments and take notes and securities for his principal, the principal cannot escape liability on a note because he never had the note in his hands and did not know of its existence.—Indiana Trust Co. v. Byram, 36 Ind. App. 6, 72 N. E. 670, 73 N. E. 1094.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & A. §§ 459, 467-471.

See, also, 31 Cyc. pp. 1566-1580.

§ 133. — Credit given to agent.

[a] (Sup. 1864)

When an agent or factor acts for a merchant in a foreign country, the ordinary presumption is that credit is given to the agent, and he is personally liable for contracts made by him for his employer, notwithstanding he discloses at the time the character in which he acts.—Vawter v. Baker, 23 Ind. 63.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & A. §§ 472-475, 500.

See, also, 31 Cyc. p. 1570.

§ 136. — Liabilities of agent.

[a] (Sup. 1855)

When a man is known to be contracting merely as the agent of another, who is also known as the principal, his contracts, if he possesses full authority for the purpose, will be deemed the contract of the principal only.—Robeson v. Chapman, 6 Ind. 352.

[b] (Sup. 1864)

Agents or factors acting for merchants resident in another state are not personally liable for contracts made by them for their employers.—Vawter v. Baker, 23 Ind. 63.

[c] (Sup. 1869)

Ordinarily an agent contracting in behalf of the government, or of the public, is not personally bound by the contract.—Perrin v. Lyman's Adm'r, 32 Ind. 16.

[d] (Sup. 1873)

One assuming to act as agent for another without authority does not necessarily render himself liable. It is when he knowingly or carelessly assumes to act without being authorized, or conceals the true state of his authority, and falsely leads the party with whom he contracts to repose in his authority, that he may be liable.—Newman v. Sylvester, 42 Ind. 106.

If one enters into a contract in the name of another and as his agent, and does it honestly, fully disclosing all the facts touching the authority under which he acts, so that the one contracted with from such information or otherwise is fully informed of the authority possessed or claimed, the agent is not liable on the ground of deceit or for misleading the other party.—Id.

[e] (Sup. 1882)

An agent may bind himself personally, although the consideration move to his principal and the agent's want of interest in the transaction, except as agent be known to the other contracting party.—Shordan v. Kyler, 87 Ind. 38.

[f] (Sup. 1906)

Where an agent discloses his principal and acts within the scope of the agency, he does not render himself personally liable unless so stipulated in the contract of agency.—Hayes v. Shirk, 167 Ind. 569, 78 N. E. 653.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & A. §§ 476-491.

See, also, 31 Cyc. pp. 1545-1555; note, 26 Am. Dec. 524; notes, 2 Am. Rep. 332, 22 Am. Rep. 179, 37 Am. Rep. 142, 54 Am. Rep. 233, 57 Am. Rep. 536; notes, 16 Am. St. Rep. 493, 22 Am. St. Rep. 508.

§ 137. Estoppel to deny authority.

[a] (Sup. 1870)

Where the principal sent his agent to receive certain property, with power to exercise his judgment as to the quality of the property, and the agent did exercise his judgment, the

principal is bound by the acts of the agent in receiving the property, although some of it proved to be of indifferent quality.—Rupp v. Stith, 33 Ind. 244.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 492-494.

See, also, 31 Cyc. pp. 1234-1244.

(B) UNDISCLOSED AGENCY.

Disclosure and knowledge or notice of extent of authority, see post, §§ 147, 148.

Liabilities on contracts signed in representative or fiduciary capacity, see **BILLS AND NOTES**, § 123.

Ratification of acts of agent, see post, §§ 163-176.

Undisclosed limitation of authority, see ante, § 116.

§ 139. Acting in agent's name.

[a] (Sup. 1857)

When a principal permits his agent to hold himself out as principal, he cannot complain that third persons, who dealt with him bona fide as such, hold him liable as principal.—Rathbone v. Sanders, 9 Ind. 217.

[b] (Sup. 1890)

A deed executed by an attorney in his own name, without disclosing his principal, though, for that reason, not a valid execution of a power to sell land, is competent evidence to show the sale of the land, and payment of the price, and vests in the vendee an equitable title.—Joseph v. Fisher, 122 Ind. 399, 23 N. E. 856.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 496-498.

See, also, 31 Cyc. pp. 1555-1559.

§ 143. Rights of undisclosed principal.

As to goods sold by factor, see **FACTORS**, § 66.

[a] (Sup. 1880)

An undisclosed principal may claim the benefit of a contract of sale of his property by his agent, and may maintain an action thereon, and enforce any remedies which might have been maintained or enforced by the agent himself.—Johnson v. Hoover, 72 Ind. 395.

[b] (Sup. 1881)

An undisclosed principal may sue on a promissory note payable to the agent, subject to the equities arising from the transaction.—Nave v. Hadley, 74 Ind. 155.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 502-512.

See, also, 31 Cyc. pp. 1598-1602.

§ 145. Liabilities of undisclosed principal.

[a] (Sup. 1871)

In an action against an undisclosed principal, by one who sold goods to defendant's agent, to recover the price, defendant may show payment in full to the agent as a defense.—Thomas v. Atkinson, 38 Ind. 248.

Where a special agent purchases on credit, without disclosing his agency, and without authority to purchase on credit, the principal is not liable after having paid the agent.—Id.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 499, 513-520.

See, also, 31 Cyc. pp. 1574-1580; note, 77 C. C. A. 166.

§ 146. Liabilities of agent of undisclosed principal.

[a] (Sup. 1855)

An agent, who does not disclose his agency, will be held as principal.—Merrill v. Wilson, 6 Ind. 426.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 521-527.

See, also, 31 Cyc. pp. 1555-1559; note, 77 C. C. A. 166.

(C) UNAUTHORIZED AND WRONGFUL ACTS.

As between principal and agent, see ante, § 72. Insurance agents, see **INSURANCE**, § 93.

Liability of municipal corporation for torts of officers and agents, see **MUNICIPAL CORPORATIONS**, §§ 744-753.

Ratification, see post, §§ 163-176.

§ 147. Duty to disclose or ascertain authority.

[a] (Sup. 1859)

One who purchases of a person not held out as general agent, without inquiry as to the agent's authority, trusts to the agent's good faith, and must suffer if the agent exceeded his apparent and real authority.—Reitz v. Martin, 12 Ind. 306, 74 Am. Dec. 215.

[b] (Sup. 1864)

Those who deal with an agent whose authority is limited to special purposes are bound, at their peril, to know the extent of his authority.—Berry v. Anderson, 22 Ind. 36.

[c] (Sup. 1872)

Where a firm commissioned a general agent to purchase tobacco for cash only, but did not make this condition known to the sellers, and the agent afterwards purchased on credit and gave the firm receipt, the firm were liable, although they had abundantly supplied the agent with money.—Fatman v. Leet, 41 Ind. 133.

[d] (Sup. 1872)

The principal is not bound by the acts of a special agent, if he exceeds the limits of his authority. And it is the duty of every person who deals with a special agent to ascertain the extent of the agent's authority, before dealing with him. If this be neglected, such person will deal at his peril, and the principal will not be bound by an act which exceeds the particular authority given.—*Cruzan v. Smith*, 41 Ind. 288.

[e] (App. 1892)

Persons dealing with a general agent are presumed to be acquainted only with his general authority, and are not bound to ascertain the extent of his power.—*Gaar, Scott & Co. v. Rose*, 29 N. E. 610, 3 Ind. App. 269.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & A. §§ 528-533.

See, also, 31 Cyc. pp. 1322-1326.

§148. Knowledge or notice of extent of authority.

[a] (Sup. 1831)

It is a general rule that a principal is bound by the acts of his general agent, though the agent exceeds his private instructions, but the rule does not apply where the person dealing with such agent is aware of the existence of such instructions.—*Longworth v. Conwell*, 2 Blackf. 469.

[aa] (Sup. 1862)

On August 18, 1850, the common council of the city of Indianapolis adopted a resolution by which S. was appointed the agent of said city to negotiate certain city bonds at a rate not less than 97 cents on the dollar, and the mayor of the city was directed to take proper security from S. for the discharge of the trust. S. accepted the trust, and on the same day executed his bond with securities, conditioned that he should well and truly execute said trust, and pay over to the city all moneys that might come to his hands as such agent. *Held*, that those dealing with the agent were not compelled to look after the records of the council either for the appointment or instructions of the agent, since they were not necessarily of record.—*City of Indianapolis v. Skeen*, 17 Ind. 628.

[b] (Sup. 1872)

If a principal puts his agent in a condition to impose upon innocent third persons by limiting his authority, the principal will be bound by his dealings with persons ignorant of such limitations, since he must lose in preference to such third persons.—*Cruzan v. Smith*, 41 Ind. 288.

If a general agent, acting within the limits of his business, violates instructions received from the principal, but which are not communicated to third persons with whom he deals, the principal will be liable to such third persons.—*Id.*

[c] (Sup. 1873)

It is material that the party complaining of a want of authority in the agent should be ignorant of the truth touching the agency. If he has full knowledge of the facts, or of such facts as fairly and fully put him on inquiry, and he fails to avail himself of such knowledge or the means of knowledge reasonably accessible, he cannot, in the absence of fraud, say that he was misled simply on the ground that the party assumed to act as agent without authority.—*Newman v. Sylvester*, 42 Ind. 106.

[d] (Sup. 1874)

If A. places personal property in the hands of B. as his agent, to sell, and B. sells the property to C., and wrongfully takes for it a note, not governed by the law merchant, to himself or to D., and the note is assigned by the payee to an innocent assignee for a valuable consideration, in a suit by the assignee of the note against the maker A. may, on his application, be made a defendant, and may set up by way of answer the facts, stating his rights and interest, and recover on the note so given.—*Summers v. Hutson*, 48 Ind. 228.

[e] (Sup. 1876)

Where a person authorizes another to sign the name of the former to a note for a specified sum, the payee will be charged with knowledge of the extent of such authority, and the person conferring it cannot be bound for a larger sum.—*Blackwell v. Ketcham*, 53 Ind. 184.

[f] (Sup. 1878)

J., without the knowledge or consent of G., placed in G.'s staveyard 20,000 oil barrel staves, intending to sell them to him, or to A., who had agreed to deliver G. 300,000 staves. J. directed A. not to deliver the 20,000 to C. or G. without receiving the pay therefor, but A., without being paid, sold and delivered them to C., whom he informed of J.'s directions, and C. delivered them to G. and received pay therefor. *Held*, that A. was, at most, a special agent of J., and exceeded his authority.—*Rich v. Johnson*, 61 Ind. 246.

[g] (Sup. 1885)

Restrictions upon an agent's apparent authority are not binding upon third persons, where there is nothing to put them upon inquiry as to the extent of his actual authority.—*Lake Shore & M. S. Ry. Co. v. Foster*, 104 Ind. 293, 4 N. E. 20, 54 Am. Rep. 319.

[h] (Sup. 1888)

Where plaintiff, at the request of defendant, sends bonds to a bank for collection, with instructions to receive a sum less than their face, if paid at a certain time, and defendant at a later date pays an amount less than the bank is authorized to accept, for which the bank gives a release, defendant is liable for the balance, it appearing that he knew the extent of the bank's authority.—*Hammons v. Bigelow*, 115 Ind. 363, 17 N. E. 192.

[1] (App. 1892)

In an action against a company for the price of goods sold to its alleged agent, evidence that plaintiff asked the alleged agent if he was the agent of the company, and that he replied that he was, is admissible to show the good faith of plaintiff in dealing with such alleged agent.—*Foss-Schneider Brewing Co. v. McLaughlin*, 5 Ind. App. 415, 31 N. E. 838.

[3] (App. 1906)

While one holding himself out as having authority to do an act will be personally liable if he acted without authority, where a purported agent's lack of authority was known to both parties, or was unknown to both through mutual mistake, the agent is not personally liable.—*Sourwine v. McRoy Clay Works*, 42 Ind. App. 358, 85 N. E. 782.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 534-552.

See, also, 31 Cyc. pp. 1322-1325, 1549, 1550.

§ 149. Unauthorized assumption of agency.

[a] (Sup. 1885)

Where one without authority assumes to act as agent of another, he makes himself liable as principal.—*Terwilliger v. Murphy*, 104 Ind. 32, 3 N. E. 404.

[b] (App. 1897)

Where defendant signed the name of another to a letter of credit without authority from him, he is liable to a merchant acting in reliance thereon, though he believed he had such authority.—*Mendenhall v. Stewart*, 47 N. E. 943, 18 Ind. App. 262.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 553-555.

See, also, 31 Cyc. pp. 1567-1570.

§ 150. Effect of exceeding authority in general.

[a] (Sup. 1823)

Where an agent exceeds his authority, he may be liable himself, but his principal is not.—*Deming v. Bullitt*, 1 Blackf. 241.

[b] (Sup. 1894)

When a special agent exceeds his authority and his act is not ratified by the principal, such act is not binding upon the principal.—*Davis v. Talbot*, 36 N. E. 1098, 137 Ind. 235.

[c] (App. 1906)

An agent cannot, by agreement with a third person knowing the facts, deposit the money of his principal with the third person to his own credit, and thereby exclude his principal from the recovery of the same.—*Robards v. Hamrick*, 39 Ind. App. 134, 79 N. E. 386.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 556-563.

See, also, 31 Cyc. pp. 1545-1547.

§ 151. Acting after termination of authority.

[a] (Sup. 1848)

A direction by the maker of a note to the collecting agent to apply a payment to the payee's note after he had ceased to be such agent, is not a payment of the note, although the money remains in his hands unapplied.—*Taylor v. Jones*, 1 Ind. 17, Smith, 5.

[b] (App. 1893)

Third parties dealing bona fide with one who has been accredited to them as an agent are not affected by the revocation of his agency, unless notified of such revocation.—*Springfield Engine & Thresher Co. v. Kennedy*, 34 N. E. 856, 7 Ind. App. 502.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 564-566.

See, also, 31 Cyc. pp. 1491-1496.

§ 152. Unauthorized dealings with principal's property.

[a] (Sup. 1883)

Where a farm hand in charge of his employer's farm during the temporary absence of the employer and without authority so to do sold and delivered his employer's wheat, the sale was tortious, and conferred no title on the purchasers.—*Shearer v. Evans*, 89 Ind. 400.

[b] (Sup. 1905)

The creditor of an employé obtains no title to the employer's money paid by the employé in satisfaction of the debt, though the creditor had no knowledge that the money belonged to the employer.—*Porter v. Roseman*, 165 Ind. 255, 74 N. E. 1105, 112 Am. St. Rep. 222.

A clerk who converts the money of his employer obtains no title thereto and can confer no title on one to whom he pays the money in satisfaction of an individual debt.—Id.

[c] (App. 1910)

Where defendants knew that plaintiffs claimed to own and were in possession of certain land in controversy, before they procured a deed from plaintiffs' vendor pursuant to an assignment of plaintiffs' contract, they were not excused from paying plaintiffs the balance of the price, by an agreement with plaintiffs' son that he should receive certain of the capital stock of a certain corporation in consideration of the balance of plaintiffs' interest in the property; the son having no authority to bind plaintiffs as their agent to any such agreement.—*Baldwin v. Siddons*, 90 N. E. 1055.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 567-569.

See, also, 31 Cyc. pp. 1437-1447.

§ 153. Payments by agent.

[a] (Sup. 1897)

An agent of plaintiff, in excess of his authority, and without plaintiff's knowledge or consent, gave checks on plaintiff's bank account in settlement of illegal deals in options to one codefendant, who kept a "bucket shop," which checks were by co-defendant bank charged against plaintiff, and credited to defendant broker. Both bank and broker had notice of extent of the agent's authority to draw checks, and the bank had notice of the nature of the deals for which the checks were given. *Held*, that the rules as to following trust funds applied, and hence plaintiff should have judgment against defendant broker for the money so received by him from her agent, and all the funds in defendant bank at the commencement of the suit which had been credited to defendant broker by reason of checks from said agent should be paid over to plaintiff.—*Pearce v. Dill*, 48 N. E. 788, 149 Ind. 136.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Princ. & A. §§ 570, 571.

See, also, 31 Cyc. p. 1403; note, 14 L. R. A. 234.

§ 155. Unauthorized contracts of agent.

[a] (Sup. 1828)

If an agent execute an obligation for his principal not warranted by the power, the principal, being unapprised of the nature of the obligation, will not be bound by it, though he was in the room when the obligation was executed, and though his subsequent agent conceived himself authorized to comply with similar obligations so executed by the first agent.—*Modisett v. Lindley*, 2 Blackf. 119.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Princ. & A. §§ 574–582.

See, also, 31 Cyc. pp. 1545–1551.

§ 156. Representations of agent.

[a] (Sup. 1862)

The fraudulent representations of an agent, made in the course of the business of his principal, bind the principal.—*Teter v. Hinders*, 19 Ind. 93.

[b] (Sup. 1885)

A principal, whose agent, appointed to effect an exchange of land, makes fraudulent representations as to the value and location of the land, is liable therefor, though ignorant thereof.—*Wolfe v. Pugh*, 101 Ind. 293.

[c] (Sup. 1888)

False representations of an agent, in the scope of his authority, bind the principal.—*Du Souchet v. Dutcher*, 113 Ind. 249, 15 N. E. 459.

[d] (Sup. 1889)

One who has been induced by the fraudulent misrepresentations of the seller to purchase a worthless town warrant may, in an action for

money had and received, recover of him the amount paid, though the seller was acting merely as agent and had turned the money over to the principal.—*Moore v. Shields*, 121 Ind. 267, 23 N. E. 89.

[e] (App. 1891)

A principal is bound by the fraudulent representations of his agent, whether general or special, if the business with reference to which the representations were made was within the scope of his authority.—*Beem v. Lockhart*, 1 Ind. App. 202, 27 N. E. 239.

[f] (Sup. 1892)

Fraudulent representations made by an agent pursuant to a conspiracy between him and his principal are imputable to the principal.—*Nichols v. Colgan*, 30 N. E. 301, 130 Ind. 341.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Princ. & A. §§ 583–587; 48 CENT. DIG. Ven. & Pur. § 44.

See, also, 31 Cyc. p. 1364.

§ 158. Fraud of agent.

Fraudulent representations, see ante, § 156.

[a] (Sup. 1885)

Where the agent perpetrates a fraud in exercise of his authority to accomplish the object of the agency, the principal is liable for the fraud, though he may not have directed it nor had knowledge of it.—*Wolfe v. Pugh*, 101 Ind. 293.

[b] (Sup. 1890)

Where a school township accepts the property purchased to establish a graded school, and retains the title, it is no defense, in an action on a note for the price, that the trustee acted in bad faith in making the purchase, unless it be shown that the vendor, a Masonic lodge, had knowledge of the fraud.—*Craig School Tp. v. Scott*, 124 Ind. 72, 24 N. E. 585.

[c] (App. 1892)

The perfidy of an agent in his conduct towards his principal will not enable the latter to repudiate a contract made by the agent if within the scope of the agent's authority.—*Union Cent. Life Ins. Co. v. Huyck*, 32 N. E. 580, 5 Ind. App. 474.

[d] (App. 1908)

An agent who fraudulently acts without authority, or who conceals his want of authority, is personally liable for his act.—*Sourwine v. McRoy Clay Works*, 42 Ind. App. 358, 85 N. E. 782.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Princ. & A. §§ 589–598.

See, also, 31 Cyc. pp. 1583, 1603.

§ 159. Negligence or wrongful acts of agent.

Liability of school corporation for acts and omissions of officers and agents, see SCHOOLS AND SCHOOL DISTRICTS, § 89.

Negligence of agent imputable to principal, see NEGLIGENCE, § 90.

[a] (Sup. 1874)

Neglect and want of skill of an agent, by which the principal is wronged, will not entitle the principal to relief against a third person not guilty of any wrong in the matter.—*Bacon v. Markley*, 46 Ind. 116.

[b] (Sup. 1882)

Where an agent does an unlawful thing resulting in injury to a third party, he cannot shelter himself behind his principal and escape liability.—*McNaughton v. City of Elkhart*, 85 Ind. 384.

[c] (Sup. 1882)

An agent who wrongfully detains the goods of another for his principal is personally liable.—*Berghoff v. McDonald*, 87 Ind. 549.

[d] (Sup. 1885)

A corporation that intrusts a general duty to an agent is responsible to an injured person for damages flowing from the agent's wrongful act done in the course of his general authority, although in doing the particular act the agent may have failed in his duty to the principal, and may have disobeyed instructions.—*Pennsylvania Co. v. Weddle*, 100 Ind. 138.

A corporation is responsible for the acts of an agent performed while engaged in the discharge of duties within the general scope of his agency, although the particular act was willful, and was not directly authorized.—*Id.*

[e] (Sup. 1888)

Where the misconduct of an agent acting within the scope of his authority causes a loss, it must be borne by the principal rather than by a third person, who has fairly dealt with the agent.—*Commercial Union Assur. Co. v. State ex rel. Smith*, 15 N. E. 518, 113 Ind. 331.

[f] (App. 1892)

Where a tortious act was committed by defendant's agent, the agent and principal are equally liable.—*Block v. Haseltine*, 3 Ind. App. 491, 29 N. E. 937.

[g] (App. 1892)

In an action for the value of certain wheat stolen from plaintiff and sold to defendant by plaintiff's servant, it appeared that on two previous occasions plaintiff had authorized the same servant to sell wheat to defendant, and receive pay therefor; that at each sale the servant used the same team, and the wheat was of the same grade; and that defendant bought the wheat in good faith, paying the servant therefor, not knowing that the relations between plaintiff and the servant were changed. *Held* that plaintiff could not recover.—*Miller v. Miller*, 4 Ind. App. 128, 30 N. E. 535.

[h] (App. 1895)

An agent in charge of a building, who fails to make necessary repairs, is not liable to a tenant injured by such failure.—*Dean v. Brock*, 11 Ind. App. 507, 38 N. E. 829.

[i] (App. 1895)

One who commits an unlawful act cannot escape liability therefor on the ground that he acted as agent for another.—*Blue v. Briggs*, Ind. App. 105, 39 N. E. 885.

[j] (App. 1896)

Where a statute declaring a private remedy provides a penalty as damages to the individual to whom the right is denied, and, on conviction of a fine, the denial of the right by an agent renders the principal liable for the penalty, to the individual.—*Fruchey v. Eagleson*, 15 Ind. App. 43 N. E. 146.

[k] (App. 1903)

Where defendant, the owner of a farm, in possession of a tenant, directed his agent to have general supervision of defendant's farm, and that, if water got on his land, the agent should let it off, if necessary, and in pursuance of that direction the agent and the tenant cut a ditch through a highway, so that water flowed from defendant's land onto plaintiff's cornfield, and destroyed the corn, the act of the agent was within the scope of his authority, and renders defendant liable for the damages so caused.—*Ogle v. Hudson*, 68 N. E. 702, 30 Ind. App. 43 N. E. 146.

[l] (App. 1909)

The hiring of a horse by a traveling salesman with which to reach another town is a "necessary" and "reasonable" incident to the performance of his employer's business and renders the latter liable for his negligent use of the horse, though the town could have been reached by other modes of travel.—*Rexroth v. Holloway*, 90 N. E. 87.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 5

613; 15 CENT. DIG. Damag. § 208.

See, also, 31 Cyc. p. 1584.

§ 160½. Individual interest of agent

[a] (App. 1905)

An agent cannot act as such where his personal interest is antagonistic to that of his principal, unless his actions are ratified by the principal after full knowledge.—*Indiana T. Co. v. Byram*, 36 Ind. App. 6, 72 N. E. 670, 1094.

[b] (App. 1907)

Where a principal contracted to receive money advanced to his agents for a purchase, the fact that such agents had bills of lading executed in their own names as consignors to the consignees does not justify the principal in refusing to repay the money advanced.—*First Nat. Bank v. Goldsmith*, 40 Ind. App. 592, 82 N. E. 790.

§ 161. Repudiation by principal

As between principal and agent, see ante, §

[a] (Sup. 1876)

An account having been placed in the hands of an attorney, by the creditor, for collection, and the attorney having presented it to

debtor for payment, the debtor afterwards paid a part of the claim to another person who occupied the same office with the attorney, and who gave a receipt for the money so paid, signed by him as for the attorney, but who had no business connection with the attorney, and had no authority from him or from the creditor to receive payment, which act was not ratified by the creditor, but was ratified by his attorney, who never received the money so paid, and who afterwards repudiated the act on learning that his client had never received the money so paid. *Held*, in an action on the account, that the creditor was not bound by the payment.—*O'Conner v. Arnold*, 53 Ind. 203.

[b] (Sup. 1880)

On the issue of title to a sewing machine leased to plaintiff with the privilege of purchase, a charge that, if the lessor's agent agreed with plaintiff that she might pay therefor in boarding him, plaintiff would not be bound by the arrangement, but might repudiate the same, and repay money paid on the machine, but could not repudiate the contract and refuse to repay the money, was proper.—*Isbell v. Brinkman*, 70 Ind. 118.

[c] (App. 1899)

Under a contract constituting plaintiff the agent of defendants, and providing that orders forwarded by plaintiff must be approved by defendants, no liability attaches to defendants on an order which they refused to approve because the terms were not satisfactory.—*Whitman Agricultural Co. v. Hornbrook*, 55 N. E. 502, 24 Ind. App. 255.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 614-618.

See, also, 31 Cyc. p. 1204.

(D) RATIFICATION.

As between principal and agent, see ante, § 75. Conclusiveness against pleader of allegations relating to, see PLEADING, § 36.

Of acts of corporate officers and agents, see CORPORATIONS, § 426.

Of acts of insurance agents, see INSURANCE, § 94.

Of agency of husband for wife, see HUSBAND AND WIFE, §§ 25, 138.

Of agency of wife for husband, see HUSBAND AND WIFE, § 23½.

Of attorney's act by client, see ATTORNEY AND CLIENT, § 103.

Pleading ratification, see post, § 189.

§ 163. Nature and grounds in general.

[a] (Sup. 1877)

A ratification is an agreement to adopt an act performed by another for the one who agrees to adopt it, or the confirmation of a voidable act.—*Haggerty v. Juday*, 58 Ind. 154.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 618-621.

See, also, 31 Cyc. pp. 1245-1260, 1635-1677.

§ 164. Acts capable of ratification.

[a] (Sup. 1854)

A void act is incapable of ratification.—*State v. State Bank*, 5 Ind. 353.

[b] (Sup. 1856)

The subscription to the stock of a company by an agent in the name of the principal, but without proper authority, will bind the latter, if he subsequently ratifies.—*Jones v. Milton & R. Turnpike Co.*, 7 Ind. 547.

[c] (Sup. 1881)

Where one making a contract has no authority to contract for a third person, and does not at the time profess to act for him, the subsequent assent of such third person to be bound as principal has no effect.—*Crowder v. Reed*, 80 Ind. 1.

[d] (App. 1894)

The contract ratified must be one that the parties might have lawfully made in the first instance. The person who acts as agent must purport to be the agent of the principal, and the contract must be made upon the faith and credit of the principal. Ratification means adoption of that which was done for and in the name of another. Hence the contract at its inception must purport to be the contract of the principal.—*Minnich v. Darling*, 36 N. E. 173, 8 Ind. App. 539.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 622-626.

See, also, 31 Cyc. pp. 1247-1249; note, 4 L. R. A. (N. S.) 431; note, 5 Am. St. Rep. 618.

§ 166. Knowledge of facts.

[a] (Sup. 1846)

Where an agent, empowered by a seller of certain wool to weigh it and deliver it to the buyer, warrants a quantity of the wool, such agent's report to the seller of his having attended to the weighing and delivery of the wool is no proof of the seller's ratification of the warranty, unless it appears that he was apprised that it had been warranted.—*Richmond Trading & Mfg. Co. v. Farquar*, 8 Blackf. 89.

[b] (Sup. 1866)

In order to make the ratification of an unauthorized act of an agent binding, it must be made with a full knowledge of the facts affecting the rights of the principal.—*Manning v. Gasharie*, 27 Ind. 399.

[c] (Sup. 1881)

Where plaintiffs claimed that notes sued on were delivered to them through P., defend-

ant's agent, in consideration that they would pay a debt of defendant's son for which they were liable as sureties to an express company, and release him, while defendant claimed that the notes were procured by P. as plaintiff's agent, an instruction that if P., as a friend of both parties, or of either, and without authority, procured the notes for plaintiffs, their acceptance was a ratification of all P.'s acts in procuring the same, was erroneous, as omitting the element of knowledge by plaintiffs of such acts.—*Crowder v. Reed*, 80 Ind. 1.

[d] (*Sup.* 1894)

Defendants agreed to convey land to a number of persons on payment of \$5,000. Some of the vendees proving insolvent, the special agent of the defendants appointed to collect the money agreed to deliver the deed on payment by the solvent vendees of their share of the price, and to look to the insolvent vendees alone for the residue. *Held*, that the fact that the defendants executed a deed and placed it in escrow, and also received the money of the solvent vendees, did not amount to a ratification of the agent's acts, in the absence of any evidence that they had notice of the agreement made by him.—*Davis v. Talbot*, 137 Ind. 235, 36 N. E. 1098.

[e] (*App.* 1895)

Where a salesman, without authority, contracts on behalf of his principal to sell goods on commission for another house, and, in answer to a letter from the principal asking about the terms, the person with whom the contract was made writes that he had given the salesman some designs to sell, and was to pay a percentage on the sales, and the principal then assents to the contract, the principal is not liable for the failure of the salesman to observe a stipulation of the contract, of which his principal had no knowledge, whereby he agreed, in consideration of the exclusive right to sell the goods, to diligently devote his time to their sale.—*Willison v. McKain*, 12 Ind. App. 78, 39 N. E. 886.

A principal is bound by his ratification of the acts of his agent only to the extent that he has knowledge of the facts, and his acceptance of benefits accruing from the agent's contract cannot be regarded as a ratification of provisions of such contract as to which the principal has no information.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & A. §§ 627-633.

See, also, 31 Cyc. pp. 1253-1257.

§ 168. Implied ratification.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & A. §§ 636-655.

See, also, 31 Cyc. pp. 1263-1282.

§ 169. — In general.

[a] (*Sup.* 1882)

Where in his final report to the board of commissioners, made after the completion of

a building, the architect made a statement of extra work done by the plaintiff, reporting some of the items as done on the authority of the architect and others without his objection, and the board ordered the payment of specified items and rejected others, it was not error to exclude evidence to prove that by mistake the architect omitted from such report certain items of extra work; the action of the board, amounting to a ratification of the architect's action only in the specific cases approved.—*Eigemann v. Board of Com'rs of Posey County*, 82 Ind. 413.

[b] (*App.* 1895)

Where an administrator brought replevin to recover personal property, it was not equivalent to a ratification of the recording of a mortgage on such property without the knowledge of the intestate so as to affect one who purchased at a sale under execution against the mortgagor.—*McFadden v. Ross*, 41 N. E. 607, 14 Ind. App. 312.

[c] (*App.* 1898)

The authority of an agent must proceed from his principal, and, in ascertaining the extent of his authority, what has been expressly or impliedly authorized must be looked to, as must also the conduct of the principal after the act in relation thereto, by way of adopting or rejecting it. If the subsequent conduct may be explained and understood in a sense consistent with a previously existing limitation, such subsequent conduct cannot furnish as against the principal a foundation for an implication of extended authority by way of ratification of an unauthorized act.—*Robinson v. Nipp*, 50 N. E. 408, 20 Ind. App. 153.

[d] (*App.* 1908)

Where an agent, empowered to collect a note, received a check therefor payable to her principal, on which she indorsed the principal's name and obtained the money from the payee bank, which she converted, the principal's act in claiming the check did not constitute a ratification of the agent's act in indorsing the check and receiving the money.—*Robinson v. Bank of Winslow*, 42 Ind. App. 350, 85 N. E. 793.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & A. §§ 636-637.

See, also, 31 Cyc. pp. 1263-1267.

§ 170. — Acquiescence.

[a] (*Sup.* 1849)

Where an agreement made by attorney has been acted upon by the party for several years, he will not be allowed to say that it is not the agreement which he authorized his attorney to make.—*Wakeman v. Jones*, 1 Ind. 517, Smith, 308.

[b] (*Sup.* 1854)

A written lease under seal, signed by A., who describes himself in the introductory part of the lease as the agent of B., will become the lease of B., if he choose to adopt it; and permitting the lessee to enter and occupy under it,

and offering it as evidence to show his right of possession, show that he has so adopted it; and the lessee is estopped by the recital in the lease from denying that A. was an agent.—*McClain v. Doe ex dem. Malone*, 5 Ind. 237.

[c] (App. 1906)

After defendant's superintendent had obtained a release from an injured employé on consideration of defendant's agreement to pay wages during disability, doctor's and nurse's bills, etc., the release was immediately sent by the superintendent to defendant's home office, where it was retained; and defendant thereafter paid the injured employé a sum of money under the contract, by checks executed by a corporation operated by defendant under such superintendent, and also paid certain doctor's and nurse's bills. *Held*, that a finding that defendant ratified the contract of the superintendent was justified.—*American Quarries Co. v. Lay*, 73 N. E. 98, 37 Ind. App. 386.

[d] (App. 1909)

Where, notwithstanding an agent to purchase wool for plaintiff violated his instructions as to price, plaintiff did not repudiate any of the purchases, and, though present when the wool was sacked, weighed, and loaded on the cars, did not object to the price paid until final settlement, and then did not repudiate the purchase, or refuse to take the wool, but demanded that it be delivered to him and shipped to his own consignees he ratified the agent's acts.—*Welker v. Appleman*, 90 N. E. 35.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & A. §§ 638-643.

See, also, 31 Cyc. pp. 1275-1279.

§171. — Acceptance of benefits.

[a] (Sup. 1853)

A. conveyed to B. and C. a tract of land, and took their note for part of the purchase money. Afterwards, and before the note became due, he sent an agent to collect it. Upon the proposal of B., the agent agreed to take the individual note of B., with an extension of the time of payment, for a part of his half of the note upon his paying in hand the residue of such half. The money was thus paid and the note taken, and the agent thereupon entered a credit on the original note for one-half thereof. The land afterwards passed into the hands of D., an innocent purchaser, for a valuable consideration, without notice of the circumstances under which the credit was made, or the individual note of B. executed. A. received the note of B., acquiesced for several years in the arrangement made by his agent, and did not disapprove thereof; but afterwards filed his bill to enforce his lien as a vendor against the land in the hands of D. for the nonpayment of the individual note of B. *Held*, that as to D. at least A. must be held to have ratified the act of his agent, and that the credit entered on the original note by the agent must be treated as

a payment, and that the individual note of B. must be regarded simply as given for money loaned.—*McCarty v. Pruett*, 4 Ind. 226.

[b] (Sup. 1861)

Where P., acting without authority from H., sells land of H., receiving a promissory note for the price thereof, and H. receives the note and indorses it to a third party, such action of H. is a ratification of the acts of P., and makes the contract binding upon H., and he is estopped from denying the original authority or ratification.—*Moore v. Pendleton*, 16 Ind. 481.

[c] (Sup. 1877)

A principal authorizing her agent to purchase certain land, and pay towards the same a sum of money in his hands, and to sign all necessary papers, is precluded from repudiating a mortgage executed by him in her name, to secure his own note given for the unpaid balance, the principal having taken possession knowing of the mortgage.—*Fouch v. Wilson*, 59 Ind. 93.

[d] (Sup. 1881)

Where some of a number of bondsmen employed an attorney at a certain fee to settle suits pending against all, and the others, with knowledge of the contract, enjoyed the fruits of the compromise, *held*, that the latter thereby ratified the contract, and were liable with the others for the fee.—*Hlauss v. Niblack*, 80 Ind. 407.

[e] (Sup. 1882)

The grantor in a deed, who sues for the consideration named therein, is bound by the agreement of his agent, to whom he gave the deed for delivery to the grantee, as to the amount of the consideration.—*Moore v. Butler University*, 83 Ind. 376.

[f] (Sup. 1883)

The owner of a judgment who, with knowledge of the facts, retains the consideration for its unauthorized assignment, ratifies the assignment.—*Wallace v. Lawyer*, 90 Ind. 490.

[g] (Sup. 1886)

The agent of an express company at M. received a bill of exchange for collection and forwarded the same to another agent at A., which agent received a partial payment thereon, understanding that, under a rule of the express company, he had no authority so to do. The agent at M. secured the consent of the owners of the bill to receive such payment, informed the agent at A. of such consent and directed him to transfer the money, which he failed to do, and afterwards converted it to his own use. *Held* that, the agent at M. having authority to ratify the act of the agent at A., he did so ratify it by his direction, so that the express company was liable for the money converted.—*United States Express Co. v. Rawson*, 6 N. E. 337, 106 Ind. 215.

[h] (Sup. 1888)

False representations of an agent, in the scope of his authority, bind the principal; and

if, without authority, he makes representations of a material character while acting for the principal, the latter will be bound thereby, if he afterwards ratifies and receives the benefit.—*Du Souchet v. Dutcher*, 113 Ind. 249, 15 N. E. 459.

[1] (App. 1896)

Where the indorsement of defendants was written on certain instruments, payable to them by one claiming to be their agent, who transferred the paper to plaintiffs, and defendants had the benefit of the proceeds of the transfer, which they retained with knowledge of the facts, it is immaterial to an issue of the right to the proceeds of the paper whether defendants authorized the indorsement or had knowledge of it at the time.—*Hunt v. Listenberger*, 14 Ind. App. 320, 42 N. E. 240, 964.

[J] (App. 1898)

Acceptance by a seller of notes given his agent by the buyer, on the agent's promise to remedy defects in the property sold, is a ratification of the promise.—*C. Aultman & Co. v. Richardson*, 52 N. E. 86, 21 Ind. App. 211.

[k] (App. 1908)

That a principal asserted title to a check which his agent for the collection of money had received and wrongfully indorsed does not constitute a ratification of the indorsement.—*Robinson v. Bank of Winslow*, 42 Ind. App. 350, 85 N. E. 793.

[l] (App. 1910)

Where a seller retaining title until the payment of the price with the right to take possession on default received possession from an agent who took the property from the buyer under an agreement to take it back in satisfaction of the notes and mortgage given for the price, and retained the possession, he could not dispute the authority of the agent to make the agreement.—*Reeves & Co. v. Miller*, 91 N. E. 812.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 644-655.

See, also, 31 Cyc. pp. 1267-1274.

§ 172. Ratification in part.

[a] (Sup. 1880)

An undisclosed principal, claiming the benefit of a contract of sale of his property made by his agent, must do so as an entirety, and cannot reject a portion of the contract relating to the consideration or mode of payment.—*Johnson v. Hoover*, 72 Ind. 395.

[b] (App. 1902)

A principal must adopt or repudiate the unauthorized contract of his agent as a whole, and cannot adopt the portion that is beneficial and reject the remainder.—*Adams Exp. Co. v. Carnahan*, 29 Ind. App. 606, 63 N. E. 245, 64 N. E. 647, 94 Am. St. Rep. 279.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 656-658.

See, also, 31 Cyc. pp. 1257-1260.

§ 173. Evidence of ratification.

[a] (Sup. 1883)

In an action on a note not signed by defendant, evidence considered, and held sufficient to show a ratification of the signing of defendant's name by another.—*Mullaney v. Indiana Nat. Bank of Indianapolis*, 91 Ind. 77.

[b] (Sup. 1894)

Ratification of an act performed by an alleged agent, like the agency itself, must be clearly and affirmatively established by him who relies on the agency or ratification for the enforcement of his claim, and hence the fact that after certain property had been conveyed to defendant by his co-tenant by a deed containing a clause assuming a mortgage therein defendant joined in the execution of other deeds for lots and paid his part of the expenses, taxes and interest, etc., without knowledge of such assumption clause, and, immediately after learning of such clause, repudiated the same, was insufficient to establish a ratification of such clause.—*Metzger v. Huntington*, 37 N. E. 1084, 39 N. E. 235, 139 Ind. 501.

[c] (App. 1896)

Where an agent acts outside of the apparent scope of his authority, the burden of proof is upon one dealing with him to prove that his acts were ratified by the principal.—*Willison v. McKain*, 39 N. E. 886, 12 Ind. App. 78.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 659-661.

See, also, 31 Cyc. pp. 1635, 1541-1642, 1647, 1665.

§ 175. Operation and effect.

[a] (Sup. 1829)

A., as the agent of B., purchased land, partly with his own money and partly with the money of B., taking a conveyance in the name of B. for the purpose of vesting the property in him. B. afterwards affirmed the transaction. Held, that such affirmation related to the time of the execution of the conveyance, rendering the land subject to B.'s debts from that time.—*Elliott v. Armstrong*, 2 Blackf. 198.

[b] (Sup. 1854)

The holder's ratification of the unauthorized assignment of a note will relate back to the time the assignment was made.—*Persons v. McKibben*, 5 Ind. 261, 61 Am. Dec. 85.

[c] (Sup. 1883)

Both the principal and agent are liable for conversion, where a principal ratifies his agent's act in purchasing wheat from a farm hand, who wrongfully took it from his employer, and selling the wheat after mixing it with other wheat.—*Shearer v. Evans*, 89 Ind. 400.

[d] (Sup. 1886)

The ratification of an agent's acts, with knowledge of the circumstances, relates back to the time they were performed, and binds the principal the same as if authority had been given in advance.—United States Exp. Co. v. Rawson, 106 Ind. 215, 6 N. E. 337.

[e] (App. 1894)

He who ratifies and adopts a contract made in his name without his knowledge or authority will be bound by it through all of its legitimate consequences the same as if he had authorized it in the first instance.—Minnich v. Darling, 36 N. E. 173, 8 Ind. App. 539.

[f] (App. 1906)

Where, after plaintiff's selling agent had contracted to sell certain machinery through W., plaintiff undertook to perform the contract by offering to deliver the machinery, it thereby ratified the contract, and it was immaterial that the selling agent had no authority to delegate his power to W.—Nichols & Shepard Co. v. Berning, 76 N. E. 776, 37 Ind. App. 109.

[g] (App. 1909)

A principal's ratification of the unauthorized acts of his agent relates back to the inception of the transaction.—Welker v. Appleman, 90 N. E. 35.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 662-668.

See, also, 31 Cyc. pp. 1283-1291; note, 61 Am. Dec. 88.

§ 176. Retraction.

[a] (Sup. 1880)

A principal, who ratifies an unauthorized sale of his property by his agent, cannot afterwards reclaim the property by bringing assumption to recover the agreed price.—Johnson v. Hoover, 72 Ind. 395.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. § 669.

See, also, 31 Cyc. pp. 1284-1285.

(E) NOTICE TO AGENT.

As to incompetency of fellow servant, see MASTER AND SERVANT, § 173.

Notice of breach of warranty, see SALES, § 285.

Notice to husband as agent of wife, see HUSBAND AND WIFE, § 25.

Notice to insurance agents, see INSURANCE, § 378.

Notice to master of defects in appliances and places for work, see MASTER AND SERVANT, § 125.

Notice to municipal officers or agents of defects or obstructions in street, see MUNICIPAL CORPORATIONS, § 790.

Notice to officers or agents of corporations in general, see CORPORATIONS, § 428.

§ 177. Imputation to principal in general.

Insurance agent, see INSURANCE, § 74.

[a] (Sup. 1852)

To affect a person with notice of a fact known to one alleged to have been his agent, the agency of the latter must first be established.—Jones v. Ransom, 3 Ind. 327.

[b] (Sup. 1873)

Where recitals in a deed show that the grantor purchased the real estate as the agent of the purchaser, and that he held the title in trust for the purchaser, and that the latter recognized and adopted the acts of the grantor as his agent, and gave his assent to the trust, and received the benefits thereof by accepting the deeds of the grantor, the purchaser is chargeable with any notice or knowledge possessed by the grantor affecting the title to the real estate conveyed.—Brannon v. May, 42 Ind. 92.

Notice to an agent is notice to the principal.—Id.

[c] (Sup. 1883)

Notice of a vendee's election to treat the contract as rescinded, because of the vendor's demanding improper notes for the price, to which he is not entitled under the contract, may properly be given the vendor's agent, appointed to hold the deed and deliver it only upon compliance by the vendee with such improper demands.—Vawter v. Bacon, 89 Ind. 565.

[d] (App. 1896)

As tending to prove notice to a natural gas company of the unsafe condition of its line, resulting in escape of gas and an explosion, testimony of the mayor of the city in which the lines were located that before the explosion he informed one of the company's men, who had control of the line, of the unsafe condition of the pipes, and that he thought the line should be taken up, is admissible.—Alexandria Mining & Exploring Co. v. Irish, 16 Ind. App. 534, 44 N. E. 680.

[e] (App. 1903)

Notice to an agent for the purchase of land of the rights of another therein is notice to the principal.—Blair v. Whittaker, 69 N. E. 182, 31 Ind. App. 664.

[f] (Sup. 1904)

Where one who contemplated loaning money directed another to appraise the land offered as security to procure an abstract and to determine whether the title was good and unincumbered, and, if so, to make the loan, the lender was charged with notice of a recorded mortgage.—Field v. Campbell, 72 N. E. 260, 164 Ind. 389, 108 Am. St. Rep. 301.

[g] (Sup. 1909)

Where a general agent is in charge of work for his principal, the presumption that the principal knew all facts of which the agent had knowledge is so violent that it may not be controverted in determining the parties' rights in

respect to a claim of compensation for additional work done.—*Cleveland, C., O. & St. L. Ry. Co. v. Moore*, 170 Ind. 328, 82 N. E. 52, 84 N. E. 540.

Where the agent of a surety company was in charge of the construction of railroad grading, and he had knowledge of changes in the plans for such work, the surety company is conclusively presumed to know of such change.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 670-679.

See, also, 31 Cyc. pp. 1587-1591; note, 21 L. R. A. 340; note, 24 Am. St. Rep. 228.

§ 178. Scope of agency or authority.

[a] (App. 1897)

When an agent is acting within the scope of his agency or authority, the great weight of the adjudicated cases hold that his knowledge is the knowledge of his principal, and that the principal is bound by his acts; but this rule does not obtain when the agent acts for himself and wholly independent of the business or employment of his principal.—*Shaffer v. Milwaukee Mechanics' Ins. Co.*, 46 N. E. 557, 17 Ind. App. 204.

[b] (Sup. 1900)

Notice to agent is notice to principal of any matters within scope of agent's authority.—*Marion Mfg. Co. v. Harding*, 58 N. E. 194, 155 Ind. 648.

[c] (Sup. 1903)

Where an attorney, who was at times employed by a loan company to collect dues, fines, etc., and at times secured loans from the association, he filling out the blank application, and being paid by the applicants, secured a loan for defendant, filling out the blank application, he did not act as agent for the company, so as to render it chargeable with his knowledge that the mortgage given to secure the loan was given by defendant as a surety.—*International Building & Loan Ass'n v. Watson*, 64 N. E. 23, 158 Ind. 508.

Where notice or knowledge is sought to be imputed to the principal through the agent, it is essential and requisite that such agency or authority to act for the principal in the transaction in question be first proved by either positive or circumstantial evidence; at least to the extent of establishing a prima facie case of such agency.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 680-684.

See, also, 31 Cyc. pp. 1587-1591.

§ 179. Time of notice to agent.

[a] (Sup. 1870)

In an action by a merchant to recover for goods sold to defendant's wife, the fact that a clerk of the plaintiff, who sold some of the goods, had been told casually some months

before, at a time when it did not appear that he was in plaintiff's employ, that the defendant and his wife were not then living together, is not admissible to charge plaintiff with knowledge of the separation.—*Day v. Wamsley*, 33 Ind. 145.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 685-688.

See, also, 31 Cyc. pp. 1592-1595.

(F) ACTIONS.

Accrual of principal's right of action against third person as affected by ignorance of agent's unauthorized act, see LIMITATION OF ACTIONS, § 95.

Actions between principal and agent, see ante, §§ 78, 79.

Competency of agent as witness in action by or against principal, see WITNESSES, § 100.

§ 183. Rights of action by principal or agent or both.

[a] (Sup. 1860)

Plaintiff sued to recover damages for fraud in the sale of real estate. The fraudulent representations were made to an agent, who assigned his interest in the cause of action to his principal. *Held*, that the assignment of the agent was of no legal effect, as the cause of action was in the principal without an assignment.—*Cramer v. Wright*, 15 Ind. 278.

[b] (Sup. 1862)

An agent may sue on a contract made in his own name, but not on a contract made in the name of his principal.—*Sharp v. Jones*, 18 Ind. 314, 81 Am. Dec. 359.

[c] (Sup. 1866)

A complaint by A. against B. alleged that A., having been a member of a copartnership before that time dissolved, had employed an agent to compound and pay the debts of the copartnership, for which he was liable as such partner; that B. had falsely and fraudulently represented to said agent that he held a note of said copartnership, for the payment of which A. was liable, and that said note was then in the hands of an attorney in a distant town; that said agent, confiding in said representations, paid said debt, etc. It was insisted for the defense that the suit should have been brought by the agent upon whom the fraud was practiced, and that the plaintiff's only remedy was against this agent. *Held*, that the complaint showed a good cause of action against B.—*Pattison v. Barnes*, 26 Ind. 200.

[d] (Sup. 1871)

An agent who contracts in his own name, instead of that of his principal, may sue in his own name for damages on a breach of the contract.—*Beard v. Sloan*, 38 Ind. 128.

[e] (Sup. 1878)

Under 2 Rev. St. 1876, pp. 33, 34, §§ 3, 4, providing that every action must be prosecuted in the name of the real party in interest, except in the case of executors, administrators, trustees of an express trust, and persons expressly authorized to sue by statute, one cannot maintain an action for goods sold by him as agent, though he agreed to be personally responsible for the debt in case it could not be collected.—*Smock v. Brush*, 62 Ind. 176.

[f] (Sup. 1881)

A mortgage taken by an agent in his own name instead of the name of the principal to secure a debt of the principal is held by the agent in trust for the principal, and the principal may foreclose the mortgage and subject the property to the payment of the debt.—*Durham v. Craig*, 79 Ind. 117.

[g] (Sup. 1884)

If agents for the sale of certain articles are answerable to the seller for the price, they are entitled to maintain an action therefor in their own names.—*Fuller v. Curtis*, 100 Ind. 237, 50 Am. Rep. 786.

[h] (Sup. 1887)

The right of an agent to bring an action in certain cases in his own name is subordinate to the rights of the principal, who may, unless in particular cases, where the agent has a lien or some other vested right, bring suit himself, and thus suspend or extinguish the right of the agent.—*Rowe v. Rand*, 12 N. E. 377, 111 Ind. 206.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 601-700; 7 CENT. DIG. Bills & N. § 1394.

See, also, 31 Cyc. pp. 1608-1622; note, 12 Am. Dec. 700.

§ 184. Rights of action against principal or agent or both.

[a] (Sup. 1860)

Where ties were delivered to a railroad company through the agency of a third person, and plaintiff was cognizant of the principal when he contracted with the agent, he should have sued the company.—*Cochran v. Brooks*, 15 Ind. 343.

[b] (Sup. 1881)

Payment to an agent, being payment to the principal, extinguishes the debt, and the debtor cannot maintain an action against the agent on the failure of the latter to pay the proceeds of the note to the principal.—*Worley v. Moore*, 77 Ind. 567.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 701-703.

See, also, 6 Cyc. p. 51, 31 Cyc. pp. 1613, 1614.

§ 185. Defenses against principal or agent.

[a] (Sup. 1868)

Where an agent takes a note in his own name for a debt due to his principal, and transfers the note to the latter, the maker cannot set up as a defense that when it was made the agent was not authorized to take it in his own name.—*Palmer v. Egbert*, 4 Ind. 65.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 704-706.

See, also, 31 Cyc. pp. 1630-1632; note, 40 Am. Dec. 46.

§ 186. Defenses by principal or agent.

[a] (Sup. 1905)

Defendant, a resident of Indiana, owed money to plaintiff, a resident of New York, for goods sold and delivered. An employé of defendant also owed money to plaintiff, and, in order to meet notes which he had given for the debt, misappropriated money belonging to defendant, and with such money took up the notes which had been transmitted by plaintiff to a bank for collection. *Held*, in an action by plaintiff for goods sold and delivered, that defendant could set off his claim for the money received by plaintiff from defendant's employé.—*Porter v. Roseman*, 74 N. E. 1105, 165 Ind. 255, 112 Am. St. Rep. 222.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 707, 708.

See, also, 31 Cyc. pp. 1630-1632.

§ 188. Parties.

Right of selling agent to bring suit in his own name, see ante, § 183.

Substitution of principal in action against agent, see PARTIES, § 63.

[a] (Sup. 1859)

The complaint in a suit for the rescission of a contract for the conveyance of land alleged that one of the defendants was the plaintiff's agent to sell; that he wrote to the plaintiff misrepresenting the value of the land; that thereupon the plaintiff sold for less than the real value to the other defendant; and that the two had previously agreed to share the land. *Held*, that the agent was a proper party.—*Roy v. Haviland*, 12 Ind. 364.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 711, 712.

See, also, 31 Cyc. pp. 1618-1625.

§ 189. Pleading.

Conclusiveness of allegations on pleader, see PLEADING, § 36.

Pleading and proof in assumpsit, see ASSUMPSIT, ACTION OF, § 23.

Pleading authority of agent in action to foreclose mechanic's lien, see MECHANICS' LIENS, § 272.

[a] (Sup. 1825)

In covenant in a deed averred in the declaration to have been executed for the obligator by his attorney in fact, a plea denying the attorney's authority must be verified by affidavit.—*Allen v. Thaxter*, 1 Blackf. 399.

[b] (Sup. 1881)

The law does not require a party declaring upon a contract resting in parol, made for him by an agent, to aver that it was made for him by an agent; but he may aver generally that it was made by him, and prove the averment by showing that he made it through an agent.—*Ohio & M. R. Co. v. Nickless*, 73 Ind. 382.

[c] (Sup. 1881)

Where an agent rightfully acts for his principal, it is sufficient to charge the act as that of the principal, without naming the agent.—*Crowder v. Reed*, 80 Ind. 1.

[d] (App. 1894)

Ratification, as applied to principal and agent, may be pleaded in general terms because it is a fact and is not a legal conclusion, but, when the word is used in a sense akin to estoppel, it is not proper to plead it in general terms, but the acts done constituting it must be specially pleaded, and, if it merely states legal conclusions, the pleading will be bad on demurrer.—*Minnich v. Darling*, 36 N. E. 173, 8 Ind. App. 539.

[e] (App. 1909)

There is no difference in law between a charge that a contract was made directly with a party and a charge that it was made with his agent.—*Colt v. Lawrenceburg Lumber Co.*, 88 N. E. 720.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 713-717.

See, also, 31 Cyc. pp. 1625-1638.

§ 190. Evidence.

Evidence as to agency, see ante, §§ 18-23.

Evidence as to authority of agent, see ante, §§ 118-123.

Evidence of ratification of acts of agent, see ante, § 173.

Limitation of action on implied contract of principal to reimburse surety, see LIMITATION OF ACTIONS, § 28.

[a] (Sup. 1864)

Where, in an action on a contract, the defense is that the contract was made by the

defendant as agent, the burden of proof is upon the defendant to establish such defense.—*Vawter v. Baker*, 23 Ind. 63.

The presumption that an agent, for a principal residing in a foreign country is personally liable for contracts made by him for his employer, though he discloses at the time the character in which he acts, may be rebutted by proof that credit was given to both principal and agent or to the principal only.—*Id.*

[b] (Sup. 1881)

In an action to recover the value of a machine sold by defendant in alleged violation of his contract of agency, the evidence considered, and held sufficient to sustain a finding that the sale was made by a general agent of the plaintiff, and not by defendant under his contract of agency.—*D. M. Osborne & Co. v. Guffin*, 76 Ind. 220.

[c] (Sup. 1906)

In an action on a contract made by defendant's agent, evidence as to what communications passed between the agent and his superior officers, as to the contract, is inadmissible, there being no plea of ratification or estoppel.—*American Telephone & Telegraph Co. v. Green*, 73 N. E. 707, 164 Ind. 349.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 718-720;

See, also, 31 Cyc. pp. 1638-1667; note, 53 Am. Dec. 773.

§ 191. Trial.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. §§ 721-732.

See, also, 31 Cyc. pp. 1670-1679.

§ 198. Appeal and error.

[a] (App. 1896)

That there was evidence in the record, in an action for goods sold, supporting defendant's theory that he did not buy said goods on his individual credit, but that they were sold by plaintiff to defendant's alleged principal, and that defendant was acting as the manager of said principal, will not, of itself, justify the appellate court in reversing a judgment for plaintiff.—*Horne v. Western Refrigerating Co.*, 16 Ind. App. 695, 43 N. E. 571.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & A. § 734½.

See, also, 31 Cyc. pp. 1680, 1681.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

PRINCIPAL AND SURETY.

Scope-Note.

[INCLUDES promises to be bound, with and for another primarily liable, for the payment of a debt or performance of a duty or contract or other obligation by him; nature, requisites, validity, incidents, construction, operation, and effect of such promises in general; organization, franchises, powers, and dealings of surety companies; and rights, liabilities, and remedies of sureties, principals, and creditors.

[EXCLUDES collateral promises of guaranty (see *Guaranty*), or indemnity (see *Indemnity*); contracts of suretyship by particular classes of persons (see *Infants*; *Insane Persons*; and other specific heads), partners (see *Partnership*), and corporations (see *Corporations*); particular forms of contracts or instruments of suretyship (see *Bonds*; *Bail*; *Undertakings*); and liabilities of sureties for performance of particular classes of fiduciary or official duties (see *Guardian and Ward*; *Executors and Administrators*; *Trusts*; *Officers*; and titles of specific officers), and for performance of particular acts in judicial proceedings (see *Arrest*; *Attachment*; *Garnishment*; *Injunction*; *Replevin*; *Appeal and Error*; *Costs*; and other specific heads). For complete list of matters excluded, see cross-references, post.]

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This Digest is compiled on the Key-Number System. For explanation, see page iii.

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V. Rights and Remedies of Surety.**(A) AS TO CREDITOR.**

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I. CREATION AND EXISTENCE OF RELATION.

Determination of question of suretyship, after change of venue, see VENUE, § 80.
 Married women as sureties, see HUSBAND AND WIFE, § 56.
 Power of corporation, see CORPORATIONS, § 388.

(A) BETWEEN INDIVIDUALS.

§ 1. Nature of the relation.

Nature of liability of surety, see post, § 65

[a] (Sup. 1885)

The engagement of a surety is that in the event his principal fails he will perform the original obligation, and whether entered into jointly with the principal or separately the extent and character of the obligation are the same as to both, depending only on the form in which it is expressed.—*La Rose v. Logansport Nat. Bank*, 1 N. E. 805, 102 Ind. 332.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. § 1.

See, also, 32 Cyc. pp. 14-20.

§ 2. What law governs.

Capacity of married women to make contracts of suretyship, see HUSBAND AND WIFE, § 56.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. § 2.

See, also, 32 Cyc. p. 74.

§ 4. Suretyship distinguished from other contracts.

Indorsement distinguished from suretyship, see BILLS AND NOTES, § 245.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 5-7.

See, also, 32 Cyc. pp. 20-22.

§ 5. — In general.

[a] (App. 1896)

Defendant delivered to plaintiff a writing as follows: "I hereby agree to hold myself responsible for, and agree to pay for, any goods and merchandise which may be purchased of you by L., to the amount of \$500." *Held*, that the contract was an original undertaking, on which defendant was liable without notice of its acceptance by plaintiff.—*Lane v. Mayer*, 15 Ind. App. 382, 44 N. E. 73.

[b] (App. 1898)

An undertaking to pay obligees, upon a fixed basis, a certain share of any indebtedness they might have to pay as sureties, is an original promise, and not a collateral undertaking of suretyship.—*Spencer v. McLean*, 50 N. E. 769, 20 Ind. App. 626, 67 Am. St. Rep. 271.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. § 5.

See, also, 32 Cyc. pp. 20-22.

§ 6. — Guaranty.

[a] (Sup. 1862)

An undertaking to "stand surety" for another is a contract of suretyship, and not of guaranty.—*Watson v. Beabout*, 18 Ind. 281.

[b] (Sup. 1869)

The contract of the guarantor is his own separate contract. He is not bound to do what the principal has contracted to do, like the surety, but only to answer for the consequences of the default of the principal. The original contract of the principal is not his contract, and he is not bound to take notice of its non-performance.—*McMillan v. Bull's Head Bank*, 32 Ind. 11, 2 Am. Rep. 323.

A., B., and C. executed to a bank a joint and several bond, in the penalty of \$15,000, with a condition reciting that A. had become a member of a certain firm, rendering it necessary for him to use more funds in the firm's

business than he would have at command, which he proposed to borrow, and then proceeding thus: "Now the foregoing bond is to be in force and binding upon us, according to its terms, for the full amount of any loans and advances the said bank may make to the said A. in connection with his said business, not exceeding in amount \$15,000, for which sums by the foregoing bond we acknowledge ourselves as sureties, and, in case of his failure to pay any such loans and advances as aforesaid, that the same may and shall be collected of us. Unless such loans and advances are made to said A. in his business aforesaid, and upon the faith of this bond, the same is null and void." *Held*, that this was not a mere overture or proposition by B. and C. to guaranty, but was an actual undertaking and that the instrument was not a guaranty, but B. and C. were sureties. —Id.

[c] (Sup. 1874)

An indorsement on a note of the words, "We guaranty payment," is a guaranty and not a contract of suretyship or mere indorsement.—*Sample v. Martin*, 46 Ind. 226.

[d] (App. 1898)

Where one gives a bond to a town conditioned for performance of another's contract to supply it with light, he is a surety, and not a guarantor, and hence is not entitled to notice of his principal's default.—*Town of Sullivan v. Cluggage*, 52 N. E. 110, 21 Ind. App. 667.

[e] (App. 1899)

There is a contract of suretyship, and not of guaranty, where bonds, the consideration for the sale of goods by G. & Co. to T., are executed as the joint and several undertaking of W. and T., and authorize the sale of goods by G. & Co. to T., and in one W. undertakes not merely to pay damages resulting from failure of T. to fulfill her agreement, but also to pay for the goods bought by her if she failed to pay for them, and in the other he designates himself as surety for T., and it is recited, if she fails to pay for goods bought, "the parties hereto" agree to indemnify G. & Co. against any loss, and all persons interested in the contract "are hereby secured" against loss.—*Wheeler v. Rohrer*, 52 N. E. 780, 21 Ind. App. 477.

[f] (App. 1899)

A salesman executed a bond to his employer, with sureties, conditioned that whereas the salesman had been given a position, and during the term of employment there might come into his hands or control moneys, securities, or personal property belonging to the employer, therefore, if he should account for and pay, without loss or delay, all such moneys, securities, and other personal property so coming into his possession or under his control, and not divert or detain any portion thereof on any pretext whatever, then the obligation to be void, and otherwise to remain in full force. *Held*, that the bond is a contract of suretyship, and not

of guaranty.—*Durand & Kasper Co. v. Rice*, 54 N. E. 771, 23 Ind. App. 11.

[g] (App. 1900)

Where one, having a contract with another to build a house, executes a bond to the other to secure the payment of any mechanics' bills or claims for material to be furnished in building, and a lumber company signs the bond as "surety" in consideration of the tractor's purchasing from it material to build the house, the lumber company was not a lateral guarantor, but was bound with the principal as an original promisor.—*G. F. Verner Lumber Co. v. Rice*, 55 N. E. 868, 23 Ind. App. 586.

[h] (Sup. 1904)

One who joined with a building contractor in signing a bond to the owner, conditioned that the contractor would perform his contract, was not a surety, but a guarantor.—*Closson v. Billman*, 69 N. E. 449, 161 Ind. 610.

[i] (App. 1904)

Where the agent of an insurance company is appointed agent of a new company for the same stockholders, and it takes a bond stipulating that, in consideration of such appointment and of the compensation to be paid the agent under contract, the obligors under and agree with the company that the agent shall fully perform all the agreements in the contract, and that they bind themselves jointly and severally with the agent for the full performance of the contract, such agreement is a contract of suretyship, and not of guaranty.—*Indiana Live Stock Ins. Co. v. Bender*, 69 N. E. 691, 32 Ind. App. 287.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. § 6;

CENT. DIG. Guar. § 4.

See, also, 32 Cyc. pp. 20, 21.

§ 7. Validity of obligation of principal

Execution of written instrument by principal, see post, § 20.

Validity of assent of surety, see post, § 38.

[a] (Sup. 1832)

If A., for a debt due him from B., takes a note executed by B. in the name of the first B. & C., without the knowledge of C., it is fraudulent on C., and if D., supposing from its face that the note has been duly executed by B. & C., execute it with the intention of being a surety, it is also fraudulent and void as to D.—*Ilagar v. Mounts*, 3 Blackf. 57.

[b] (Sup. 1862)

In an action upon a bond given by defendant as agent, it appeared that the council of the city appointed defendant the agent of the city to negotiate certain city bonds at a rate not less than 97 cents on the dollar. Defendant accepted the trust, and on the same day executed his bond, with sureties, conditioned that he would well and truly execute said trust, and pay over to the city all moneys that might

to his hands, as such agent. Bonds of the city to the amount of \$25,000 were then placed in his hands, and afterwards the former resolution of the council was so far modified as to authorize defendant to negotiate the bonds at a rate not greater than an interest of 10 per cent. Again the council modified their former instructions, by authorizing the agent to make a loan of \$20,000 by hypothecation of \$25,000 of bonds. In the meantime, prior to the last modification, in violation of his trust, he borrowed the sum of \$5,000 at 30 days, and to secure the same hypothecated \$21,000 of the bonds. This money he did not pay over to the city, and in consequence the city was obliged to pay, and did pay, in order to prevent loss, the said sum of \$5,000, with interest and expenses. *Held*, that it was no defense to the action that the council transcended its powers in issuing the bonds.—*City of Indianapolis v. Skeen*, 17 Ind. 628.

[c] A suit cannot be maintained against the principal and surety on a bond given by an express agent to secure the faithful discharge of his duties to an express company, which carried on its business in the state without filing the statement of the amount of capital employed as required by Act March 5, 1855, because under the provisions of that law, the business of the company so carried on is illegal.—(Sup. 1864) *Daniels v. Barney*, 22 Ind. 207; *Same v. Wells*, Id.; (1809) *Barney v. Daniels*, 32 Ind. 19.

[d] (Sup. 1875)

A surety who signs a note given for a loan of the common school fund, made by the county auditor, is not released by reason of the loan not being secured by a mortgage of real estate, as required by statute.—*Scotten v. State ex rel. Simonton*, 51 Ind. 52.

[e] (Sup. 1878)

Duress of the principal in a contract will discharge the surety as well as the principal.—*Coffelt v. Wise*, 62 Ind. 451.

[f] (Sup. 1880)

Only a person upon whom the unlawful fear or restraint operated can avoid his contract on the ground of duress; and a surety upon a recognizance cannot plead the duress of his principal in discharge of his own liability.—*Tucker v. State ex rel. Hart*, 72 Ind. 242.

[g] (Sup. 1884)

Where a person agrees to become surety on a bond to be executed pursuant to a loan negotiated by a third person, the fact that the latter has authority to negotiate the loan as agent of the other party, by the terms of which they were to obtain such loan on executing an obligation to the person making it, will not authorize such third person to subsequently obtain the loan on his false and fraudulent representations that the obligation had been duly executed.—*Hayes v. Burkam*, 94 Ind. 311.

[h] (Sup. 1885)

A contract to construct and furnish work on the line of a certain railway, "in the county of —, state of Indiana," and to prosecute such work "with such force, and at such places" as directed, is not void for uncertainty in not naming the county; and sureties on a bond given to secure the due performance of such contract cannot claim to be relieved from liability on that ground.—*Irwin v. Kilburn*, 104 Ind. 113, 3 N. E. 650.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Princ. & S. §§ 8-12, 14, 16, 18.

See, also, 32 Cyc. pp. 23-30.

§ 8. Capacity of parties.

Bond of contractor for construction of drain, see DRAINS, § 59.

Capacity of married women, see HUSBAND AND WIFE, § 87.

[a] (Sup. 1873)

The sureties of a married woman, who is not herself liable, on a promissory note, are liable to the payee, where there is no fraud, duress, deceit, or violation of law or public policy on the part of the payee in procuring the execution of the note.—*Davis v. Statts*, 43 Ind. 103, 13 Am. Rep. 382.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Princ. & S. § 13.

See, also, 32 Cyc. pp. 27, 67.

§ 9. Creation of relation in general.

Evidence as to existence of relation, see post, § 45.

[a] (Sup. 1883)

Where a surety on a note, after he has signed it, intrusts it to the principal, who obtains the signature of another surety, the latter may by agreement with such maker determine for whom he will become surety, and fix the nature of his liability, as between him and those who have already signed, and that he will become surety for all who have previously signed, without any contract or communication between him and such prior makers or the payee, and without their knowledge, though he knows that one or more of the prior makers signed merely as surety.—*Baldwin v. Fleming*, 90 Ind. 177.

[b] (Sup. 1888)

Suretyship between makers of a note depends on the relations existing between them and is determined by inquiring who received the consideration of the contract, or who, according to the arrangements actually made and existing among themselves, ought to pay the debt.—*Sefton v. Hargett*, 15 N. E. 513, 113 Ind. 592.

[c] (Sup. 1890)

A person signing a note as surety may at the time of such signing fix his liability as be-

tween him and the other parties whose names preceded his by agreement written or parol, express or implied, without consultation with the other sureties whose names appear on the note.—*Houck v. Graham*, 24 N. E. 113, 123 Ind. 277.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & S. §§ 19-21.

See, also, 32 Cyc. pp. 22, 23; note, 17 Am. Dec. 416.

§ 10. Express contracts.

[a] (Sup. 1860)

An agreement that goods sold should be paid for on delivery was guarantied by a surety in these words: "On the part of A. and B., I hold myself with them responsible for their part of the above contracts." *Held*, that the undertaking of the surety bound him to a direct performance of the contract, and was, in effect, that he or his principals would pay for the goods on delivery.—*Kirby v. Studebaker*, 15 Ind. 45.

[b] (Sup. 1882)

The agreement, "I, H. P. W., agree to stand as surety for J. E. W. in the above agreement," binds H. P. W. as a principal, and a joint suit against him and J. E. W. is maintainable.—*Watson v. Beabout*, 18 Ind. 281.

[c] (Sup. 1881)

A surety who signs an instrument is bound thereby, though his name does not appear in the body of the writing.—*Dodd v. Mitchell*, 77 Ind. 388.

[d] (App. 1892)

Where a person has agreed that, in case a sale on credit is made, he will become surety on a note to be given by the buyer, it is his duty to sign the note on being notified that the sale has been made and the note taken, and he will not be released from liability by the seller's failure to formally demand that he sign it.—*Webster v. Smith*, 4 Ind. App. 44, 30 N. E. 139.

Where a person agrees with another that, if the latter will sell goods to a third person on credit, he will become surety on the note to be given by such third person, without specifying the form of note to be given, and after the sale fails to sign the note as surety, he will not be released from liability on his promise by the fact that the sale was conditional, and that the title was retained in the seller until the note should be paid.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & S. §§ 23-27.

See, also, 32 Cyc. pp. 33, 34.

§ 11. Implied contracts.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & S. §§ 28-34.

See, also, 32 Cyc. pp. 34-37.

§ 12. — In general.

[a] (Sup. 1866)

One who draws a bill of exchange for accommodation of the payee is the surety, the latter, within the meaning of 2 Gav. & St. p. 308, § 674, relating to the remedies against their principals.—*Lacy v. Lacy*, 26 Ind. 324.

[b] (App. 1894)

An agent for an implement manufacturer who indorses a buyer's note to the manufacturer, is a surety for the buyer.—*Ohio Thrift & Engine Co. v. Hensel*, 9 Ind. App. 328, N. E. 716.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & S. §§ 28-34.

See, also, 32 Cyc. p. 34.

§ 13. — Execution of joint obligation.

Sufficiency of execution of instrument, see p. 18-23.

[a] (Sup. 1881)

One of two joint makers of a note, whose request an heir receives their note as a part of his distributive share of the estate, and afterwards surrenders it for their new note for the amount of the old one, is a principal as between himself and the payee, and is discharged by an oral extension of time given by his co-obligor.—*Mullendore v. Wertz*, 75 Ind. 431, 39 Am. Rep. 155.

[b] (App. 1897)

R., the owner of one-fifth of the stock of a corporation, indorsed its note, and afterwards he and P., the president and owner of nine-four-fifths of the stock, signed a note, the proceeds of which were used by P. to pay the corporation's note. Both participated in negotiating the loan, knew what use was to be made of the proceeds, and agreed that R. should sign the note; but there was no understanding between the payee and the makers that R. should sign it. After P. signed it, he requested the payee to have R. sign it; and R. afterwards signed it at the payee's request. *Held*, that the fact did not show that R. was only surety on the last note.—*Pape v. Randall*, 47 N. E. 530, Ind. App. 53.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & S. § 32.

See, also, 32 Cyc. p. 34.

§ 14. — Assumption of debt of another.

[a] (Sup. 1886)

The effect of an agreement between partners whereby one partner assumes a firm's indebtedness is as between the partners to make the partner assuming the debt the principal debtor and the copartner, the surety. Under such agreement, the copartner has the right to insist that, as between himself and partner, the latter shall pay the firm's indebtedness.

of his own means.—*Bays v. Conner*, 5 N. E. 18, 105 Ind. 415.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Princ. & S. § 33.

See, also, 32 Cyc. pp. 35-37.

§ 16. Change from principal debtor to surety.

[a] (Sup. 1882)

M. and D. made a joint note. D., in fact, was surety. D. afterwards, upon a sufficient consideration, agreed with M. to pay the note. *Held*, that this arrangement made M. surety, as between himself and D., and that M. could insist, under the statute, that D.'s property should first be taken on the execution against both.—*McTaggart v. Dolan*, 86 Ind. 314.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. § 35.

See, also, 32 Cyc. pp. 37, 38.

§ 16½. Change from surety to principal debtor.

[a] (Sup. 1890)

In an action to declare a judgment satisfied on the ground that F., the principal debtor, had assigned certain fees due him to defendant, to be collected and applied on the judgment, and that defendant, by reassigning the fees to F., had released plaintiff, who was liable on the judgment as surety only, the evidence showed that, before the assignment to defendant, F. had conveyed to plaintiff land on which the judgment was a lien, and out of which it could have been satisfied; the consideration being that plaintiff should pay the judgment in question, and other indebtedness against F. *Held* that, on receiving the conveyance, plaintiff ceased to be surety, and became liable on the judgment as principal.—*Crim v. Fleming*, 123 Ind. 438, 24 N. E. 358.

[b] (Sup. 1890)

Where a surety, for a valuable consideration, agrees with his principal to pay the joint indebtedness, he thereby becomes the principal, and the principal becomes his surety.—*Chaplin v. Baker*, 124 Ind. 385, 24 N. E. 233.

[c] (Sup. 1905)

A surety who executes a renewal note on the surrender by the payee of the original notes becomes bound, as between himself and the payee, not as surety, but as principal.—*Garriue v. Kellar*, 74 N. E. 523, 164 Ind. 676, 69 L. R. A. 870, 108 Am. St. Rep. 324.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 36, 37.

§ 17. Notice to creditor of relation.

Notice of acceptance by creditor, see post, § 28.

[a] Where the fact of suretyship is not shown on the face of the contract, notice thereof to the creditor must be proved, in order to enable

the surety to avail himself of the protection which the law affords to sureties.—(Sup. 1878) *Davenport v. King*, 63 Ind. 64; (1880) *Arms v. Beitman*, 73 Ind. 85; (1881) *Mullendore v. Wertz*, 75 Ind. 431, 39 Am. Rep. 155; (1881) *Albright v. Griffin*, 78 Ind. 182; (1882) *Lamson v. First Nat. Bank*, 82 Ind. 21; (1882) *Tharp v. Parker*, 86 Ind. 102.

[b] One of several makers of an instrument, who has signed the same as surety for the other makers, may avail himself of the protection which the law affords a surety, as against the creditor, where the latter has knowledge of the relation as surety, though that relation does not appear from the face of the instrument.—(Sup. 1882) *Starret v. Burkhalter*, 86 Ind. 439; (1885) *Gipson v. Ogden*, 100 Ind. 20.

[c] (App. 1898)

A finding that a note was given for rent due from a maker to the payee is sufficient to show that he knew that a co-maker was only a surety.—*Brannon v. Irons*, 49 N. E. 469, 19 Ind. App. 305.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 21, 38.

See, also, 32 Cyc. p. 38.

§ 18. Execution of written instruments.

Estoppel to deny validity, see post, § 46.

Filling blanks, see post, § 29.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 39-62.

See, also, 32 Cyc. pp. 41-51.

§ 20. — By principal.

[a] (Sup. 1873)

Sureties may agree to become liable, and assent to the delivery of a bond to the obligee, without the name of the principal being signed thereto.—*Wild Cat Branch v. Ball*, 45 Ind. 213.

If an instrument, in the body thereof, purports to be signed by a principal and his sureties, but, when delivered, is not signed by the principal, the obligee is chargeable with notice that it is imperfect; and the sureties may show that they did not assent to its delivery before being signed by the principal.—*Id.*

[b] (App. 1897)

The mere fact that a person executed a note as security for another, without any agreement that the latter's signature would be obtained, will not release the former, on failure to obtain such signature.—*Fassnacht v. Emsing Gagen Co.*, 18 Ind. App. 80, 46 N. E. 45, 47 N. E. 480, 63 Am. St. Rep. 322.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 39-42.

See, also, 32 Cyc. pp. 41-43; note, 91 C. C. A. 298.

§ 21. — By surety.

Conditional signature, see post, § 23.

[a] (Sup. 1872)

The complaint on a note alleged that a defendant, whose name appeared upon the back of the note, signed the note at its date and before delivery, as surety for the maker, by indorsing his name on the back of the note, with the understanding and agreement that he was surety for said maker. *Held*, that the averments were sufficient to charge the indorser as surety.—*Ewing v. Logan*, 40 Ind. 342.

[b] (Sup. 1882)

The word "security" written after a signature to a note means surety.—*Favorite v. Stidham*, 84 Ind. 423.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & S. §§ 43, 44.

See, also, 32 Cyc. pp. 43–51.

§ 22. — By co-sureties.

Conditional signature, see post, § 23.

Forgery of signature of co-surety, see post, § 41.

Invalidity as to one or more co-sureties as affecting others, see post, § 38.

Obligations constituting parties co-sureties, see post, § 192.

[a] (Sup. 1861)

The failure of one of the persons agreed on as a surety to a bond to sign the same, without the consent of the other sureties, releases the latter.—*Swope v. Forney*, 17 Ind. 385.

[b] (Sup. 1879)

An agreement was made for the stay of execution for a certain time, if the judgment debtor would procure A. and B. to sign a recognizance upon the docket in this form: "We, A. and B.," etc. The same was signed by A., but B. never signed it. At the end of the time the judgment creditor ordered execution against A., who thereupon brought suit to secure his release from the recognizance. *Held*, that the same never became operative, and A. was not bound thereby.—*McKinley v. Snyder*, 65 Ind. 143.

[c] (Sup. 1889)

Defendants were requested by an administrator to become sureties on his bond, jointly with his brothers. They found at the clerk's office a bond containing the names of themselves and the brothers as sureties, signed the bond, and left it with the clerk, without inquiry or explanation, expecting that the brothers would also sign it. The bond was approved by the clerk without further signatures, and defendants, after learning this fact, made no effort to be released. *Held*, that they had executed the bond.—*State ex rel. McClamrock v. Gregory*, 119 Ind. 503, 22 N. E. 1.

[d] (Sup. 1909)

An agreement between a payee and a surety on a note was that the surety was to

sign, with another surety, and that all releases were to be executed by both sureties. signing a renewal, the surety noted the same with a lead pencil "Get [the co-surety] on as well," and the note with this notation it was delivered to the payee's agent. Real notes prior to this had been signed by the surety without the name of his co-surety appearing thereon, but that fact was unknown to him till a short time before signing the note in question. *Held*, that the failure to obtain the signature of the co-surety released the principal.—*Hunter v. First Nat. Bank*, 172 Ind. 63, 20 N. E. 734.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & S. § 47.

See, also, 32 Cyc. pp. 45–47.

§ 23. — Conditional signature.**[a] (Sup. 1864)**

Where an officer's bond is presented by the principal in it to several persons, and their signatures as sureties for him are solicited by him, and he represents to them severally that by signing it he will procure the signatures of a certain number of other persons as sureties, and some of them, induced by such representations to sign it, and others sign it upon condition or in consideration that such other signatures shall be procured, and such other signatures are not procured, the bond is not binding upon them.—*Pepper v. State ex rel. Harvey*, 22 Ind. 390, 85 Am. 430.

[b] (Sup. 1865)

The sureties on a promissory note are not liable, although they signed it upon the promise of the maker, which was never fulfilled, that they would procure others to sign it as sureties.—*Deardorff v. Foresman*, 24 Ind. 481.

[c] In an action on a guardian's bond, it is a sufficient defense for a surety that he signed the bond on the express condition that the principal obligor, before delivering it to the creditor, would have it signed by one or more other solvent men as sureties with him, which was not done.—(Sup. 1866) *Blackwell v. State ex rel. Simpson*, 26 Ind. 204; (1876) *Hunter v. State ex rel. Martin*, 53 Ind. 321.

[d] (Sup. 1866)

The agreement of a surety with his principal that the latter shall not deliver a new bond till the signature of another be procured as a co-surety will not relieve the surety of his liability on the bond, although the co-surety was not obtained, where there is nothing on the face of the bond, or in the attending circumstances, to apprise the taker that such further signature was called for in order to complete the instrument.—*Webb v. Baird*, 27 Ind. 368, 89 Dec. 507.

[e] (Sup. 1869)

When a bond has been signed and delivered to the principal obligor by a surety, upon

condition that others, not named in the instrument, shall sign before it is delivered to the obligee, and it is delivered without such signatures being obtained, and received by the obligee without notice of such condition or circumstances which should put him upon inquiry, the condition imposed will not avail the surety. It is not a question of the power of the principal to deliver the bond in its apparently perfect condition, but simply a question of estoppel.—*State ex rel. McCarty v. Pepper*, 31 Ind. 76.

[f] (Sup. 1889)

In an action upon a bond, the facts that the obligor signed the bond upon the express stipulation that the principal should procure 12 other names of as responsible men as there were in the county to execute the bond as co-sureties with defendant, which the principal failed to do, notwithstanding the stipulation had been stated to and agreed to by him, do not constitute a defense.—*State ex rel. Lakey v. Garton*, 32 Ind. 1, 2 Am. Rep. 315.

[g] (Sup. 1869)

Where a surety signs an instrument apparently perfect and complete, and hands it to his principal to be delivered to the obligee only when it shall have been executed by certain other as sureties, and the principal, without complying with the condition, delivers the instrument to the obligee, who has no notice, actual or constructive, of the condition, and takes the instrument in good faith, such surety will be bound.—*State ex rel. Griswold v. Blair*, 32 Ind. 313.

[h] (Sup. 1870)

Where A., being requested to become a surety on a sheriff's official bond by B., a person having no connection with the bond, which was not then present, told B. that the latter might sign the name of A. to the bond, provided that C. and D. first executed it, and A. never having seen the bond, never having been requested by said sheriff to execute it, and never having had any communication in relation to the bond with said sheriff or any other person except B., the name of A. was signed by B., to the bond, which was never executed by C. or D., *held* that A. was not bound as surety.—*Bagot v. State ex rel. Dennison*, 33 Ind. 262.

[i] (Sup. 1877)

In an action on a note executed by a partnership as principal and another as surety, against the surviving partner, the executor of the deceased partner, and the surety, an answer by the latter by way of counterclaim, alleging that he signed as surety at the request of the deceased partner in his lifetime, and on his promise that certain bank stock belonging to decedent should stand as collateral for the payment of the note, but that, before such bank stock could be transferred, the decedent had died, and praying that the bank stock be transferred to the surety, or that it be first sold to

satisfy any judgment that might be rendered on the note, is sufficient, on demurrer by the executor; and an answer to such counterclaim, by the executor, that the decedent's estate and also such partnership are insolvent, and that the executor claims such bank stock as assets of the estate, is insufficient.—*McCoy v. Wilson*, 58 Ind. 447.

[j] (Sup. 1879)

On appeal from a judgment rendered by a mayor of a city, the appeal bond was signed by one of the two sureties named therein, and intrusted by him to the principal for delivery to the mayor only upon its being signed by the other surety; but the principal, instead of so doing, erased the name of the other surety and took the bond to the mayor, who accepted and approved it. *Held*, that the surety who had signed was not liable on the bond, and the fact of such erasure did not alter the rule.—*Allen v. Marney*, 65 Ind. 398, 32 Am. Rep. 73.

[k] (Sup. 1832)

A surety does not escape liability from the fact that he signed on an unfulfilled promise of his principal that others should sign, or that others signed later, as sureties, whose names were not in the bond.—*Mowbray v. State ex rel. City of Peru*, 88 Ind. 324.

[l] (App. 1897)

One who signs a note as surety under an agreement that it shall not be delivered unless also signed by another cannot be held by the payee who accepted the note with knowledge of the condition and without the signature of the other surety.—*Deering Harvester Co. v. Peugh*, 45 N. E. 808, 17 Ind. App. 400.

[m] (App. 1899)

If a surety signs a bond which is to be signed by another whose name appears in the bond as co-obligor, and the bond is delivered without such other person having signed it, and without the consent of the one who has signed, the delivery is a nullity, and such surety is not bound.—*Davis v. O'Bryant*, 55 N. E. 261, 23 Ind. App. 376.

If a bond contains the names of other obligors, and is delivered without the signature of all, the obligee must inquire whether those who have signed consent to its being delivered without the signature of the others. In such case the party signing may question the delivery. But if there is nothing on the face of the bond or otherwise to indicate that others are to sign it, and the bond is accepted on the faith of appearances without notice that it is not to be delivered in its then shape, the party signing cannot question the validity of the delivery.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & S. §§ 45-54.
See, also, 32 Cyc. pp. 44-50; note, 45 L. R. A. 321; note, 25 Am. Rep. 706.

§ 25. Delivery of written instruments.

Delivery of incomplete instruments, see post, § 29.

Delivery of instrument executed on condition, see ante, § 23.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 21, 55-58.

See, also, 32 Cyc. pp. 51-54.

§ 28. — Acceptance and notice thereof.

[a] (Sup. 1861)

A contract for purchase and sale between A. and B. was reduced to writing, and signed by A. and two others as his sureties. In a suit by B. against the sureties, they answered that he did not notify them of his acceptance of their guaranty, and that he had given credit thereon. *Held*, that the case did not show any necessity for such notice.—*Swope v. Forney*, 17 Ind. 385.

[b] That a bond was not approved as required by law is no defense in an action against the sureties thereon for official misconduct of the principal therein.—(Sup. 1864) *Pepper v. State ex rel. Harvey*, 22 Ind. 399, 85 Am. Dec. 430; (1885) *State ex rel. Rowe v. Britton*, 102 Ind. 214, 1 N. E. 617, affirmed *Britton v. State ex rel. Rowe* (1888) 115 Ind. 55, 17 N. E. 254; (1889) *Peelle v. State ex rel. Hipes*, 118 Ind. 512, 21 N. E. 288.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 21, 57, 58.

See, also, 32 Cyc. pp. 52, 53.

§ 29. Incomplete instruments.

Filling blank as alteration of instrument, see post, § 101.

Fraud in filling blank, see post, § 41.

Insertion of names of sureties at time of signature by each as alteration of instrument, see post, § 101.

[a] (Sup. 1869)

A surety, signing and delivering to the principal obligor a bond before the names of the sureties have been inserted in the body of the instrument, will be held as agreeing that the blank for such names may be filled after he has executed it.—*State ex rel. McCarty v. Pepper*, 31 Ind. 76.

[b] (Sup. 1876)

Where a promissory note, perfect in all its parts, except that the date thereof is left blank, is signed by the makers, as principal and surety, and intrusted by the latter to the former, for delivery to the payee, such principal has an implied authority to fill such blank by inserting therein the true date of its execution; but he has no authority to insert a date prior to the true one; nor has such payee, if he have knowledge of the true date of its execution and of the signing by such surety, as such, a right to accept such note with knowledge that such false date has been inserted in such blank.—*Emmons*

v. Meeker, 55 Ind. 321; *Same v. Carpenter*, Id. 320.

[c] (Sup. 1878)

A surety intrusting a note signed in blank to his principal, to be filled up, makes him his agent, and is bound by the note as filled up, although made payable to a person other than the one verbally agreed upon.—*Gothrump v. Williamson*, 61 Ind. 599.

[d] (Sup. 1885)

Where a surety signs a note in blank, and intrusts it to the principal under an agreement that the amount due the creditor may be ascertained and inserted, the creditor may insert the true amount, though the principal may have represented to the surety, that the amount would be a smaller one.—*Eichelberger v. Old Nat. Bank*, 103 Ind. 401, 3 N. E. 127.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. § 15.

See, also, 32 Cyc. pp. 27, 28.

§ 30. Consideration.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 63-70.

See, also, 32 Cyc. pp. 54-57.

§ 31. — Necessity.

[a] (App. 1897)

A person signing a note as surety subsequent to the incurring of the original obligation, without any new or distinct consideration passing therefor, is not liable.—*Wipperman v. Hardy*, 46 N. E. 537, 17 Ind. App. 142.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. § 63.

See, also, 32 Cyc. p. 54.

§ 33. — Sufficiency in general.

[a] (Sup. 1881)

An agreement provided for the settlement of various suits pending between plaintiff and defendant, and required them to pay certain proportions of the costs therein. After the agreement was executed a third person indorsed on the back of it a statement reciting that as the agreement had not theretofore been performed, by reason of defendant having failed to give surety for the performance of his part thereof, such third person thereby became jointly responsible with defendant for the performance of the agreement. *Held*, that the agreement of plaintiff to do the things required of him by the contract was sufficient consideration for the undertaking of the third person.—*McDonough v. Kane*, 75 Ind. 181.

[b] (Sup. 1882)

Where the satisfaction and discharge of a judgment for \$1,206.69 was the sole consideration for a note for \$1,312.40, a surety on the note, though not a party to the judgment, was bound thereby equally with the principal.—*Gipson v. Shanklin*, 83 Ind. 147.

[c] Since the surrender of an old note is sufficient consideration to support a new note given for its renewal, as between the principal and the payee of the new note, such consideration is sufficient to support the renewal note as against a surety thereon.—(Sup. 1883) *Coffin v. Trustees of Asbury University*, 92 Ind. 337; (1884) *Brewster v. Baker*, 97 Ind. 260.

[d] (Sup. 1884)

The execution by the principal maker of a note of a chattel mortgage to the surety is a sufficient consideration for the execution of the note by the surety.—*Judd v. Martin*, 97 Ind. 173.

[e] (App. 1893)

In every form of suretyship, the existence of a sufficient consideration between the maker and payee of a note establishes a sufficient consideration, also, as against the surety.—*Wheeler v. Barr*, 7 Ind. App. 381, 34 N. E. 591.

[f] (Sup. 1899)

The consideration moving to the maker of a note supports the obligation as against one signing as surety.—*Lackey v. Boruff*, 53 N. E. 412, 152 Ind. 371.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & S. §§ 65, 66.

See, also, 32 Cyc. pp. 54-57.

§ 34. — Executed consideration to principal.

[a] A surety who signs a note after its delivery to the payee is not bound, unless there is a new consideration for his promise.—(Sup. 1882) *Favorite v. Stidham*, 84 Ind. 423; (App. 1894) *Brant v. Barnett*, 10 Ind. App. 653, 38 N. E. 421.

[b] (Sup. 1882)

Where a person signs a note as surety without the knowledge of the principals, after a signing and delivery by them, he is not bound, unless some new consideration be shown; but, if he signs at the time of the original execution of the note he is liable.—*Favorite v. Stidham*, 84 Ind. 423.

[c] (Sup. 1885)

In an action on a bank cashier's bond against the sureties, when the complaint sets out that the bond was executed in pursuance of a by-law of the bank which required the bond to be executed, the fact that the bond was approved subsequently to the appointment of the principal to the position does not show a lack of consideration for its execution.—*La Rose v. Logansport Nat. Bank*, 102 Ind. 332, 1 N. E. 805.

[d] (App. 1892)

The signing of a note by a person as co-surety, after the execution and delivery of the same, creates a new and distinct undertaking, and, to be binding, must be supported by a consideration other than that which sustains the contract of the maker and first surety.—*Owens v. Tague*, 3 Ind. App. 245, 29 N. E. 784.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & S. § 67.

See, also, 32 Cyc. pp. 56, 57.

§ 37. — Failure of consideration.

[a] (Sup. 1861)

The engagement of the surety, executing a written contract, may be founded on a consideration variant from that which induced execution by his principal; and if this consideration is a condition subsequent, to be performed by the creditor, his failure to perform is a fraud on the surety and releases him from all liability on his engagement.—*Campbell v. Gates*, 17 Ind. 126.

[b] (Sup. 1890)

A payee of a note induced A. to become surety thereon, by agreeing that he would deliver to the maker a former note and mortgage of personal property for cancellation, so that A. might secure himself by obtaining a first mortgage on the property. *Held*, that a failure and refusal to comply with the agreement was a failure of consideration between the payee and A.—*Jeffries v. Lamb*, 73 Ind. 202.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & S. § 70.

See, also, 32 Cyc. pp. 29, 50.

§ 38. Validity of assent in general.

[a] (Sup. 1864)

Where the bond of a county treasurer is presented to a person for his signature by the principal in the bond, and such person signs it, there being several signatures attached to it already, and it afterwards appears, from some cause, that the bond is not binding on some or any of the persons whose names preceded his, it should be held not binding upon him, unless it be shown that he had knowledge of its invalidity as to the others at the time he signed it.—*Pepper v. State ex rel. Harvey*, 22 Ind. 399, 85 Am. Dec. 430.

[b] (Sup. 1887)

Defendant signed a note as co-surety after a firm name had been attached to it by the obligor as member of such firm, and contended that he was discharged by the laches of the obligee in not ascertaining whether the firm name had been signed by competent authority. *Held* that, in the absence of circumstances putting the obligee upon inquiry, defendant would not be discharged.—*Schmidt v. Archer*, 113 Ind. 365, 14 N. E. 543.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & S. §§ 71-75.

See, also, 32 Cyc. p. 57; note, 8 Am. St. Rep. 246.

§ 40. Fraud.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & S. §§ 78-81, 86-90.

See, also, 32 Cyc. pp. 59-66; note, 21 L. R. A. 409.

§ 41. — In general.

[a] (Sup. 1840)

As a sealed note, executed in the name of the firm of H. & Co., binds only H., a third person, executing such note as surety, supposing it to be the note of the firm, cannot complain that a fraud was committed on him, though the note was for the private debt of H.—*Harter v. Moore*, 5 Blackf. 367.

[b] (Sup. 1869)

A surety signed a county treasurer's official bond, at the request of the principal obligor, after the signatures of other sureties, without reading it, or hearing it read, or asking what it was, upon being told by the principal that it was a county paper. *Held*, that such surety was not released by the fact that one of the signatures before his was forged.—*State ex rel. McCarty v. Pepper*, 31 Ind. 76.

[c] (Sup. 1870)

Action on a note by the payee. Answer by surety that prior to the execution of the note the maker was the proprietor of a retail furniture store, which, including the stock, had been sold to him by this defendant, to whom the maker was indebted therefor in a certain sum, and that it had been agreed between said maker and this defendant that the latter should hold a lien on said stock and all additions thereto to secure said indebtedness, and that said maker was to execute a mortgage on the same for that purpose; that the payee, who was a wholesale furniture dealer in the same place, knew of said indebtedness, and, intending to deceive this defendant and induce him to sign the note as surety, represented to him that said maker was doing a good business and getting along well, but needed more stock, and that the payee would furnish him some more goods, if this defendant would become surety on his note for the same; that this defendant relying on said statements and in consideration of the fact that said goods were to be added to the stock, thus augmenting his security, became surety on said note, believing at the time that the note was given for goods furnished by the payee to the maker as aforesaid, whereas the payee did not furnish the maker any goods, but the whole consideration of the note on the part of the maker was a prior indebtedness of the maker to the payee, of which fact the surety was at the time ignorant; that the maker was at the time insolvent, and was not prospering in his business, as the payee well knew; that the maker had never paid his indebtedness to the surety, who never received any consideration for his signature to the note. *Held*, that the facts set forth by the answer were sufficient to release the surety.—*Ham v. Greve*, 34 Ind. 18.

[d] (Sup. 1871)

A surety in a bail bond or undertaking is not released by the fact that he was induced to sign by fraud or false representations, unless the party to whom the obligation was executed is chargeable with the fraud. A fraud practiced by the obligor, upon his surety, can-

not be set up as between the surety and obligee. Hence where, in a suit to revive enforce a judgment against replevin bail, bail answered that the defendant in the replevin suit procured his consent to become replevin bail on another judgment; that he, at request of defendant, went with him to clerk's office, to execute the same; that he was German, and cannot read English script; that the record was not read to him, but the deceiver fraudulently represented that it was a judgment he had consented to stay; that, relying on this representation, he executed the undertaking set forth; that at the time he had no knowledge of the judgment sued on; and that if he had known it was a different judgment he would not have become replevin bail thereon.—*Held*, that the answer was bad, because it did not connect the judgment plaintiff with the deceiver.—*Lepper v. Nuttman*, 35 Ind. 384.

[e] (Sup. 1871)

In an action on a bond given by one partner to another to indemnify the latter against the partnership liabilities, false and fraudulent representations as to the amount of these liabilities, made to the surety on the bond for the purpose of inducing him to execute the bond by the partner to whom the bond was given, constitute a good defense to the action against such surety.—*Fishburn v. Jones*, 37 Ind. 115.

[f] (Sup. 1873)

Where the payee of a promissory note fraudulently gave it to the maker to obtain the name of a surety thereon, and the maker applied to a person who could not read or write, and asked him to sign the note as surety, stating to him that it was for a certain smaller sum than that expressed in the note, and he thereupon authorized the principal to put his name to the note, without asking that the name might be read, the payee not having anything to do with procuring the signature, and being chargeable with any fraud or deception, the surety was liable for the amount of the note.—*Craig v. Hobbs*, 44 Ind. 363.

[g] (Sup. 1875)

As a rule of law, strict integrity and complete fairness are due from the creditors of a debtor to one who is about to become surety for such debtor; but this rule will not excuse the person about to become surety from giving reasonable attention to the circumstances under which he is called on and reasonable diligence to inform himself as to the prudence of the transaction he is about to do.—*Stedman v. Boone*, 49 Ind. 469.

If a person, asked to become surety for another, is put on his guard by the circumstances surrounding the party for whom he is asked to become surety, and can ascertain from the persons present all the facts necessary to shield himself from fraud, he should make inquiry.—*Id.*

[h] (Sup. 1881)

When the name of one of two or more obligors in a bond, note, or other writing obligatory has been forged, the supposed co-obligor, though a surety only, and though he signed in the belief that the forged name was genuine, is nevertheless bound, if the payee or obligee accepted the instrument without notice of the forgery.—*Helms v. Wayne Agricultural Co.*, 73 Ind. 325; *Wayne Agricultural Co. v. Cardwell*, 73 Ind. 555.

[i] (Sup. 1882)

In an action against a surety on a note given by his principal to an administrator for goods purchased by the principal's wife statements by the administrator that the wife would receive a considerable sum as decedent's heir and that he wanted his signature only to comply with the law, were not material inducements, exempting defendant from liability.—*Shropshire v. Kennedy*, 84 Ind. 111.

[j] (Sup. 1882)

A surety may defeat an action on the ground of fraud, though his principal may have received all the consideration for which he bargained, and on proof that the creditor fraudulently concealed a material fact or made a false representation of some material matter he is entitled to release without supplementing such proof by evidence of want or failure of consideration.—*Wilson v. Town of Monticello*, 85 Ind. 10.

[k] (Sup. 1884)

It is the duty of a surety to ascertain the nature of an obligation embraced in his undertaking, and there can be no fraud practiced on a surety having the means of acquiring full knowledge of the facts, such as to prevent the obligee from enforcing the obligation.—*Jones v. Swift*, 94 Ind. 516.

A. was induced to become replevin bail by the false representations by judgment defendant that two of the three sureties against whom the judgment had been obtained had consented to plaintiff's release of the third, whereby the other sureties were also released. *Held*, that A. was bound; the creditor having no knowledge of the fraud.—*Id.*

[l] (Sup. 1885)

Where a surety signs a note in blank and intrusts it to the principal, under an agreement that the amount due the creditor may be ascertained and inserted, there is no fraud on the part of the creditor in inserting the true amount, although the principal may have represented to the surety that the amount would be much less than that inserted.—*Eichelberger v. Old Nat. Bank*, 103 Ind. 401, 3 N. E. 127.

[m] (Sup. 1888)

A surety who has been misled by the principal as to the character and extent of an obligation signed and assumed at the request of the latter, cannot make the fraud of the principal a defense against the payee or obligee unless he

can show that the latter participated in or had knowledge of it.—*Lucas v. Owens*, 113 Ind. 521, 16 N. E. 196.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & S. §§ 78-81.
See, also, 32 Cyc. p. 59.

§ 42. — Concealment.

[a] (Sup. 1866)

An answer to a suit upon a note by one of the defendants alleged that he was merely a surety on the note, and that the payee had, without his knowledge, taken another note from the principal for interest on the amount of the first note at the rate of 14 per cent. per annum. *Held*, that a mere failure to give information, unasked, as to the other note, did not constitute a fraud upon the surety.—*Coats v. McKee*, 26 Ind. 223.

[b] (Sup. 1870)

The mere fact that a creditor, being about to take a note, with surety, from a person whom he knows to be insolvent, does not, voluntarily and without solicitation, announce to the proposed surety the insolvency of the principal, will not release the surety.—*Ham v. Greve*, 34 Ind. 18.

[c] (Sup. 1882)

A town issued bonds and delivered them to an agent to sell. The agent, upon receiving the bonds, gave a bond for the faithful performance of the duty. He defaulted and absconded. Upon a suit against the sureties on the bond, *held*, that a failure of the town authorities to inform the sureties that the principal had misappropriated the proceeds of bonds before delivered to him constituted a defense to the suit.—*Wilson v. Town of Monticello*, 85 Ind. 10.

[d] (App. 1891)

Where a creditor conceals from one about to become a surety any material fact whereby his risk is increased, and suffers the surety to enter into the contract under a false impression as to the real state of facts, the concealment amounts to a fraud, and in equity will release the surety.—*Springfield Engine & Thresher Co. v. Park*, 29 N. E. 444, 3 Ind. App. 173.

Before the omission to disclose a material fact by the creditor will operate as a fraud and discharge the surety, the fact must be such as in some way to affect the liability of the surety to his detriment.—*Id.*

A collateral and contemporaneous agreement between the principal and payee of a note of which the surety is ignorant operates as a fraud on the surety, and will discharge her when it in any way changes the surety's liability.—*Id.*

Notes were made for the purchase of an engine, and a mortgage was given to secure them, which contained a stipulation that, on default in one note, all should become due. There-

after defendant signed one of such notes as surety, without knowledge of the mortgage or stipulation. *Held*, that the mortgage did not operate, as a change of the contract, to discharge the surety; nor was failure to notify her thereof the suppression of a material fact, amounting to fraud.—*Id*.

[e] (App. 1897)

Where the payee knows that the surety signs under a belief that the note is wholly for goods then purchased by the principal, his concealment of the fact that it includes a pre-existing debt of the principal releases the surety.—*Fassnacht v. Emsing Gagen Co.*, 18 Ind. App. 80, 46 N. E. 45, 47 N. E. 480, 63 Am. St. Rep. 322.

[f] (App. 1904)

Where the agent of an insurance company, who had been guilty of embezzlement, was appointed agent of a company formed with the same stockholders and officers, and it took a bond for the faithful performance of his contract of employment, without giving the sureties notice of his embezzlement, of which it had knowledge, the sureties were not bound, since the continuance of such agent in the employment had the effect of a meditated fraud.—*Indiana & O. Live Stock Ins. Co. v. Bender*, 69 N. E. 691, 32 Ind. App. 287.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 80-90.
See, also, 32 Cyc. pp. 62, 63.

§ 43. Duress and undue influence.

[a] (Sup. 1878)

In an action against C. as principal, and A. as surety on a note, an answer to the effect that it was executed under threats by W., representing himself to be an officer, and showing a folded paper marked "United States Warrant," that he would arrest C. for obtaining goods under false pretenses, and under fear, etc., sets forth a valid defense.—*Coffelt v. Wise*, 62 Ind. 451.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 18, 78-81.
See, also, 32 Cyc. p. 59.

§ 45. Evidence of existence of relation.

[a] (Sup. 1849)

Persons who sign their names to a note will be presumed to be joint makers, and not principal and surety, in the absence of anything to the contrary on the face of the note.—*Chandler v. Ruddick*, 1 Ind. 391.

[b] (Sup. 1877)

Where, in an action on a note executed by two persons, each claims that he is merely a surety and the other the principal, testimony that one of them was indebted to the other is admissible to rebut the presumption that the latter was principal, arising from the fact that

he took the money, where he also testified that the former secured the loan in order to pay him what he owed him.—*Harvey v. Osborn*, 55 Ind. 535.

Where, on the trial of the question of suretyship as between A. and B., the makers of a promissory note, upon which they have been sued, upon pleadings by each alleging that he was the surety and the other the principal, the evidence established that such note had been given for a loan of money by the payee, and that, when such money was procured, A., in the presence of B. and the payee, took such money and carried it away, it was competent for A., in order to rebut any inference arising from such evidence that he was the principal, to introduce evidence to show that B. was, at the time of such loan, indebted to him, as a circumstance tending to support his own testimony that B. had procured such loan to pay such indebtedness to A.—*Id*.

[c] (Sup. 1887)

While an accommodation indorser is not liable to one who signs a note as maker for contribution, as a co-surety, evidence is admissible to establish the relation of the makers and indorsers between themselves, and it is incumbent on one who signs as maker to prove that the indorser signed as a co-surety in order to compel him to make contribution as a co-surety.—*Knopf v. Morel*, 111 Ind. 570, 13 N. E. 51.

[d] (App. 1896)

Where it appeared, in an action on a note signed by plaintiff's parents, that the note was given in renewal of a prior note executed by the father alone, and there was no evidence that the mother owed plaintiff anything at the time, the jury were warranted in finding that she signed the renewal note merely as surety.—*Crumrine v. Crumrine's Estate*, 14 Ind. App. 641, 43 N. E. 322.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. § 22.
See, also, 32 Cyc. pp. 39-41.

§ 46. Estoppel or waiver as to defects or objections.

Estoppel to assert or deny liability as surety, see post, § 83.

Reliance of surety on fraudulent representations, see ante, § 41.

[a] (Sup. 1825)

In an action on a replevin bond, the defendant cannot question the constitutionality of the statute under which the bond was executed.—*Magruder v. Marshall*, 1 Blackf. 333; *Weaver v. Field*, *Id*. 334.

[b] (Sup. 1861)

Where a public officer has assumed the duties of his office, the sureties on his bond are estopped to deny the validity of his appointment or election.—*Lucas v. Shepherd*, 16 Ind. 368.

[c] (Sup. 1881)

The sureties on a guardian's bond, executed to enable him to sell real estate of his wards, are estopped, after he has sold the property, to deny that he was such guardian.—*Gray v. State ex rel. Mills*, 78 Ind. 68, 41 Am. Rep. 545.

[d] (Sup. 1887)

Where a plaintiff asks and obtains the delivery of property sued for in an action of replevin, he and his sureties are estopped from averring that there was no consideration for their undertaking.—*McFadden v. Fritz*, 110 Ind. 1, 10 N. E. 120.

[e] (Sup. 1889)

Where plaintiffs in replevin execute a bond and obtain possession of the property, they are estopped, after judgment for defendant and a failure to comply therewith, to set up as a defense to a suit on the bond that the statutory provisions as to its execution were not technically complied with.—*Hartlep v. Cole*, 120 Ind. 247, 22 N. E. 130.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 91-95.

See, also, 32 Cyc. pp. 69-71.

§47. Ratification.

[a] (Sup. 1872)

Where the surety denied that he executed the bond, and there was evidence that he afterwards assented to his name remaining on the bond, *held*, that the jury were authorized to find him liable on the bond for money received by his principal after such assent, and not paid over.—*Hall v. State ex rel. Robinson*, 39 Ind. 301.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. § 96.

See, also, 32 Cyc. p. 51.

§49. Cancellation for invalidity.

Revocation by act of surety, see post, § 51.

[a] (Sup. 1875)

If a person is induced by fraud to become the surety of a debtor, and by the act he takes the property of the debtor from the reach of his creditors by ordinary process of law, he must, upon the discovery of the fraud, at once rescind, if he would relieve himself.—*Stedman v. Boone*, 49 Ind. 469.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Princ. & S. § 77.

§51. Duration and termination of relation in general.

Duration of liability and term or period covered, see post, §§ 68-71.

[a] (Sup. 1877)

Notice by the surety to the principal in an appeal bond, that he revokes his signature, before its delivery and approval by the justice, is not a defense to an action on the bond, but such

notice communicated to the justice before he receives the bond is a defense.—*Covert v. Shirk*, 58 Ind. 264.

[b] (Sup. 1883)

A bond providing that it shall continue in force until terminated by the obligors by notice in writing, and that no notice shall have the effect of terminating the bond unless it be in writing, signed by the parties giving the same, and actually delivered to the obligee at a certain place, did not intend to release all of the sureties or one of them by notice from one alone, but the notice must be on behalf of all.—*McFall v. Howe Sewing Mach. Co.*, 90 Ind. 148.

[c] (Sup. 1885)

The guarantors of the faithful performance by a bank cashier of his duties may revoke their suretyship at pleasure, without regard to the cashier's misconduct, provided they give such reasonable notice to the bank as to enable it to dismiss the cashier without injury to themselves, or to obtain new security.—*La Rose v. Logansport Nat. Bank*, 102 Ind. 332, 1 N. E. 805.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 97-100.

See, also, 32 Cyc. pp. 74-88.

(B) SURETY COMPANIES.

Competency as sureties on bond of executor, see EXECUTORS AND ADMINISTRATORS, § 26.

§58. Foreign companies.

[a] (App. 1903)

Though Burns' Rev. St. 1901, § 3453, providing that agents of foreign corporations shall deposit in the clerk's office of the county where they propose doing business the power of attorney under which they act, should be construed as applicable to a foreign surety company, failure of such company's agent to comply with the requirement would not render a bond given by him invalid.—*Barricklow v. Stewart*, 68 N. E. 316, 31 Ind. App. 446.

Surety companies being governed by a special statute (Burns' Rev. St. 1901, §§ 5480, 5494), the general law pertaining to foreign corporations is not applicable to them.—*Id.*

[b] (Sup. 1909)

A township board of finance may pass on the sufficiency of the bond of a bank seeking to become a depository of public funds under Burns' Ann. St. 1908, §§ 7522-7546, though such bond is the bond of a surety company authorized to carry on business in the state. Rehearing. 88 N. E. 673, denied.—*Board of Finance of Clark Tp. v. State ex rel. Tell City Nat. Bank*, 89 N. E. 367.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Princ. & S. § 102.

See, also, 32 Cyc. pp. 304, 305, 19 Cyc. p. 1263.

II. NATURE AND EXTENT OF LIABILITY OF SURETY.

Construing together contract of surety and that of principal, see **CONTRACTS**, § 164.

§ 59. General rules of construction.

Scope and extent of liability, see post, § 66.

[a] (Sup. 1885)

The rule which requires that sureties shall not be bound beyond the terms of their engagements does not require a forced and unreasonable construction of the contract, with a view of relieving them.—*Irwin v. Kilburn*, 104 Ind. 113, 3 N. E. 650.

[b] A surety is a favorite of the law and has a right to stand on the very terms of his contract; but, like any other contract, it must be given a reasonable interpretation in accordance with the established rules of construction.—(Sup. 1887) *Weir Plow Co. v. Walmsley*, 11 N. E. 232, 110 Ind. 242; (App. 1891) *McDonald v. Huestis*, 27 N. E. 509, 1 Ind. App. 275.

[c] The contract of a surety must receive a strict interpretation and cannot be extended beyond the fair scope of its terms.—(App. 1896) *Citizens' Street Ry. Co. v. Abright*, 42 N. E. 238, 1028, 14 Ind. App. 433; (1896) *Dunlap v. Eden*, 15 Ind. App. 575, 44 N. E. 560.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 103, 103½.

See, also, 32 Cyc. pp. 71, 72.

§ 61. Parties liable as sureties.

Married women in general, see **HUSBAND AND WIFE**, § 87.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. § 106.

See, also, 32 Cyc. pp. 125-127.

§ 62. — Joint or several.

Contribution among sureties, see post, §§ 194-200.

Joinder of defendants in action by creditor, see post, § 152.

Mutual rights and liabilities of cosureties, see post, §§ 191-200.

[a] (Sup. 1877)

A., B., and C. executed to D. a written contract for the sale to D. of chattels, containing the following conditions: "For all moneys advanced on said contract, I agree to pay 10 per cent. interest. In case I fail to deliver said" chattels "according to said contract, I bind myself and sureties to pay" to D. "\$500 damages." *Held*, that the contract was clearly an obligation binding the defendants jointly and severally.—*McCormick v. Mitchell*, 57 Ind. 248.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. § 106.

See, also, 32 Cyc. pp. 125-127.

§ 65. Nature of liability.

Change from principal debtor to surety, see ante, § 16.

Change from surety to principal debtor, see ante, § 16½.

[a] (Sup. 1860)

The surety is as much bound by the terms of his contract as is the principal—*Tucker v. Talbott*, 15 Ind. 114.

[b] (Sup. 1873)

A co-surety on a note, who has paid one-half of its amount, is still liable for the whole debt, and is not entitled to an order requiring the remainder to be satisfied out of the property of the other co-surety.—*Schooley v. Fletcher*, 45 Ind. 86.

[c] (Sup. 1883)

One who expressly agrees that he is principal and undertakes as such cannot claim a right of set-off under the statute applicable to sureties.—*Menaugh v. Chandler*, 89 Ind. 94.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 105-107.

§ 66. Scope and extent of liability in general.

Rules of construction of contract of suretyship, see post, § 59.

[a] (Sup. 1869)

A., B., and C. executed to a bank a joint and several bond, in the penalty of \$15,000, with a condition reciting that A. had become a member of a firm, rendering it necessary for him to use more funds in the firm's business than he would have at command, which he proposed to borrow, and then proceeding thus: "Now the foregoing bond is to be in force and binding on us, according to its terms, for the full amount of any loans and advances the said bank may make to the said A. in connection with his said business, not exceeding in amount \$15,000, for which sums by the foregoing bond we acknowledge ourselves as sureties, and, in case of his failure to pay any such loans and advances as aforesaid, that the same may and shall be collected of us. Unless such loans and advances are made to said A. in his business aforesaid, and on the faith of this bond, the same is null and void." *Held*, that the fact that loans were not to be given solely on the credit of the bond did not affect the question of the liability of the sureties.—*McMillan v. Bull's Head Bank*, 32 Ind. 11, 2 Am. Rep. 323.

[b] The liability of a surety is measured by the strict terms of his contract, and cannot be extended by construction or implication.—(App. 1896) *Town of Salem v. McClintock*, 46 N. E. 39, 16 Ind. App. 656, 59 Am. St. Rep. 330; (1904) *Arbaugh v. Shockney*, 34 Ind. App. 268, 71 N. E. 232, 72 N. E. 668; (Sup. 1906) *Stewart v.*

This Digest is compiled on the Key-Number System. For explanation, see page iii.

Knight & Jillson Co., 76 N. E. 743, 166 Ind. 498.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 108-110, 112; 40 CENT. DIG. Princ. & A. § 80.

See, also, 32 Cyc. pp. 109-114.

§ 68. Term or period covered.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 116-120; 40 CENT. DIG. Princ. & A. § 80.

See, also, 32 Cyc. pp. 75, 76.

§ 70. — Pre-existing liabilities or defaults.

Concealment of previous default or misconduct as fraud on surety, see ante, § 42.

[a] (Sup. 1878)

Sureties on a bond are not liable for a default which occurred before they became sureties.—Lowry v. State ex rel. Hill, 64 Ind. 421.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. § 120.

See, also, 32 Cyc. pp. 74, 75.

§ 71. — Successive terms or periods.

[a] (Sup. 1892)

A guardian filed a bond with satisfactory sureties at the time of his appointment, and afterwards, on receiving additional money belonging to his wards, was required to file another bond. There was nothing to indicate an intention to make the second bond subsidiary to the first, but it appeared to be given as primary security. *Held*, that it was not necessary to exhaust the remedies against the obligors in the first bond before bringing suit on the second, all being equally liable.—State ex rel. Joseph v. Mitchell, 132 Ind. 461; 32 N. E. 86, following Allen v. State ex rel. Stevens (1878) 61 Ind. 268, 28 Am. Rep. 673.

[b] (App. 1902)

The bond of a township trustee in force when public funds were received and converted to his own use, or diverted from the use of the township, and not one subsequently given by him, is violated, and liable for the money.—Gonser v. State ex rel. Haskins, 65 N. E. 764, 30 Ind. App. 508.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 117-119.

See, also, 32 Cyc. pp. 76-78; note, 10 Am. St. Rep. 843.

§ 73. Interest, costs, attorneys' fees, and damages.

Reimbursement to surety of interest and attorneys' fees paid, see post, § 185.

[a] (App. 1891)

Where a memorandum was executed contemporaneously with a note to the effect that the surety should not be bound for interest but

for principal alone, the note and memorandum must be considered as forming one contract in determining the rights and liabilities of the surety.—McDonald v. Huestis, 27 N. E. 509, 1 Ind. App. 275.

Defendant signed as surety a note which bore interest from date, and which provided for the payment of attorney's fees, and the payee agreed in writing that defendant should "not be bound for interest, but for the principal alone." *Held*, that said agreement did not relieve defendant from liability for attorney's fees or for interest after maturity.—Id.

[b] (App. 1899)

A note providing for an attorney's fee was filed after the death of the principal maker as a claim against his estate, no attorney being employed for the purpose. After part payment of it by the estate, suit was commenced thereon by an attorney against the sureties, and during its pendency the maker's estate paid the balance of the principal and interest. *Held*, that the sureties were liable for attorney's fees incurred in bringing the suit.—Shoup v. Snepp, 53 N. E. 180, 22 Ind. App. 30.

[c] (App. 1908)

A surety is liable for interest upon a delayed claim for the payment of materials furnished to the principal.—United States Fidelity & Guaranty Co. v. American Blower Co., 41 Ind. App. 620, 84 N. E. 555; Same v. American Radiator Co., 41 Ind. App. 712, 84 N. E. 558.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 114, 115, 455.

See, also, 32 Cyc. pp. 120, 121; note, 51 C. C. A. 248.

§ 75. Performance of contract or conditions by creditor.

Failure to perform condition as to surety as failure of consideration, see ante, § 37.

[a] (Sup. 1904)

Where a building contract required the owner to insure the buildings and the materials on the premises in his own name, or in the name of the contractor, the proceeds of the policy, in case of loss, to be paid to the builder and owner as their interest might appear, the owner's failure to insure was insufficient to discharge the contractor's surety; no loss having occurred which such insurance would have covered.—Hohn v. Shideler, 72 N. E. 575, 164 Ind. 242.

[b] (App. 1908)

Where a surety bond provides that the contract shall be duly performed and that the material furnished shall be paid for, an action by one furnishing materials is independent of any right of the owner, and a breach of the contract by such owner does not affect the right.—United States Fidelity & Guaranty Co. v. American Blower Co., 41 Ind. App. 620, 84 N. E. 555;

Same v. American Radiator Co., 41 Ind. App. 712, 84 N. E. 558.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. § 128.

See, also, 32 Cyc. pp. 166-173.

§ 77. Debt secured, and payment thereof by principal.

Diversion of note secured to unauthorized purpose, see post, § 95.

[a] (Sup. 1880)

A bond conditioned to pay any indebtedness existing on the part of the principal to the obligee, whether such indebtedness should consist of book accounts, notes, leases, or other contracts or agreements, expressly covered an obligation of the principal on a note.—Morgan v. Smith American Organ Co., 73 Ind. 179.

[b] (Sup. 1886)

Where a bond and a contract of agency were executed contemporaneously, they must be construed together, and the several liabilities, which the sureties engaged that their principal should pay, must be confined to such liabilities as might arise under the contract.—Singer Mfg. Co. v. Forsyth, 9 N. E. 372, 108 Ind. 334.

[c] (App. 1896)

Sureties on the bond of a subcontractor are not liable for all debts contracted by him in the execution of the contract, but are bound only to the extent that they guarantee the payment of debts.—Dunlap v. Eden, 44 N. E. 560, 15 Ind. App. 575.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. § 123.

See, also, 32 Cyc. p. 167.

§ 78. Property or funds covered, and disposition thereof and accounting by principal.

[a] (Sup. 1887)

Where the surety's undertaking is that his principal shall perform the conditions of a contract regarding the sale, upon commission, of goods to be furnished him in the future, the surety is not liable for default of the principal respecting goods already on hand, which the principal and the owner, without his knowledge, had afterwards agreed should be sold as though furnished under the contract.—Weir Plow Co. v. Walmsley, 110 Ind. 242, 11 N. E. 232.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. § 124.

See, also, 32 Cyc. pp. 145-148.

§ 79. Duties of office or employment, and performance thereof by principal.

Concealment of previous default or misconduct as fraud on surety, see ante, § 42.

Failure to terminate employment or contract after default by principal, see post, § 122.

[a] (Sup. 1878)

An agent's bond conditioned for the proper conduct of the business and to guarantee the principal against loss of property intrusted to the agent, and to bear expenses of transportation and sale, is broad enough to cover a contract whereby the agent undertakes to make weekly reports, and turn in notes and moneys received from week to week.—Doherty v. Chase, 64 Ind. 73.

Where an agent's contract, covered by a bond, required him to make weekly reports, and turn over from week to week notes and moneys, conduct of the agent in becoming indebted to the principal on account of goods sold, and giving notes to the principal which he refused to pay, and turning over to the principal notes of insolvent parties, were breaches of the contract and bond.—Id.

[b] (App. 1897)

An incorporated town, owning waterworks, employed a person to superintend the plant by written contract, providing that one of his duties should be to collect water rents and keep an account with each consumer, and took a bond conditioned for the faithful discharge of "duties as such superintendent of the waterworks, according to law and contract." The bond recited none of his duties, nor contained any other reference to any contract, and no ordinance or resolution had been passed fixing the duties of the superintendent. *Held*, the bond being a nonofficial one, that the sureties were not liable for a failure to account for water rents.—Town of Salem v. McClintock, 16 Ind. App. 656, 46 N. E. 39, 59 Am. St. Rep. 330.

Where duties are imposed on a principal in a nonofficial bond which are not commonly attached to the position which he fills, and no mention of them is made in the bond, the sureties are liable for default as to such duties only as are plainly and commonly understood to belong to the class of employment by which the principal is designated.—Id.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. § 125.

See, also, 32 Cyc. pp. 76-78.

§ 80. Performance of contract by principal.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 126, 127.

See, also, 32 Cyc. pp. 166, 167.

§ 81. — In general.

[a] (Sup. 1885)

Sureties for the performance of a contract are presumed to have seen the contract, to have been acquainted with its terms, and to have contracted with reference thereto.—Irwin v. Kilburn, 3 N. E. 650, 104 Ind. 113.

[b] (Sup. 1887)

Sureties on a bond, conditioned that the principal shall perform certain work within a

designated time, are liable for actual damages, but are not liable for a penalty provided in the contract between the principal and obligee, to be paid by the former in case of a failure to complete the work within the time specified.—*Dill v. Lawrence*, 109 Ind. 564, 10 N. E. 573.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. § 126.

See, also, 32 Cyc. pp. 166, 167.

§ 82. — Building contracts.

Rights acquired under contracts by third persons, see **CONTRACTS**, § 187.

[a] (Sup. 1902)

One who contracted with a township to build a schoolhouse for it gave a bond conditioned that he would provide the labor and material at his own cost, and that the township should not be answerable therefor. *Held*, that the sureties on the bond were not liable to persons who had furnished the contractor materials.—*Greenfield Lumber & Ice Co. v. Parker*, 65 N. E. 747, 159 Ind. 571.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. § 127.

See, also, 6 Cyc. pp. 83, 84, 32 Cyc. pp. 176, 177.

§ 83. Estoppel to assert or deny liability.

Estoppel as to existence of relation of suretyship, see ante, § 46.

Married women, see **HUSBAND AND WIFE**, § 87.

Waiver of or estoppel to assert discharge of surety, see post, § 129.

[a] (Sup. 1862)

The defendant was appointed agent by the common council of the city of J. to negotiate city bonds. He gave his bond, with sureties, for his proper discharge of the trust; but afterwards he borrowed \$5,000, giving a note, and pledging \$25,000 worth of bonds therefor. The city sued, alleging that he had refused to pay over the \$5,000, and that they (plaintiffs) had been forced, in order to prevent loss, to pay the note, with costs and expenses, etc. *Held*, that whether the bonds were properly or improperly pledged, in the first instance, could not in this action be inquired into, because the act was so far adopted by the principal as to advance the money to redeem, as stipulated by him.—*City of Indianapolis v. Skeen*, 17 Ind. 628.

[b]. (Sup. 1869)

Any act of a principal which estops him from setting up a defense personal to himself operates equally against his sureties.—*McCabe v. Raney*, 32 Ind. 309.

[c] (Sup. 1391)

The facts that a judgment creditor represented to the surety of the judgment debtor that he would have nothing to pay on the judgment in case certain property sold for enough to satisfy another judgment which it held against the principal, and that such property did sell for

enough for that purpose, do not estop the judgment creditor to enforce the judgment against the surety where it is not shown that he acted on the representations.—*First Nat. Bank v. Williams*, 126 Ind. 423, 26 N. E. 75.

[d] (Sup. 1905)

Where T. assumed a mortgage on certain land which he sold to E., who also assumed the mortgage, and plaintiff purchased from E. after foreclosure, and after T. had procured an assignment of the decree by paying the amount due, plaintiff was bound to know that there was nothing in the adjudication as between T. and E. that estopped the former from claiming that he was a surety, and taking steps to enforce the decree for his benefit.—*Oglebay v. Todd*, 76 N. E. 238, 166 Ind. 250.

Where a purchaser of land from one of the defendants in a suit to foreclose a mortgage thereon, who was the principal debtor, in addition to examining the record of the foreclosure suit, inspected an assignment of the judgment to T. on the margin of the record, such assignment was sufficient to put him on inquiry, which, if pursued, would have disclosed that T. was a surety, and was entitled to enforce the judgment for his benefit.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 129, 130.

See, also, 32 Cyc. p. 69.

§ 86. Acts requisite to fix liability.

Conditions precedent to action against surety, see post, §§ 137–139.

Failure to act or proceed against principal, see post, §§ 124–126.

Failure to give notice to surety of default as discharge of surety, see post, § 123.

Nature of relation between parties as requiring notice of default of principal, see ante, § 6.

[a] (Sup. 1855)

A surety in a note is liable on the default of the principal without notice.—*Harris v. Pierce*, 6 Ind. 162.

[b] (Sup. 1882)

Notice of default is not necessary to fix the liability of sureties in a joint and several bond.—*Burns v. Singer Mfg. Co.*, 87 Ind. 541.

[c] (App. 1898)

Where one abandons his contract to supply a town with light, the town need not contract with another before suing the contractor's bondsmen.—*Town of Sullivan v. Cluggage*, 52 N. E. 110, 21 Ind. App. 667.

FOR CASES FROM OTHER STATES,

See, 32 Cyc. pp. 106–109.

§ 87. Time of accrual of liability.

[a] (Sup. 1878)

A corporation, having purchased of A. real estate, gave to him, as part of the consideration, its bond, with sureties, conditioned to assume

and pay, a note given by A. to other parties, not matured, and payable without relief; such bond providing that, if A. should be compelled to pay the note, he might have his action on the bond, against the corporation and the sureties on such bond, for the sums so paid by him, and the judgment thereon to be without relief. The payee of such note brought suit against A., the indorsers, and the principal and sureties on the bond. *Held*, that the sureties were liable to A., jointly with the corporation, on the bond, immediately upon the failure of the corporation to pay off the note at its maturity.—*South Side Planing Mill Ass'n v. Cutler & Savidge Lumber Co.*, 64 Ind. 560.

[b] (App. 1899)

The liability of the principal and his sureties on a bond accrues at the same time, and arises from one breach of the same contract.—*Durand & Kasper Co. v. Rockwell*, 54 N. E. 771, 23 Ind. App. 11.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. § 121.

See, also, 32 Cyc. p. 122.

III. DISCHARGE OF SURETY.

Act of municipal contractor in subletting portions of work as affecting liability of sureties on bond, see MUNICIPAL CORPORATIONS, § 347.

Assumption of part of debt by surety and release of principal as consideration of contract releasing claim against surety, see CONTRACTS, § 66.

Bail bonds, see BAIL, §§ 18, 74.

Bonds and undertakings on appeal or writ of error, see APPEAL AND ERROR, § 1227.

Bonds of city agents, see MUNICIPAL CORPORATIONS, § 217.

Bonds of county officers, see COUNTIES, § 98.

Bonds of executors or administrators, see EXECUTORS AND ADMINISTRATORS, § 531.

Bonds of guardians, see GUARDIAN AND WARD, § 177.

Bonds of public officers in general, see OFFICERS, § 128.

By discharge of principal in bankruptcy, see BANKRUPTCY, § 431.

Duplicity in pleading discharge, see PLEADING, § 90.

Matters of fact or conclusion in pleading relating to, see PLEADING, § 8.

Necessity of assent to proposition to release judgment so as to discharge surety, see CONTRACTS, § 15.

Pleading matters of fact or conclusion relating to, see PLEADING, § 8.

Recognizances, see RECOGNIZANCES, § 4.

Release of judgment against principal and surety, see JUDGMENT, § 887.

Release of surety as valid consideration for promise, see CONTRACTS, § 65.

Replevin bail, see EXECUTION, § 177.

Validity of notice by surety to principal given on Sunday, see SUNDAY, § 9.

§ 89. Subsequent release or agreement

[a] (Sup. 1877)

In an action on the bond of a town trustee for his misappropriation of funds, answer by a surety that, having executed the bond while a commissioner having cognizance thereof, he, as a measure of public policy, with the consent of such trustee, the board of commissioners, and the county auditor, entered his name therefrom and procured an additional surety thereon. *Held* to be insufficient. Erasure only rendered it necessary for the plaintiff to explain the same by other evidence.—*Johnson v. State ex rel. Martin*, 60 Ind. 26.

[b] (Sup. 1880)

A surety in one of a series of three chase-money notes may plead, as a defense, available to himself in a suit to enforce liability as surety, a promise by the vendee, the vendee, made for the surety's benefit, to release him from liability and accept a mortgage to secure such note from a subsequent purchaser from the vendee.—*Clodfelter v. Lett*, 72 Ind. 137.

A. bought a store of B., and gave three notes for part of the price; the first secured by mortgage on the store, and C. a surety on the third. Afterwards D. bought the store of A., and agreed to pay the first and to make a mortgage to C. to secure the third. B., without C.'s knowledge, delivered the first two notes to A., released A.'s mortgage and agreed with A. to take a mortgage from A. to secure the third note, and to release A. therefrom as surety. *Held*, that there was no consideration for B.'s promise to release C., that A. had a right to make the release of his surety an element of consideration in his sale to D., and B.'s agreement rested on a sufficient consideration, whether D. or A. obtained his promise to release C.—*Id.*

[c] (Sup. 1885)

An oral agreement between the payee of a note and a surety on it, which besides being indefinite to be capable of enforcement, contradicts the contract set forth in the note, is not available to discharge the surety.—*Trentman v. Fletcher*, 100 Ind. 105.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§

133½, 136-139; 40 CENT. DIG. Princ.

A. § 80.

See, also, 32 Cyc. pp. 153-158.

§ 91. Death of principal.

Rights of surety against estate of deceased principal, see post, § 185½,

[a] (App. 1905)

The liability of the principal and surety on a liquor dealer's bond given as required by Burns' Ann. St. 1901, § 7279, requiring an applicant for a liquor license to give a bond conditioned on his payment of judgments for damages growing out of unlawful sales, is

destroyed by the death of the principal.—*State ex rel. Niece v. Soale*, 74 N. E. 1111, 36 Ind. App. 73.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. § 141.

See, also, 32 Cyc. pp. 83, 84.

§ 92. Death of surety.

Remedies against estate of deceased surety, see post, § 146.

[a] (Sup. 1878)

The estate of a deceased surety on a guardian's bond is liable on the same until the trust is terminated.—*Cotton v. State ex rel. Roberts*, 64 Ind. 573.

[b] (Sup. 1880)

Since Rev. St. 1843, § 467, relating to joint obligors, was continued in force by 2 Rev. St. 1876, p. 314, § 802, the rule of common law, whereby the death of a surety bound jointly with his principal upon a note discharged his estate from all liability thereon does not exist in Indiana.—*Hudelson v. Armstrong*, 70 Ind. 99.

[c] (Sup. 1881)

Under 2 Rev. St. 1876, p. 309, § 783, which provided for the survival of causes of action other than those mentioned in section 782, the death of a surety on a joint note did not discharge his estate from liability.—*Redman v. Marvil*, 73 Ind. 593.

[d] (Sup. 1882)

The death of a surety before the approval of the official bond which he has signed does not affect his liability.—*Mowbray v. State ex rel. City of Peru*, 88 Ind. 324.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. § 142.

See, also, 32 Cyc. pp. 84, 85; note, 49 C. C. A. 591.

§ 93. Diversion of instrument to unauthorized purpose.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 143-145

See, also, 32 Cyc. pp. 186, 187.

§ 95. — Negotiable instruments.

[a] (Sup. 1870)

Where one is induced to sign a note as surety, by the representation, made to him for the purpose of so inducing him by the payee, that the note is to be used in payment for goods to be furnished by the payee to the maker, and the note is used to pay a pre-existing debt of the maker to the payee, the person so signing is not bound as surety.—*Ham v. Greve*, 34 Ind. 18.

[b] (Sup. 1881)

Where one becomes surety on a note, on an agreement between the principal and the payee, made known to the surety before he executed the same, that it shall be applied to a speci-

fied purpose, and the same is afterwards, without his knowledge or consent, applied by them to another and different purpose, he is thereby released, and has a good defense to a suit on such note by the payee or his representative.—*Johnston v. May*, 76 Ind. 293.

[c] (Sup. 1903)

Where a surety signed notes under an agreement that they were to be used for a certain purpose, but afterwards, with knowledge that the notes had been used for a different purpose, applied for an extension of the time, and executed new notes, for which the old ones were surrendered for cancellation, the diversion of the first notes from the use for which they were intended was no defense to an action on the renewal notes.—*Baut v. Donly*, 67 N. E. 503, 160 Ind. 670.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. § 144.

See, also, 32 Cyc. pp. 186, 187.

§ 96. Change in obligation or duty of principal.

Alteration of instrument, see post, § 101.

Change in parties, see post, § 102.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 146-165.

See, also, 32 Cyc. pp. 177-191; note, 6 Am. St. Rep. 458.

§ 97. — In general.

[a] (Sup. 1855)

An agreement with the principal in a bond, in order to release the surety, need not be such as would release the debt itself.—*Dickerson v. Board of Com'rs of Ripley County*, 6 Ind. 128, 63 Am. Dec. 373.

[b] Any material alteration of a contract without the consent of the surety will discharge him, although he may sustain no injury by the change, or it may even be for his benefit.—(Sup. 1864) *Judah v. Zimmerman*, 22 Ind. 388; (1881) *Cartmel v. Newton*, 79 Ind. 1.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 146-154.

See, also, 32 Cyc. pp. 177-181.

§ 98. — Duties of office or employment.

Alteration of instrument, see post, § 101.

[a] (Sup. 1890)

The by-laws of a bank provided for the appointment of a committee, consisting of the president, cashier, and a designated director, without whose sanction the cashier was to make no loans above a certain amount. Held that, it being the cashier's duty under this by-law to consult the president in making loans above the prescribed amount, the fact that there was no director designated to act as the third member

of the committee does not so enlarge the powers and duties of the cashier in such matters as to discharge the sureties on his bond from liability for losses resulting from unauthorized loans.—*Wallace v. Exchange Bank of Spencer*, 126 Ind. 205, 26 N. E. 175.

An agreement of the board of directors of a bank, increasing the salary of a cashier in consideration of his performing additional duties, not changing his duties as cashier, or his relation to the bank as such, does not release the sureties on a bond previously given for the faithful performance of his duties as cashier from liability for a breach of duty as such cashier.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & S. §§ 155-157.

See, also, 32 Cyc. pp. 183, 184.

§ 99. — Provisions of contracts in general.

[a] (Sup. 1873)

An agreement to pay an increased rate of interest thereafter, indorsed on a note, made by the principal only, without the knowledge or consent of the surety, does not of itself change, alter, or supersede the contract evidenced by the face of the note, so as to release the surety.—*Huff v. Cole*, 45 Ind. 300.

[b] (Sup. 1876)

Under an agreement between the maker and payee of a note bearing 8 per cent. interest, without the knowledge or consent of a surety thereon, in consideration that the payee would extend the time for the payment of the note for an indefinite period after its maturity, the maker indorsed on the note the following: "I hereby agree to pay 10 per cent. interest on this note hereafter," dated the day before the maturity of the note, and signed by the maker. *Held*, that the agreement indorsed on the note was not a merger and abrogation of the contract contained in the note in respect to the payment of interest, or such an alteration of the original contract as would discharge the surety in an action on the original contract.—*Bucklen v. Huff*, 53 Ind. 474.

[c] (Sup. 1880)

A bond conditioned to pay any indebtedness existing on the part of the principal to the obligee, whether such indebtedness should consist of book accounts, notes, leases, or other contracts, was not affected, nor was the liability of the surety thereon discharged, by the act of the principal in executing a note without the knowledge of the surety for a debt previously contracted by him.—*Morgan v. Smith American Organ Co.*, 73 Ind. 179.

[d] Sureties are entitled to stand strictly on the terms of their contract, and where the contract is changed in a material manner without their consent or knowledge, for a consideration, they are discharged.—(Sup. 1881) *Bailey v.*

Boyd, 75 Ind. 125; (App. 1900) *Parker Land & Improvement Co. v. Ayers*, 43 Ind. App. 513, 87 N. E. 1062.

[e] (App. 1891)

Notes were made for the purchase of an engine, and a mortgage was given to secure them, which contained a stipulation that, on default in one note, all should become due. Thereafter defendant signed one of such notes as surety without knowledge of the mortgage or stipulation. *Held*, that the mortgage did not operate as a change of the contract, so as to discharge the surety.—*Springfield Engine & Thresher Co. v. Park*, 3 Ind. App. 173, 20 N. E. 444.

[f] (App. 1905)

A surety is not bound beyond the strict terms of his engagement, and a surety will be released if a material change is made in the contract without his consent.—*Durbin v. Northwestern Scraper Co.*, 36 Ind. App. 123, 73 N. E. 297.

[g] (Sup. 1907)

A material change in a contract by the principals without the knowledge of the surety discharges the surety.—*Cleveland, C. & St. L. R. Co. v. Moore*, 170 Ind. 328, 82 N. E. 52, 84 N. E. 540.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & S. §§ 158-161.

See, also, 32 Cyc. pp. 177-183.

§ 100. — Provisions of building contracts.

Extension of time for performance, see post, §§ 103-108.

[a] (Sup. 1859)

A. agreed to erect for B. a building, to be wholly completed by November 1, 1856. B. advanced to A. at the same time \$2,000, and A. gave his note for that amount, with C. as surety, with the agreement that the completion of the building according to the contract should be accepted in satisfaction of the note. Subsequently, without the knowledge of C., a further agreement was made between A. and B. that A. should put an additional story on the building for a further consideration, but the time was not extended; and in a suit on the note against C., the surety, it was *held* that the second contract so increased the difficulty and expense, and tended to delay the completion of the first, as to materially affect its execution, and so the surety was discharged.—*Zimmerman v. Judah*, 13 Ind. 286.

[b] (Sup. 1864)

Where a building contract is modified by a provision for the erection of an additional story, and the extension of the time for the completion of the house, without the consent of the surety on the bond of the owner, the surety is discharged.—*Judah v. Zimmerman*, 22 Ind. 388.

[c] (Sup. 1890)

The fact that plaintiffs, owners of land on which buildings were erected, paid the contractors partly by a note, instead of money, as agreed, does not relieve the sureties on the contractors' bond conditioned for the protection of the property from mechanics' liens.—Foster v. Gaston, 123 Ind. 96, 23 N. E. 1092.

Such payment by note is not a partial defense to the action as to such surety, even though the note was worthless, where the plaintiffs, having under their contract no control over the money to be paid the contractors, could not pay off mechanics' liens therewith.—Id.

[d, e] (Sup. 1890)

Under Rev. St. §§ 4246, 4247, providing that contractors for county buildings shall give bond with security, for the faithful performance of the work and the prompt payment of all material and labor debts incurred in its prosecution, and giving laborers and materialmen a right of action on the bond, the sureties are not released from liability to unpaid laborers and materialmen by any alteration in the terms of the contract made by the commissioners and the contractor after the sureties signed the bond.—Conn v. State ex rel. Stutsman, 125 Ind. 514, 25 N. E. 443.

[f] (App. 1899)

Where the construction contract is part of the builder's bond, and provides that changes can be made in the plans and specifications in the manner therein stated, such changes do not release the surety.—Young v. Young, 52 N. E. 776, 21 Ind. App. 509.

[g] (App. 1899)

Where a contract for the construction of a building provides that changes may be made in the plans and specifications as the work progresses, sureties on a bond given for its performance are not discharged because alterations are made without their consent, where they conform to the contract.—American Surety Co. v. Lauber, 53 N. E. 703, 22 Ind. App. 326.

[h] (App. 1899)

A contract which provides for constructing a building in a manner prohibited by city ordinance is not invalid, where it also provides that any necessary changes may be made, and a change is made, so as to avoid a violation of the ordinance, so that the sureties on the contractor's bond, which makes the contract a part thereof, are not released from liability because of the change.—Higgins v. Quigley, 54 N. E. 136, 23 Ind. App. 348.

A contract for remodeling a house provided that the rear part, which was frame, should be replaced by a new frame addition, and the one-story brick part raised to the height of the other walls. A change was made, the second story of the brick part being constructed of wood, instead of brick, involving an addition

of \$20 to the contract price. There was no change in the style, shape, or general arrangement. *Held*, that the change was within a provision of the contract allowing any necessary or desired changes to be made in the plans without invalidating the contract, so that the sureties on the contractor's bond were not released from liability.—Id.

A contract for constructing a building provided for payment of 75 per cent. as the work progressed, but did not require the architect's estimates to be in writing. In an action by the owner to recover overpayments made, he testified that he made certain payments under direction of the architect, who testified that the payments were made on his estimates, and were not beyond the contract price. He also testified that, when the last of such payments was made, more than that amount of work had been done. The payments were less than 75 per cent. of the contract price. *Held* to show that the payments were made under the contract, and on the architect's estimates, so as not to release sureties on contract.—Id.

[i] (App. 1903)

Where a building contract and the contractor's bond each provided for changes in the construction of the building, permission was thereby given in advance by the surety for changes.—Hedrick v. Robbins, 66 N. E. 704, 30 Ind. App. 395.

[j] (Sup. 1904)

Where a building contract provided that the owner should pay claims for labor and material, and should only pay to the contractor the difference between the amount so paid and contract price on completion of the building, but such provisions, together with other material requirements of the contract, were thereafter orally modified on a sufficient consideration, so that the owner paid the contract price directly to the contractor, etc., without the knowledge or consent of the contractor's surety, the surety was thereby discharged.—Guthrie v. Carpenter, 70 N. E. 486, 162 Ind. 417.

[k] (Sup. 1904)

Sureties on a contractor's bond, to be relieved of liability for violation or departure from the principal contract, must show damages therefrom, to the extent of which only will they be relieved. So failure of the owner to insure the building, as agreed, is immaterial, there having been no fire.—Schreiber v. Worm, 72 N. E. 852, 164 Ind. 7.

[l] (Sup. 1904)

Where a building contract contemplated alterations of the plans, and substitution of materials and work of a different character, provisions that such alterations should be made on the written order of the architects, the value of the work added or omitted to be computed by them, and the amount so ascertained added

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or deducted from the contract price, were for the exclusive protection of the owner, which he was entitled to waive; and hence the contractor's surety was not discharged because unimportant alterations, trivial in value, were made by agreement between the parties without reference to the architects.—*Hohn v. Shideler*, 72 N. E. 575, 164 Ind. 242.

[m] (App. 1908)

A surety of a contractor to erect a steam heating plant in a public school building is not released from liability because the contractor subsequently agreed for an additional sum to connect the plant with another building, in the absence of proof that the extension interfered with, delayed, or changed the performance of the contract secured by the surety, since the rule that to release a surety there must be an alteration in the subject-matter in the contract does not extend to independent contracts pertaining to additional subject-matter.—*United States Fidelity & Guaranty Co. v. American Blower Co.*, 41 Ind. App. 620, 84 N. E. 555; *Same v. American Radiator Co.*, 41 Ind. App. 712, 84 N. E. 558.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & S. §§ 162-165.

See, also, 32 Cyc. pp. 188-190; note, 52 C. C. A. 427.

§ 101. Alteration of instrument.

Alteration of instruments in general, see ALTERATION OF INSTRUMENTS.

Change in provisions of contracts, see ante, § 99.

Erasure of name of surety and addition of new surety by agreement of parties, see ante, § 80.

Filling blanks, see ante, § 29.

[a] (Sup. 1861)

A contract stipulated for the vendee's note, with surety. A note, with a surety, was offered; but, being objected to, as not bearing interest, the vendee wrote in the words "with interest." *Held*, that the insertion of these words, without the surety's consent, discharged him, and therefore that the note was not such as to satisfy the contract.—*Kountz v. Hart*, 17 Ind. 329.

[b] (Sup. 1868)

The alteration of a promissory note after its execution, without the knowledge or consent of the surety, by adding a clause fixing the rate of interest, is a material alteration, and constitutes a good defense to an action against the surety on the note so altered.—*Hart v. Clouser*, 30 Ind. 210.

[c] (Sup. 1860)

Where the transferee of a note signed it as maker to induce a bank to discount it, with the understanding with the bank that he signed as surety only for the other makers, one of whom was a surety, there was not such an al-

teration as released such surety.—*Bowser v. Rendell*, 31 Ind. 128.

[d] (Sup. 1875)

The conditions of the bond of a township trustee, elected and qualified in 1867, recited, when signed by the sureties, that he should correctly account to the board of commissioners at its March term, 1868; but, either before or after it was accepted and approved by the auditor of the county, the deputy auditor altered it by inserting the word and figures "1869 and 1870" after the figures "1868." *Held*, that the alteration did not discharge the sureties.—*State ex rel. Jackson Tp. v. Berg*, 50 Ind. 496.

[e] (Sup. 1876)

A short time before the maturity of a note bearing 8 per cent. interest the payee required the payment of 10 per cent. interest for such time as the note should run after maturity. The maker thereupon altered the note, so as to make it stipulate that it should bear interest at the rate of 10 per cent., instead of 8 per cent. The payee, being unable to write or read writing, having no knowledge of the alteration thus made, and not assenting thereto, received the note again from the maker and retained it after maturity, receiving the increased rate of interest without knowledge of the alteration. *Held*, that the alteration was a mere spoliation of the note, and did not affect the payee's right to recover on the note as it existed before the spoliation, against a surety thereon, and the payee could not be regarded as guilty of such negligence as would deprive him of such right to recover.—*Bucklen v. Huff*, 53 Ind. 474.

[f] (Sup. 1877)

A note whose amount had been left blank was intrusted by the surety to the principal maker, to be delivered to the payee company, and the agent thereof, without consent of the surety, upon inserting the amount, interlined, after the clause, "with 10 per cent. interest per annum," the words "after maturity." *Held*, that the alteration discharged the surety.—*Franklin Life Ins. Co. v. Courtney*, 60 Ind. 134.

[g] (Sup. 1881)

An indorsement on a note of a pretended partial payment, before or at the time of its delivery to the payee, is a material alteration, which discharges the surety.—*Johnston v. May*, 76 Ind. 293.

[h] (Sup. 1882)

Changing the time of payment of a note from one day to one year is an alteration which will discharge the liability of the surety; the alteration having been made after signing by the surety and without his knowledge or consent.—*Stayner v. Joice*, 82 Ind. 35.

[i] (Sup. 1882)

Where the agent of the payees of certain notes, which were the joint and several notes of principal and surety, so altered them with

the consent of the principal, but without the knowledge or consent of the surety, that they became the joint notes of the makers, the alteration was material, and discharged the surety from all liability.—*Eckert v. Louis*, 84 Ind. 90.

[j] (Sup. 1882)

The surety is not relieved from liability on a bond on the ground that the names of sureties who signed it later were not in the body of the bond when he executed it, but were inserted when they severally signed it.—*Mowbray v. State ex rel. City of Peru*, 88 Ind. 324.

[k] (Sup. 1887)

A material alteration, without the knowledge of a surety, will, although favorable to him, release him from liability; and, where the contract is to furnish farming implements to the principal as ordered by him, the addition of the clause that "all goods specified in this contract, and in the price-list attached, have been delivered to the" principal, is a material alteration, as is also the stipulation that "payment for all goods ordered" by the principal "is hereby guaranteed" by the surety.—*Weir Plow Co. v. Walmsley*, 110 Ind. 242, 11 N. E. 232.

[l] (App. 1892)

The raising of the amount of a note by the maker at the request of the payee, and without the surety's knowledge, will not release the surety in a court having both law and equity powers, where the note as corrected conforms to the intent of all the parties.—*Busjahn v. McLean*, 3 Ind. App. 281, 29 N. E. 494.

[m] (App. 1893)

A surety is released by a material alteration of a note by the payee with knowledge of the suretyship without the surety's consent, and after it has been signed by the surety and is apparently complete.—*Hodge v. Farmers' Bank of Frankfort*, 34 N. E. 123, 7 Ind. App. 94.

A note delivered by a surety, with all blanks filled, including blank for the payee, who is named, merely, as an individual, cannot afterwards be altered, without the surety's consent, by writing "cashier" after the payee, thus making it payable to a bank.—Id.

[n] (App. 1897)

After defendant's testator and another had executed and delivered certain notes, the agent of the payee secured the signatures of plaintiff's ward and another to the notes, without consideration, and without the knowledge or consent of decedent. Though decedent remained solvent, plaintiff's ward paid the notes, and plaintiff, as her guardian, brought an action therefor against defendant, the executor of decedent's estate. *Held*, that such action could not be maintained, as the alteration of such notes relieved decedent from liability thereon, and such payment was therefore of no benefit to him or his estate.—*Windle v. Williams*, 47 N. E. 680, 18 Ind. App. 158.

[o] (App. 1889)

Where, at time of execution of a note by a surety, it was a complete instrument, except as to the rate of interest, the subsequent insertion of the rate, without his knowledge, releases him, though the agreement was that the note should bear such rate of interest.—*Moore v. Hinshaw*, 55 N. E. 236, 23 Ind. App. 267, 77 Am. St. Rep. 434.

[p] (App. 1900)

A contract with a sales agent authorized sales by him in "the state of Indiana and —," room being left blank for the description of other territory which the principal contemplated thereafter authorizing him to work; but the contract expressly provided that it contained "the full understanding," and was not to be affected by "any verbal statement whatever." *Held*, that the insertion in the blank of a description of additional territory was a material and unauthorized change of the contract, relieving from liability the agent's sureties, whose bond was indorsed on the contract as first executed.—*Good Roads Machinery Co. v. Moore*, 58 N. E. 540, 25 Ind. App. 479.

[q] (App. 1904)

Where the date of a note was altered after it had been signed by a surety, and without his knowledge, so as to postpone the date of payment, the alteration was material, and the surety discharged.—*Brannum Lumber Co. v. Pickard*, 71 N. E. 676, 33 Ind. App. 484.

A provision in a note that the makers and indorsers expressly agree that the payee may extend the time of payment and receive interest in advance from either the makers or indorsers for any extension so made, and waive any defense thereto on account of the same, does not prevent the release of a surety by a change in the date of the note after signature by the surety, such change making the note mature later.—Id.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Princ. & S. §§ 169-180.

See, also, 6 Cyc. p. 83, 32 Cyc. pp. 177-183; note, 66 C. C. A. 6.

§ 102. Change in parties to obligation secured.

[a] (Sup. 1843)

After a bond with three sureties has been executed and delivered, the erasure of the name of one of the sureties, while the bond is in the control of the obligee, and the substitution of another in the place, without the knowledge or consent of the other sureties, will avoid the bond.—*State ex rel. Board of County Com'rs v. Polke*, 7 Blackf. 27.

[b] Where the name of one of several sureties in an official bond is stricken out, and the name of another inserted instead, without the consent or knowledge of the other sureties, but with the consent of the principal, such other

sureties will be thereby discharged; but the bond will be valid against the principal and the surety whose name was so inserted.—(Sup. 1848) *State ex rel. Board of Com'rs of La Porte County v. Van Felt*, 1 Ind. 304, Smith, 118.

If one of the sureties upon an official bond be discharged, and another substituted, who executes the bond, the person so substituted is bound to know whether or not the alteration so made is with the knowledge and consent of the remaining sureties, and cannot plead ignorance thereof in a suit against him on the bond.—*Id.*

[c] (Sup. 1878)

The procuring, by the payee of a note, of an additional surety thereon, does not render it void as to such additional surety, though he signed it solely because of the apparent liability of a surety who had already executed it, and who is availing himself of such alteration as a defense.—*Crandall v. First Nat. Bank of Auburn*, 61 Ind. 349.

[d] (App. 1892)

It is a good defense to an action against a surety on a note that, subsequently to the making and delivery of the note, the name of another surety was added without his consent.—*Owens v. Tague*, 3 Ind. App. 245, 29 N. E. 784.

The facts that the agent of a payee of a note had special instructions to loan the payee's money only upon a note with two sureties, and that the payee refused to receive the note from his agent when he presented it with only one surety, and that the name of the additional surety was thereafter added, will not affect the question of the discharge of the first surety by such addition to the note; the contract as to him being completely executed by the delivery of the note to the agent. The payee is bound by the knowledge of his agent that the name of the second surety was added without the consent of the first surety.—*Id.*

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. PRINC. & S. §§ 181-185.

See, also, 32 Cyc. pp. 184, 185.

§ 103. Extension of time for payment or other performance.

Consent of surety to extension, see post, § 128. Neglect to act or proceed against principal, see post, §§ 124-126.

Right to show extension not shown in original action against two parties, see JUDGMENT, § 619.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & S. §§ 186-218.

See, also, 32 Cyc. pp. 191-214.

§ 104. — In general.

[a] (Sup. 1826)

The fact that the creditor has taken a judgment by confession from the principal,

with a stay of execution for six months, cannot be pleaded by the surety in bar of an action against him by the creditor, where the latter could not have collected the money sooner by the ordinary proceedings, or where the surety consented thereto.—*Barker v. McClure*, 2 Blackf. 14.

[b] (Sup. 1852)

A valid agreement by a creditor with the debtor, without the consent of the surety, not to sue for a limited time after the debt is due, discharges the surety.—*Harbert v. Dumont*, 3 Ind. 346.

[c] By an agreement, supported by a sufficient consideration, to extend the time of payment of a note to the principal therein, without the consent of the surety, the surety is discharged.—(Sup. 1855) *Dickerson v. Board of Com'rs of Ripley County*, 6 Ind. 128, 63 Am. Dec. 373; (App. 1901) *Bugh v. Crum*, 59 N. E. 1076, 26 Ind. App. 465, 84 Am. St. Rep. 307.

[d] (Sup. 1855)

An agreement by a creditor of an obligation signed by a principal and a surety to extend the time of performance need not deprive the creditor of the power of suing; but it is sufficient if it fetter and embarrass his discretion.—*Dickerson v. Board of Com'rs of Ripley County*, 6 Ind. 128, 63 Am. Dec. 373.

[e] (Sup. 1864)

A building contract provided that a note, given therewith and signed by a surety, should be held as security for the performance of the contract. Afterwards the contract was changed by the addition of another story to the building, and the time of its completion was extended. Held, that the surety was discharged.—*Judah v. Zimmerman*, 22 Ind. 388.

[f] Where a creditor, by a valid and binding agreement between himself and the principal debtor, without the consent of the surety, extends the time of payment, and thus ties up the hands of the creditor, the surety is thereby discharged.—(Sup. 1866) *Redman v. Deputy*, 26 Ind. 338; (1867) *Calvin v. Wiggam*, 27 Ind. 480; (1873) *Jarvis v. Hyatt*, 43 Ind. 163; (1882) *Williams v. Scott*, 83 Ind. 405.

[g] (Sup. 1871)

To discharge a surety by indulgence granted to the principal, the case must show a new contract concluded between the creditor and the principal debtor, by which the former for a sufficient consideration bound himself not to sue the latter for a definite period of time; but it does not matter how short the time may have been.—*Meniffee v. Clark*, 35 Ind. 304; *Turpin v. Clark*, Id. 378.

[h] (Super. 1871)

A surety, who has been fully indemnified against loss by property placed in his hands, is estopped to object to any extension of time granted by the creditor.—*Bohring v. Root*, Wils. 29.

[i] Where the holder of a note extends time for payment, the sureties thereon, who had no notice of such extension, will not be released from liability if, on the face of such note, they appear to be principals, and the holder, at the time he extended payment, had no actual notice that they were sureties.—(Sup. 1878) *Davenport v. King*, 63 Ind. 64; (1882) *Lamson v. First Nat. Bank*, 82 Ind. 21.

[j] Where it does not appear on the face of a note, and is not known to the payee, that a joint maker is surety for the other, an extension of time granted to the principal will not release the surety.—(Sup. 1879) *McCloskey v. Indianapolis Manufacturers' & Carpenters' Union*, 67 Ind. 86, 33 Am. Rep. 76; (Sup. 1880) *Arms v. Beitman*, 73 Ind. 85; (1881) *Mullendore v. Wertz*, 75 Ind. 431, 39 Am. Rep. 155; (1881) *Albright v. Griffin*, 78 Ind. 182; (1882) *Tharp v. Parker*, 86 Ind. 102.

[k] (Sup. 1879)

J. borrowed money of H. and gave his note, with G. as surety. At the maturity of the note, to induce G. to renew it, J. and A. gave him a note secured by a mortgage given by A. The note was renewed a second time, and finally G. was obliged to pay it. He then brought a suit to foreclose the mortgage. *Held*, that A.'s assent was not necessary to the second renewal of the note, and that there was a sufficient consideration for the mortgage.—*Mayer v. Grottendick*, 68 Ind. 1.

[l] (Sup. 1880)

Neither payment of interest already due on a note, nor an agreement to thereafter pay interest at a reduced rate, constitutes a new consideration for an extension of time of a note overdue so as to release the surety.—*Dare v. Hall*, 70 Ind. 545.

[m] (Sup. 1881)

One of two obligors whose obligations are equal is not discharged by the mere giving of time to the other obligor.—*Mullendore v. Wertz*, 75 Ind. 431, 39 Am. Rep. 155.

[n] (Sup. 1881)

The rule in favor of granting a surety the full benefit of the contract should not be made to yield to the rule that time is not of the essence thereof.—*Cartmel v. Newton*, 79 Ind. 1.

[o] (Sup. 1885)

Where, after recovery of judgment against two defendants, plaintiff extended the time of payment by an agreement with one defendant, the other defendant may avail himself of the fact that he was only a surety, although the question was not litigated in the action, if the creditor had knowledge that such defendant was a surety at the time the extension was made.—*Gipson v. Ogden*, 100 Ind. 20.

[p] (Sup. 1888)

When a creditor accepts part payment of a note, and reloans the balance to the principal

debtor, the sureties are discharged.—*Spurgeon v. Smitha*, 114 Ind. 453, 17 N. E. 105.

[q] (Sup. 1839)

An allegation that plaintiff accepted from the principal a note due one day after date, and a cognovit authorizing entry of judgment thereon, does not show an extension of time such as will release the surety, no agreement being shown not to sue on the original indebtedness until the note became due, and the cognovit having shortened the time within which judgment could be obtained.—*Merriman v. Barker*, 121 Ind. 74, 22 N. E. 992.

[r] (App. 1893)

A contract made with the principal debtor on a valuable consideration and without the consent of the surety, extending the time of payment for a definite period, releases the latter from liability.—*Hodge v. Farmers' Bank of Frankfort*, 34 N. E. 123, 7 Ind. App. 94.

[s] To release a surety on a note by reason of the extension of the time of its payment, the extension must be for a definite period, for a valuable consideration, without the consent of the surety, and the holder must have knowledge that the party seeking the release is a surety.—(App. 1898) *Voris v. Shotts*, 50 N. E. 484, 20 Ind. App. 220; (1905) *Durbin v. Northwestern Scraper Co.*, 73 N. E. 297, 36 Ind. App. 123; (1906) *Weaver v. Prebster*, 77 N. E. 674, 37 Ind. App. 582.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Princ. & S. §§ 186, 190, 193-195, 197-200.

See, also, 32 Cyc. pp. 191-195; note, 5 L. R. A. (N. S.) 764.

§ 105. — Requisites and validity of agreement in general.

[a] (Sup. 1844)

A surety in a specialty is not discharged by a parol agreement, made by the creditor with the principal debtor on the day the debt became due, to give the debtor the further time of one year for payment.—*Tate v. Wymond*, 7 Blackf. 240.

[b] (Sup. 1846)

Time given to the principal debtor by a parol contract to pay a specialty debt does not at law discharge the surety.—*Carr v. Howard*, 8 Blackf. 190.

[c] (Sup. 1852)

In an action by the assignee against the makers of a promissory note, being principal and sureties, the defense was that after the note became due, and before it was assigned, an extension of time was made by agreement between the principal and payee, without the knowledge of the sureties. The only evidence of such extension was three indorsements, made upon the note by the payee, after it became due, each a year apart from the other, to the effect that he had, at the date of the indorsements severally,

received the interest for a year in advance, and the note was to stand without suit to the end of the year. *Held*, that it did not appear the time of payment was extended by agreement between the principal and payee, nor that the interest might not have been paid by either or all of the makers.—*Cheek v. Glass*, 3 Ind. 286.

[d] (Sup. 1855)

An agreement for delay in demanding payment on a written obligation, made between the payee and the principal obligor, which would give the latter a right of action if violated, is sufficient to discharge a surety.—*Dickerson v. Board of Com'rs of Ripley County*, 6 Ind. 128, 63 Am. Dec. 373.

[e] (Sup. 1866)

An oral agreement by the payee of a note with the principal maker, without the knowledge of the surety, whose suretyship is known to the payee, to extend the time of payment during a definite period beyond the maturity of the paper, releases the surety if founded on a sufficient consideration.—*Pierce v. Goldsberry*, 31 Ind. 52.

[f] From the payment of interest in advance by the maker, whether at the rate specified in the note or at a higher rate, and the receipt thereof by the holder as interest, an agreement is implied to extend the time of payment during the period for which interest is thus paid, so as to discharge the surety.—(Sup. 1873) *Jarvis v. Hyatt*, 43 Ind. 163; (1874) *Abel v. Alexander*, 45 Ind. 523, 15 Am. Rep. 270.

[g] Where a creditor receives from the debtor interest in advance on the debt, the latter implies an agreement of forbearance during the time for which such interest is paid, if there is no agreement to the contrary.—(Sup. 1873) *Hamilton v. Winterrowd*, 43 Ind. 393; (1875) *Woodburn v. Carter*, 50 Ind. 376.

[h] (Sup. 1876)

Where, by agreement between a maker and payee of a note bearing 8 per cent. interest, without the knowledge of a surety thereon and in consideration of an extension, the maker indorsed, "I agree to pay 10 per cent. interest on this note," dated before the maturity, and signed by the maker, it did not constitute such a contract for extension as discharged the surety.—*Bucklen v. Huff*, 53 Ind. 474.

[i] (Sup. 1879)

A surety on a penal bond is not discharged from liability by the fact that the principal, without his consent, subsequently executed his note, payable in future, for the amount due the obligee, where such note did not comply with the law merchant of another state, where it was executed, requiring notes to be indorsed to a bank of that state.—*Lindeman v. Rosenfield*, 67 Ind. 246, 33 Am. Rep. 79.

[j] (Sup. 1880)

The executor of a payee of a note has the power to contract with the maker for the ex-

tension of the time of payment of the note, so as to discharge the surety, if the contract is made without his knowledge.—*Underwood v. Sample*, 70 Ind. 446.

[k] (Sup. 1881)

A. held B.'s note, on which C. and D. were sureties. B. subsequently paid the interest on the note, and presented a new one, nonnegotiable, with the same names forged thereon, and received the old note. *Held*, that there was no such extension of time as would discharge the sureties, and A. could sue on the old note without surrendering or canceling the new one.—*Albright v. Griffin*, 78 Ind. 182.

[l] (App. 1898)

Where the payee and principal of an overdue note jointly execute another note due in a year, with the agreement that if the principal pays the latter note at maturity the payee of the former will surrender it, the surety on the former is released by the extension implied from said agreement.—*Brannon v. Irons*, 49 N. E. 460, 19 Ind. App. 305.

[m] (App. 1905)

Burns' Ann. St. 1901, § 7045, provides that on money due on any instrument in writing, and, on an account stated, from the date of settlement, interest shall be allowed at the rate of 6 per cent. In an action on a note given by a corporation and individuals, one of them answered that she signed as a surety, and that when the note was due the holders contracted with the corporation and other signers, whereby a note should be given for a sum due the holders of the note in action, and that such new note should be sued on and a receiver appointed, and that the time of payment of the note in suit should be extended until after the appointment of the receiver. *Held*, that the facts alleged did not show an extension of time of payment which would release the surety, the extension not appearing to have been for any definite time, and no consideration appearing, in that it was not shown that the obtaining of security was of itself a valuable consideration, and, if presumable that the note bore interest from date, it could not be presumed that it bore more than 6 per cent., and it could not be presumed that the account was not drawing interest.—*Durbin v. Northwestern Scraper Co.*, 73 N. E. 297, 36 Ind. App. 123.

[n] (App. 1906)

In order to release a surety on a note by reason of the extension of the time of its payment, mutuality must appear in the agreement between the payee and the maker.—*Weaver v. Prebster*, 77 N. E. 674, 37 Ind. App. 582.

A few days before the maturity of a note the maker paid the interest thereon. It was understood by the payee that the note was to run for another year on the interest being paid. *Held* insufficient to show a mutuality of an agreement for the extension of the time between

the payee and the maker, essential to release a surety from liability.—Id.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 191, 192, 193, 201-210.

See, also, 32 Cyc. pp. 196-204; note, 53 L. R. A. 316.

§ 106. — Agreement for definite time.

[a] (Sup. 1873)

Where there is an agreement for extension generally for no definite time and interest has been paid in pursuance thereof, but not in advance, there is no implied agreement to extend the time of payment for any particular length of time, and the surety is not discharged.—Jarvis v. Hyatt, 43 Ind. 163.

[b] (Sup. 1876)

Where, by agreement between the maker and payee of a note bearing 8 per cent. interest, without the knowledge or consent of a surety thereon, in consideration that the payee would extend the time for the payment of the note for an indefinite period after its maturity, until he should demand payment, the maker indorsed on the note the following: "I hereby agree to pay 10 per cent. interest on this note hereafter"—dated the day before the maturity of the note, and signed by the maker. In pursuance of the agreement the payee did extend the time for a long period after the maturity of the note. *Held*, that the new contract, viewed as a contract for the extension of time, did not discharge the surety.—Bucklen v. Huff, 53 Ind. 474.

[c] The period of extension of payment given the principal debtor must be fixed and definite in order to discharge the surety.—(Sup. 1879) Tracy v. Quillen, 65 Ind. 249; (1879) Prather v. Young, 67 Ind. 480; (1879) Chrisman v. Perlin, 67 Ind. 586; (1884) Cates v. Thayer, 93 Ind. 156; (1886) Beach v. Zimmerman, 106 Ind. 495, 7 N. E. 237; (App. 1898) Schieber v. Traudt, 49 N. E. 605, 19 Ind. App. 349; (1898) Voris v. Shotts, 50 N. E. 484, 20 Ind. App. 220; (1898) Olson v. Chism, 51 N. E. 373, 21 Ind. App. 40; (1905) Durbin v. Northwestern Scraper Co., 73 N. E. 297, 36 Ind. App. 123; (1906) Weaver v. Prebster, 77 N. E. 674, 37 Ind. App. 582.

[d] (Sup. 1879)

An agreement was made between the holder and the principal of a note that the former would dismiss an action pending thereon against both principal and surety, and indorse a credit on the note. *Held* that, although the agreement was made without the knowledge and consent of the surety and for a valuable consideration, he was not thereby discharged.—Tracy v. Quillen, 65 Ind. 249.

[e] (Sup. 1879)

An agreement between the holder of a note and the principal that the former would extend the time of payment, indefinitely, on payment of

the interest, does not discharge the surety.—Miller v. Arnold, 65 Ind. 488.

[f] (App. 596)

A surety on a note is not released in consequence of an agreement by the payee to extend the time of payment for a year in consideration of the maker paying the interest a few days before the maturity of the note.—Weaver v. Prebster, 77 N. E. 674, 37 Ind. App. 582.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 211, 212.

See, also, 32 Cyc. pp. 202, 203.

§ 108. — Consideration.

[a] (Sup. 1825)

In debt against A. and B. on a joint and several bond for the payment of money, a plea by B. that he was surety on the bond, and that the obligee before the bond became due extended the time of payment as to A. in consideration of the latter's agreement to pay him certain interest for the delay, *held* no bar to the action against B.—Braman v. Howk, 1 Blackf. 392.

[b] An agreement between a creditor and the principal debtor extending the time of payment or performance does not release the surety, where there is no consideration for the agreement.—(Sup. 1836) Coman v. State ex rel. Armstrong, 4 Blackf. 241; (1840) Harter v. Moore, 5 Blackf. 367; (1855) Shook v. State ex rel. Stevens, 6 Ind. 113; (1855) Same v. Board of Com'rs of Ripley County, Id. 461; (1861) Halstead v. Brown, 17 Ind. 202; (Super. 1871) Bohring v. Root, Wils. 29; (Sup. 1876) Hogshead v. Williams, 55 Ind. 145; (1879) Lindeman v. Rosenfield, 67 Ind. 246, 33 Am. Rep. 79; (App. 1898) Voris v. Shotts, 50 N. E. 484, 20 Ind. App. 220; (1898) Olson v. Chism, 51 N. E. 373, 21 Ind. App. 40; (1905) Durbin v. Northwestern Scraper Co., 73 N. E. 297, 36 Ind. App. 123.

[c] (Sup. 1846)

The gratuitous giving of time by a creditor to his principal debtor does not discharge the surety, though the latter had verbally notified the creditor to sue the principal, who was then solvent, but who afterwards became insolvent.—Carr v. Howard, 8 Blackf. 190.

[d] An agreement by the payee of a note to extend the time of payment to the principal, for a usurious consideration, does not release the surety, as such agreement is invalid.—(Sup. 1858) Shaw v. Binkard, 10 Ind. 227; (1859) Goodhue v. Palmer, 13 Ind. 457.

[e] An executory agreement to extend the time of payment on a promissory note in consideration of usurious interest is invalid, and will not discharge a surety thereon.—(Sup. 1861) Brown v. Harness, 16 Ind. 248; (1861) Halstead v. Brown, 17 Ind. 202.

[f] (Sup. 1861)

A promise by the principal debtor to pay the amount of interest already due is not a consideration for an agreement for an extension of time by the creditor, sufficient to discharge the surety.—*Halestead v. Brown*, 17 Ind. 202.

A promise by the principal debtor to pay illegal interest is not such a consideration for an extension of time by the creditor as will discharge the surety.—*Id.*

[g] The payment of interest upon a note in advance is a sufficient consideration to support an agreement for an extension of time to the principal, so as to discharge the surety.—(Sup. 1866) *Redman v. Deputy*, 26 Ind. 338; (1881) *Kaler v. Hise*, 79 Ind. 301.

[h] (Sup. 1873)

Where interest has been paid in advance under an agreement to extend the time of payment of the principal debt, it is not of any importance in a suit against a surety that the rate of interest paid was greater than the legal rate.—*Hamilton v. Winterrowd*, 43 Ind. 393.

[i] (Sup. 1873)

Where a guardian procures an extension of the time for payment of money due to his ward by a mere agreement to pay a rate of interest which the guardian is bound by law to pay, the guardian's surety is liable on his bond to the ward.—*Douglass v. State ex rel. Chaney*, 44 Ind. 67.

[j] (Sup. 1873)

An agreement in writing to pay an increased rate of interest, made by the principal maker with the holder of a promissory note, is a good consideration for an extension of the time of payment; and when the agreement is to extend for a definite period, without the consent of the surety, it will discharge the surety.—*Huff v. Cole*, 45 Ind. 300.

[k] (Sup. 1874)

An agreement by the principal to continue to pay the same rate of interest specified in a promissory note, though greater than the legal rate, is not a sufficient consideration to sustain a promise to extend the time of payment; and an extension upon such consideration, without the knowledge or consent of the surety, does not discharge the surety.—*Abel v. Alexander*, 45 Ind. 523, 15 Am. Rep. 270, overruling *Pierce v. Goldsberry* (1869) 31 Ind. 52.

[l] (Sup. 1875)

An agreement for an extension between the principal maker of a promissory note and the payee, without knowledge or consent of the surety, made in consideration of the payment by the maker to the payee of a sum greater than the interest which the note would bear for the period of extension, will discharge the surety.—*White v. Whitney*, 51 Ind. 124.

[m] A surety on a note is not released by an extension of the time of its payment, on consideration that the principal will pay the in-

terest therein stipulated.—(Sup. 1877) *Christ v. Tuttle*, 59 Ind. 155; (1882) *Hume v. M. lin*, 84 Ind. 574.

[n] (Sup. 1878)

An agreement between the payee or holder of a note and the principal therein for an extension of the time of payment for a fixed definite period, made without the knowledge or consent of the surety, in the note and founded upon a new consideration, will discharge the surety from any liability on such note; where the payee of such a note extended the time thereof, on the promise of the principal to pay before its maturity another note executed by him alone to the payee, this was held a sufficient consideration for such extension.—*Bu Smiley*, 64 Ind. 431.

[o] (Sup. 1880)

In an action on a note, where a defendant surety alleged an extension of time without his consent, in consideration of the execution of security for the note, a reply that the value of the security was inadequate to secure the debt was insufficient.—*Underwood v. Sampson*, 64 Ind. 446.

[p] (Sup. 1880)

Neither payment of interest already due on a note, nor an agreement to thereafter pay interest at a reduced rate, constitutes a valid consideration for the extension of the time of payment of the note, so as to release the surety thereon.—*Dare v. Hall*, 70 Ind. 545.

[q] (Sup. 1881)

A retiring partner, who by agreement with his copartners becomes a mere surety for the firm debts, is not discharged by an oral agreement between his former copartners and the holders of the firm note to pay interest thereon at 10 per cent. in advance, instead of 10 per cent. not in advance, as provided for by the note; such agreement being usurious, and having the effect to extend the time for payment of the note.—*Williams v. Boyce*, 70 Ind. 286.

[r] (Sup. 1881)

The payee of a note, who agrees with the principal maker to extend the time of payment in consideration of a payment of usurious interest for a time already elapsed, thereby discharges the surety, cannot claim that the usury in the contract for the purpose of holding the surety still liable; usury being a defense personal to the debtor.—*Lemmon v. Whitman*, 70 Ind. 318, 39 Am. Rep. 150.

[s] (Sup. 1881)

Where it was agreed to extend the time of payment of a judgment against principal and a surety, and withhold execution therefrom until the principals procured sureties to enter bail for its payment, the trouble and inconvenience in procuring bail cannot be held to constitute a sufficient consideration for the agreement as against the surety claiming release from the judgment, but the security, the

tract for which was in this case invalid, must be regarded as the real consideration, and the inconvenience merely incidental thereto.—*Sterne v. Bank of Vincennes*, 79 Ind. 549; *Same v. Vincennes Nat. Bank*, Id. 598.

[t] (Sup. 1882)

A promise to pay the principal in installments is not a sufficient consideration for an agreement to extend the time, such as would release the surety.—*Hume v. Mazelin*, 84 Ind. 574.

[u] (Sup. 1887)

The moral obligation of a discharged bankrupt to pay a debt is sufficient consideration for an extension of time thereon, so as to discharge his surety.—*Post v. Losey*, 111 Ind. 74, 12 N. E. 121, 60 Am. Rep. 677.

[v] (Sup. 1890)

A promise to dismiss a suit on a promissory note, and to extend the time for paying the note in consideration of a partial payment, being without consideration and void, does not discharge the surety on the note.—*Davis v. Stout*, 126 Ind. 12, 25 N. E. 862, 22 Am. St. Rep. 565.

[w] (App. 1898)

Payment of interest in advance is sufficient consideration to support an agreement for extension of time of payment, which will release a surety.—*Schieber v. Traudt*, 49 N. E. 605, 19 Ind. App. 349.

[x] (App. 1906)

Payment of interest already accrued is not sufficient consideration to support an agreement for extension of time, of payment, which will release a surety.—*Weaver v. Prebster*, 77 N. E. 674, 37 Ind. App. 582.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 213-218.

See, also, 32 Cyc. pp. 199-202.

§ 109. Taking additional or substituted security.

Contracts and conveyances for indemnity by principal to surety, see post, § 175.

[a] (Sup. 1881)

A surety consented that the creditor might discharge the principal debtor upon the latter giving security for one-fourth of the debt within 10 days, and agreed that he, the surety, would remain liable for the remaining three-fourths. The creditor and the principal debtor agreed upon such a settlement, but, the security not being furnished within the 10 days, it was accepted afterwards by the creditor as a fulfillment of the agreement, without the consent of the surety. *Held*, that the surety was discharged.—*Cartmel v. Newton*, 79 Ind. 1.

[b] (App. 1891)

The mere fact that a creditor takes an additional security at the time of the execution of

the contract by the surety will not of itself discharge the surety, unless the additional security operates as a satisfaction of the debt or changes the liability of the surety.—*Springfield Engine & Thresher Co. v. Park*, 29 N. E. 444, 3 Ind. App. 173.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 219-222.

See, also, 32 Cyc. pp. 221, 222; note, 33 Am. Rep. 85.

§ 110. Judgment and execution against principal.

[a] The bare delivery to the sheriff by a creditor of a fieri facias against the principal debtor and his surety, and the creditor's countermanding the execution before a levy, are not of themselves a discharge to the surety, though the debtor had sufficient property at the time to pay the debt, and afterwards became insolvent.—(Sup. 1832) *Naylor v. Moody*, 3 Blackf. 92; (1840) *Yandes v. Patterson*, 5 Blackf. 301.

[b] (Sup. 1872)

A judgment against the principal on an official bond does not merge the liabilities of the sureties.—*State ex rel. Griswold v. Roberts*, 40 Ind. 451.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 223-225.

See, also, 32 Cyc. pp. 190, 191.

§ 111. Payment or other satisfaction by principal.

Discharge of principal without payment or satisfaction, see post, § 118.

Enforcement by surety of payment or other exoneration by principal, see post, § 179.

Payment or satisfaction by surety, see post, § 131.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 226-230.

See, also, 32 Cyc. pp. 167-172.

§ 112. — In general.

[a] (Sup. 1851)

In an action against the maker and surety of promissory notes, it appeared that the maker offered to pay the notes, but by an oral agreement retained the money on a new loan without receiving them. *Held*, that this was a payment of the notes and discharge of the surety.—*Musgrave v. Glasgow*, 3 Ind. 31.

[b] (Sup. 1881)

In suit on a note against principals and surety, it appeared that on a certain occasion, when one of the makers and the payee were present, the surety gave notice that he would not remain such any longer, and that the maker then said to the payee: "If you will let our firm have the money on our own note, we will

take it; otherwise, we will pay you off." To this the payee replied that he did not want the money, that he would take the surety's name off the note, and that he would "bring down the note, and fix the matter up, and either get new notes or take the money." No new note was executed, and the makers, without the surety's knowledge, paid interest on the note for several years, until they became insolvent, when this suit was brought. *Held*, that the transaction was in effect a payment of the note and a reloan of the money, and that the surety was discharged, and that the keeping of the surety so long in ignorance that the note had neither been paid nor exchanged for a new one had all the effect of a fraudulent concealment of facts, whether so intended or not.—*Taylor v. Lohman*, 74 Ind. 418.

[c] (Sup. 1882)

The renewal of a valid note by giving a forged note in its place does not constitute a payment of the original note, nor discharge a surety or indorser thereon.—*Lovinger v. First Nat. Bank of Madison*, 81 Ind. 354.

[d] (Sup. 1882)

A tender of property in payment of an ordinary note does not release the surety. In order to have that effect, the tender must be made in lawful money.—*Wilson v. McVey*, 83 Ind. 108.

[e] (Sup. 1886)

The collateral liability of the surety ends with the extinguishment of the principal's debt.—*Bridges v. Blake*, 106 Ind. 332, 6 N. E. 833.

[f] (Sup. 1888)

Where money is actually produced, and an unconditional offer made by the principal debtor to pay at once his note then due, and the creditor refuses to accept it, and asks the debtor to retain it, the sureties are discharged.—*Spurgeon v. Smitha*, 114 Ind. 453, 17 N. E. 105.

[g] (App. 1892)

In an action on a guardian's bond to recover an indebtedness against the ward's estate, the answer states a valid defense, where it alleges that plaintiff accepted, in extinguishment of the debt, the individual note of the guardian.—*Price v. Barnes*, 7 Ind. App. 1, 31 N. E. 809, 34 N. E. 408.

[h] (App. 1894)

A claim allowed against the estate of a decedent on a promissory note on which the decedent was surety is discharged by the subsequent satisfaction of a judgment in favor of the claimant against the principal on the note, though the judgment was for less than the amount for which the claim was allowed.—*Dick v. Dumbauld*, 10 Ind. App. 508, 38 N. E. 78.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & S. §§ 226-234.

See, also, 32 Cyc. p. 167.

§ 113. — Application of payments.

[a] (Sup. 1881)

A creditor is not bound to apply money which he has received from a sale of property on which he has made advances, and has a lien to the payment of a secured debt, in the absence of some express or implied agreement to that effect, though it may be his duty to apply the surplus remaining after the discharge of the lien to the payment of such secured debt, especially if he had knowledge of an agreement between the principal and his surety that such should be done, and that the surety was relying on the creditor to do so.—*White v. Beem*, 73 Ind. 239.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & S. §§ 239.

See, also, 32 Cyc. pp. 170-172.

§ 114. Misapplication of funds or securities by creditor.

Right of surety to compel recourse to other securities, see post, § 169.

[a] (Sup. 1880)

Where the payee of a note fails to comply with his agreement with sureties to surrender a pre-existing note and mortgage securing the same, so that the sureties might procure an indemnity mortgage on the mortgaged property, the sureties are discharged from liability on the note, and are not confined in their remedy to seeking to enforce the creditor's agreement compelling him to surrender the note and mortgage for cancellation.—*Jeffries v. L*, 73 Ind. 202.

[b] (Sup. 1891)

Where a chattel mortgagee gives no notice of the sale, and fraudulently represents that the property is only worth \$700, and that he expects to bid that sum for it, thus preventing other bidders from bidding at the sale, and then bids in the property himself for \$150, when it is worth \$1,500, which was more than the mortgage debt, such conduct relieves the sureties on the mortgage note from liability.—*Nichols, Shepherd & Co. v. Burch*, 128 Ind. 324, 27 N. E. 737.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & S. §§ 243.

See, also, 32 Cyc. p. 221.

§ 115. Release or loss of other securities.

[a] (Sup. 1882)

A creditor, who, having the note of a debtor, with a surety, has also, or afterwards, taken property from the principal as a pledge or security for the debt, must hold the property for the benefit of the surety as well as himself, and, if he parts with it, without the knowledge or against the will of the surety, he will be liable on his claim against the surety to the amount of the property so surrendered.—*Stewart v. Davis' Ex'r*, 18 Ind. 74.

[b] (Sup. 1863)

A, having recovered judgment against B. as principal and C. as surety, had execution issued, which became a lien on personal property of B. sufficient to pay it, and afterwards became one of two assignees, under a fraudulent assignment by B. of his property, with knowledge of the fraud, and thereafter removed said property from the county, and sold the same and converted the proceeds. *Held*, that A.'s acts discharged C.'s liability as surety.—*Roberson v. Roberts*, 20 Ind. 153, 83 Am. Dec. 308.

[c] (Sup. 1868)

The loss of another security, in consequence of the mere passiveness of the creditor, as by his failure to have a mortgage recorded, in the absence of a request to act, will not discharge the surety.—*Philbrooks v. McEwen*, 29 Ind. 347.

[d] (Sup. 1875)

It is the duty of the payee of a note, on which there is a surety, to hold all securities which he has from the principal in the note, whether the securities existed at the date of the note or were given afterwards; and, if he releases such securities, the surety on the note will be released to the extent of the value of the securities released.—*Holland v. Johnson*, 51 Ind. 346.

[e] (Sup. 1879)

A surety, sued by a creditor for the debt secured, cannot defend on the ground that his co-surety misappropriated property delivered him by the principal as collateral security.—*Prather v. Young*, 67 Ind. 480.

[f] (Sup. 1881)

Where a creditor, holding two mortgages, one made by his debtor and the other by a surety, fails to assert his rights under the former mortgage in an action brought thereon, whereby the security is lost, he must bear the loss thus occasioned by his negligence, and cannot come onto the surety for the whole debt.—*Moffitt v. Reche*, 77 Ind. 48.

[g] (Sup. 1881)

Defendant was surety on a note secured by second mortgage on real estate. The first mortgage was foreclosed by suit to which the payee of the note was made a party, and he allowed the time for redemption from the foreclosure sale to expire without notifying defendant. *Held*, that this was no defense to the payee's suit.—*Vance v. English*, 78 Ind. 80.

[h] (Sup. 1882)

Wrongful surrender of collateral security for a debt by the creditor, without the knowledge of a surety therefor, discharges the surety from liability to the extent of the security surrendered.—*Sample v. Cochran*, 82 Ind. 260.

Where defendant executed a note with a married woman, as her surety, the fact that she was married, and was not herself bound by the note, did not change defendant's relation to the debt, and, he being her surety, the release of any security held by the payee against such married

woman released defendant, as though she had also been bound by the note.—*Id.*

[i] (Sup. 1882)

A creditor who releases any security which he holds for the payment of his debt thereby releases a surety pro tanto.—*Sample v. Cochran*, 84 Ind. 594.

[j] (Sup. 1884)

A principal and surety were jointly sued. The surety agreed to be defaulted if plaintiff would first exhaust his remedies against the principal. Execution was taken out, and by plaintiff's laches its lien on the principal's property was lost, and he became insolvent. *Held*, that the surety was discharged.—*Smith v. McKean*, 99 Ind. 101.

[k] (Sup. 1885)

Where a creditor received an assignment of fees due the debtor as clerk of court, agreeing to collect them and apply them to his debt, and without the consent of the surety allowed the debtor to make the collection and to appropriate the proceeds, the surety was released to that amount.—*Crim v. Fleming*, 101 Ind. 154.

If the surety pays the debt, he will be entitled to be subrogated to the rights of the creditor, in respect to additional security; and if the creditor has placed it beyond his control, so that he cannot assign it to the surety, the latter will be discharged.—*Id.*

A creditor, who does not use reasonable diligence to make collateral securities available, is liable to the surety for their loss resulting from such neglect, although he received no notice from the surety.—*Id.*

[l] (Sup. 1886)

An affirmative act of a creditor, such as the release or fraudulent surrender of collateral security, whereby an indemnity of which the surety might avail himself is put out of his reach, discharges the surety pro tanto, but the mere passiveness of the creditor in the collection of his debt, either from the principal debtor or from collateral securities held by him, is not sufficient ground for discharging the surety.—*Wasson v. Hodshire*, 8 N. E. 621, 108 Ind. 26.

The surety is not released by the failure of the creditor to pay delinquent taxes on land embraced in a mortgage held as collateral security.—*Id.*

[m] (Sup. 1890)

Land which is conveyed by a principal judgment debtor to one liable as surety, after the judgment has become a lien thereon, is not discharged from the lien in the hands of the surety by the reassignment to the principal by the judgment creditor of collateral which after such conveyance was assigned to him, to be applied on the judgment.—*Crim v. Fleming*, 123 Ind. 438, 24 N. E. 358.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 244-268.

See, also, 32 Cyc. pp. 216-218.

§ 116. Release of co-surety.

[a] A surety is discharged from liability by a release of a co-surety without his consent.—(Sup. 1872) *Stockton v. Stockton*, 40 Ind. 225; (1909) *Hunter v. First Nat. Bank*, 172 Ind. 62, 87 N. E. 734.

[b] (Sup. 1875)

A guardian, in purchasing land for herself, used in payment a note given her as guardian on the sale of her ward's land; and the ward, upon coming of age, ratified and confirmed in writing the purchase as an investment of his estate, and released all right of action against certain named sureties on the bond of his guardian, but expressly excepted others. *Held* that, by such ratification and release, a surety so excepted therefrom was also released.—*Tyner v. Hamilton*, 51 Ind. 259.

[c] (Sup. 1877)

In an action on a note, brought by the payee bank against P., a surety deceased, P.'s administrator set up that R., a co-surety, had, with the bank's consent and within the time necessary for service of process after maturity of the note, executed an assignment for the benefit of his creditors, providing that the assignee should complete his trust within three years. *Held* that, as such assignment would have been no bar to an action on the note against R., within three years, the assent did not injure P., and the estate was not released from liability. The assignment was not affected by such assent.—*Paul v. Loganport Nat. Bank*, 60 Ind. 199.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Princ. & S. §§ 239-282.

See, also, 32 Cyc. pp. 156-158.

§ 117. Unauthorized payment to principal.

[a] (Sup. 1884)

Where sureties are sued on a bond conditioned for the performance of work by the principal under a contract, an answer that plaintiff had failed to comply with the terms of the contract requiring the retention of 10 per cent. of sums earned by the principal, but had paid over to him the full amount, is demurrable as a defense to the entire cause of action, though the surrender of the security alleged might constitute a defense pro tanto.—*Weik v. Pugh*, 92 Ind. 382.

[b] (App. 1903)

A building contract provided that the contractor should refund to the owner all moneys the latter was compelled to pay in discharge of any liens after all payments were made. In an action on the contractor's bond the answer alleged that the owner negligently, and in violation of the contract, paid the contractor money when, at the time of payments, if she had used any caution, she could, by withholding, as she had a right to do, have saved herself harmless. *Held* not to show such negligence as would relieve the surety.—*Hedrick v. Robbins*, 66 N. E. 704, 30 Ind. App. 595.

[c] (App. 1908)

A bond of a surety of a contractor to install a heating plant in a public school building on which there could be no right to mechanics' liens, conditioned on the contractor performing the contract and paying laborers and materialmen, insured to the benefit of the school district and laborers and materialmen, and the liability of the surety in favor of the laborers and materialmen was not discharged because of failure of the school district to retain in its session the specified part of the contract until the completion of the work, though the bond was not required by a statute.—*United States Fidelity & Guaranty Co. v. American Blower Co.*, 41 Ind. App. 620, 84 N. E. 712, 84 N. E. 558.

The failure of the obligee in a bond, conditioned on a contractor in a building contract performing the contract and paying materialmen, to retain the stipulated per cent. of contract price until the completion of the work, not such an alteration of the contract as will release the surety from his liability to materialmen.—*Id.*

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Princ. & S. §§ 285.

See, also, 32 Cyc. p. 170; note, 5 L. R. A. 418.

§ 118. Discharge of principal with payment or satisfaction.

[a] (Sup. 1842)

In debt on a replevin bond against the principal and surety, the surety let judgment by default. The principal pleaded an absolute discharge, and, on demurrer to his plea, obtained judgment. *Held*, that the plaintiff could not have damages assessed against the surety.—*Thomas v. Wilson*, 6 Blackf. 203.

[b] (Sup. 1887)

Where the discharge of the principal takes place by operation of law, as by an adjudication in bankruptcy, the surety is not released therefrom.—*Post v. Losey*, 111 Ind. 74, 12 N. E. 12, 13 Am. Rep. 677.

[c] (Sup. 1895)

Where the makers of a note successfully defend an action thereon on the ground of failure of consideration, their discharge releases the surety, though judgment by default has been rendered against him in the same action.—*Michigan Springfield Engine & Thresher Co.*, 142 Ind. 130, 40 N. E. 679, 31 L. R. A. 59.

[d] (App. 1898)

It is no defense to an action against a surety on a bond conditioned for performance of a contract that he relied on information from the contractor that he had been released from the contract, and consequently neglected to carry out the contract and save himself harmless.—*Tyner v. Hamilton*.

of *Sullivan v. Cluggage*, 52 N. E. 110, 21 Ind. App. 607.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 286-295.

See, also, 32 Cyc. pp. 151, 152; notes, 30 Am. Dec. 257, 73 Am. Dec. 297.

§ 121. Negligence of creditor in general.
Acts requisite to fix liability, see ante, § 86.
Release or loss of other security, see ante, § 115.

[a] (App. 1904)

Sureties on the bond of an agent for faithful performance of his contract, which provides that collections made by him shall be turned over to the employer at the end of each month, are discharged, if not having enforced this, though knowing its funds were being misappropriated by him.—*Indiana & O. Live Stock Ins. Co. v. Bender*, 69 N. E. 691, 32 Ind. App. 287.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 298-301.

See, also, 32 Cyc. p. 91.

§ 122. Failure to terminate employment or contract after default.

[a] (Sup. 1885)

Notice to a bank that its cashier is addicted to drunkenness, gambling, and similar vices will not release the sureties on his bond from liability for a defalcation, unless it is shown that such vices affected the cashier's fitness to perform the duties of his office.—*La Rose v. Logansport Nat. Bank*, 102 Ind. 332, 1 N. E. 805.

[b] (App. 1902)

Laches of the common council of a city and the school board in re-electing the treasurer of the board as a member thereof, and as its treasurer, when he is a defaulter, does not relieve from liability the sureties on his official bond given for the second term.—*Hogue v. State ex rel. Board of School Com'rs*, 62 N. E. 656, 28 Ind. App. 285.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 302, 303.

See, also, 32 Cyc. pp. 78, 79.

§ 123. Neglect to give notice to surety of default.

Notice or demand as condition precedent to action by creditor, see post, § 139.

[a] (Sup. 1869)

A surety is bound with his principal as an original promisor, and his obligation to pay is equally absolute. He is held ordinarily to know every default of his principal, and cannot protect himself by the mere indulgence of the creditor or by the want of notice of the default of the principal, however much such indulgence or want of notice may in fact injure him.—*McMil-*

lan v. Bull's Head Bank, 32 Ind. 11, 2 Am. Rep. 323.

[b] (Sup. 1884)

Sureties on a bond, conditioned that the principal will perform a contract for work, are not entitled to notice of his failure to perform the contract.—*Weik v. Pugh*, 92 Ind. 382.

[c] (Sup. 1888)

A surety or joint promisor is bound to take notice of the default of his principal. As to either, notice of nonpayment is not necessary.—*Pool v. Anderson*, 18 N. E. 445, 116 Ind. 88, 1 L. R. A. 712.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 304-311.

See, also, 32 Cyc. p. 176.

§ 124. Neglect to act or proceed against principal.

Conditions precedent to action against surety, see post, §§ 137-139.

Right of surety to compel recourse to principal, see post, § 168.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 312-351.

See, also, 32 Cyc. pp. 91-97.

§ 125. — In general.

[a] The mere forbearance of a creditor to prosecute his debtor does not discharge a surety on the obligation.—(Sup. 1832) *Naylor v. Moody*, 3 Blackf. 92; (1840) *Yandes v. Patterson*, 5 Blackf. 301; (1860) *Kirby v. Studebaker*, 15 Ind. 45.

[b] (Sup. 1865)

The sureties upon the bond of a commissioner appointed by the court to sell property upon a petition for partition are not discharged by the mere neglect of the obligee to sue the principal, when they have not given him notice to sue.—*Owen v. State ex rel. Owen*, 25 Ind. 107.

[c] (Sup. 1865)

In an action on an administrator's bond, an answer by the sureties, alleging that the administrator was for a long time after the execution of the bond solvent, and that the heirs and the court had dismissed proceedings against him by citation to compel him to account, without the consent of the sureties, is bad.—*Owen v. State ex rel. Owen*, 25 Ind. 371.

[d] (Sup. 1872)

A note was made by one as principal and another as surety. The principal died, and his estate was solvent and was settled. The payee of the note did not file it as a claim against the estate of the principal. *Held*, that his failure to file the note as a claim against the estate of the principal did not defeat his right of action against the surety.—*Fetrow v. Wiseman*, 40 Ind. 148.

[e] (Sup. 1878)

Mere delay in levying on the property of the principal, under a judgment against him and the surety, will not discharge the surety, although procured by the creditor's positive direction, and meanwhile the principal disposes of all his leviable property.—*Jerauld v. Trippet*, 62 Ind. 122.

[f] Mere forbearance or delay of the creditor in proceeding to collect a debt, in the absence of a binding agreement, made on a valid consideration, or the surrendering of securities, or the release of a lien, or some active fraud, which results in injury which a surety had no means of averting will not discharge the surety.—(Sup. 1881) *Taylor v. Lohman*, 74 Ind. 418; (1890) *May v. Reed*, 25 N. E. 216, 125 Ind. 199.

[g] (Sup. 1881)

Execution was issued against a principal and sureties, which could have been satisfied in part by the property of the principal; but with consent of the creditors no levy was made. *Held*, that the sureties were released to the extent that the execution, might have been satisfied.—*Sterne v. Bank of Vincennes*, 79 Ind. 549; *Same v. First Nat. Bank of Vincennes*, Id. 560; *Same v. McKinney*, Id. 578.

[h] (Sup. 1882)

An agreement by a creditor with the surety on a note to sue forthwith must be founded on some new consideration.—*Mendel v. Cairnes*, 84 Ind. 141.

[i] (Sup. 1890)

In the absence of a statutory notice, the mere failure of the holder of a note to attempt to collect until the principal maker has become insolvent does not release a maker who has signed the note as surety.—*May v. Reed*, 125 Ind. 199, 25 N. E. 216.

[j] (Sup. 1893)

Where, in an action by one mortgagee to foreclose his separate interest the other mortgagees are made defendants, and by making default forfeit their remedy against the property, the lien of a mortgage given them as secondary security is thereby released.—*O'Brien v. Moffitt*, 133 Ind. 660, 33 N. E. 616, 36 Am. St. Rep. 566.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 312-328.

See, also, 32 Cyc. pp. 91-97.

§ 126. — Notice by surety.

[a] If a surety in a promissory note that is due apprehend the insolvency of the principal or his removal from the state, he may require the holder of the note, by notice in writing as provided by the statute, to sue on it, whether the principal be insolvent or not; and, if the holder fail to sue on the note within a reasonable time after such notice, the surety will be discharged.—(Sup. 1840) *Reid v. Cox*, 5 Blackf. 312; (1851) *Overturf v. Martin*, 2 Ind. 507.

[b] (Sup. 1851)

Where the surety on a note required the holder to sue by notice in writing, the fact that a suit was instituted at the next term after notice given, and for some cause dismissed, was no evidence of diligence, since the suit should have been properly brought and duly prosecuted.—*Overturf v. Martin*, 2 Ind. 507.

[c] (Sup. 1857)

The provisions of the statute requiring notice by a surety to the creditor to proceed against the principal to be in writing must be complied with, and verbal notice will not operate to release the surety.—*Colerick v. McCleas*, 9 Ind. 245.

[d] (Sup. 1859)

A creditor is not bound to follow the principal debtor out of the state upon notice given by the surety to bring suit on the obligation.—*Rowe v. Buchtel*, 13 Ind. 381.

A. gave his note, dated April 1, 1852, to B., with C. as surety. In November, 1856, C. gave B. written notice to sue the note; but A. had then left the state, and he never returned to it, but died in Ohio, leaving no property and having no administrator in Indiana. At the second term of the court of common pleas after receiving the notice, B. sued C. C. defended on the ground that he had not been sued at the first term after notice; but it was *held* that the notice to sue did not operate as a requirement to sue the surety, and that a suit against the surety was not necessary to secure any rights against the principal, as he could have paid the note at any time without suit, and then proceeded against the principal.—Id.

[e] (Sup. 1860)

Where notice is given by a surety to the creditor to sue, as provided by the statute, it is the duty of the creditor to bring his suit in the court having jurisdiction, the term of which will thereafter first commence.—*Craft v. Dodd*, 15 Ind. 380.

[f] (Sup. 1861)

A surety's right to give notice to the creditor to sue, and to secure his release if suit is not brought, is a right by statute, and not at common law.—*Halstead v. Brown*, 17 Ind. 202.

[g] (Sup. 1863)

On May 3, 1861, A. as principal and B. and C. as sureties executed a joint note to D., who indorsed it to E., who on August 27, 1861, recovered judgment on it by default against B. and C.; process being returned "Not found" as to A. On December 6, 1861, B. and C. in writing notified E. to sue A. on the note. E. failed to do so, but sued out his execution against B. and C., who thereupon filed their complaint to enjoin the collection of the judgment of them. *Held*, that E., having, before receiving the notice, sued all the makers of the note, and recovered judgment against all on whom he could get service of process, could not be required to bring another suit before he

could avail himself of that judgment, unless some equitable ground was specially shown entitling them to such relief.—*Irwin v. Helgenberg*, 21 Ind. 106.

[h] (Sup. 1868)

A telegram to the holder of a note by the surety in the following terms: "Express Noland & Co.'s note to Esquire Bennett, for collection, to-day. Don't fail,"—was not a sufficient "notice in writing," within the meaning of 2 Gav. & H. St. §§ 672, 673, discharging a surety on failure of the creditor to sue the principal after notice by the surety to do so.—*Kaufman v. Wilson*, 29 Ind. 504.

[i] (Sup. 1871)

After the maturity of a cause of action, and after notice in writing has been given by a surety, to the obligee, or creditor to forthwith institute an action on the contract, a neglect to institute such suit for nearly fourteen months will discharge the surety.—*Root v. Dill*, 38 Ind. 109.

[j] (Sup. 1873)

2 Gav. & H. St. p. 306, § 672, provides that any person bound as surety for another, when the right of action has accrued, may by notice in writing require the creditor or obligee to bring an action against the principal; and section 673 provides that if the creditor or obligee shall not proceed to bring such action within a reasonable time, and prosecute it to judgment, the surety shall be discharged. *Held* that, to enable the party to proceed under these provisions, he must have been a surety at the inception of the contract.—*Fensler v. Prather*, 43 Ind. 119.

Where, upon a dissolution of co-partnership between two makers of a note given for firm purposes, it was agreed that one was to collect the assets of the firm and pay its debts, and the other (the defendant) was to pay his share of any deficit, and thereafter the defendant paid the plaintiff, who was aware of the agreement, one-half of the note on his consenting to relieve him from further liability thereon, and to look to the other partner for the other half, *held*, that the arrangement between the partners and the part payment of the note did not so change the relations between the former partners as to make the defendant a surety for his former partner for the payment of the residue, so as to bring them within the provisions of 2 Gav. & H. St. p. 306, §§ 672, 673, for a discharge of the surety, by notice to the creditor to proceed against the principal and the latter's failure to do so.—*Id.*

A notice by a surety to the creditor that, if the latter thought the surety liable, he would take notice to proceed accordingly and legally, was not sufficient to require the creditor to sue forthwith on the note.—*Id.*

[k] (Sup. 1874)

A surety who contests his liability on the ground that the principal, deceased, has left an estate sufficient for payment of debts, and that

the surety has notified the creditor to proceed against the estate, which the latter has neglected to do, must show that the estate is situated within the state where the surety is sued, and that administration has been had upon it.—*Whittlesey v. Heberer*, 48 Ind. 260.

[l] (Sup. 1876)

A surety upon a contract in writing, on which the right of action has accrued, cannot avail himself of the remedy provided by Code, §§ 672, 673, by giving notice in writing to an attorney of the creditor or obligee, directing such attorney forthwith to institute an action upon the contract.—*Driskill v. Board of Com'rs of Washington County*, 53 Ind. 532.

[m] (Sup. 1876)

The surety on a contract for the payment of money made in the state is not discharged by the failure of the payee on notice in writing by the surety to bring suit on the contract in another state, where such nonresident principal has property out of which the amount of such debt might have been made, and on trial of a suit against such surety, evidence cannot be given as to the principal's having such property in another state.—*Conklin v. Conklin*, 54 Ind. 289.

[n] (Sup. 1877)

Under the statute requiring a notice in writing to be given by the surety on a note to the holder requiring him to proceed against the maker, a verbal agreement by the holder to do so in response to a verbal notice will not release the surety.—*Chrisman v. Tuttle*, 59 Ind. 153.

[o] (Sup. 1879)

In the absence of any statutory provision on the subject, if, after a debt is due, the surety requests the creditor to sue the principal, who is then solvent, and the creditor fails to do so, and the principal afterwards becomes insolvent, the surety is not thereby discharged.—*Miller v. Arnold*, 65 Ind. 488.

A verbal request by the surety to the holder of a note to enforce its payment by suit against the principal is unavailing to discharge such surety when disregarded by one holder.—*Id.*

[p] (Sup. 1880)

Code 1852, §§ 672, 673, (2 Rev. St. 1876, p. 276), provide that any person bound as surety on any contract in writing for the payment of money or the performance of any act when the right of action has accrued may require, by notice in writing, the creditor or obligee forthwith to institute an action on the contract, and that, if the creditor or obligee shall not proceed within a reasonable time to bring his action on such note and prosecute the same to judgment or execution, the surety shall be discharged from all liability thereon. *Held*, that these provisions are applicable to joint and several notes executed by the principal and surety, payable at a bank in the state and ne-

gotiable as inland bills of exchange and indorsed before maturity to a bona fide holder without notice of the fact of suretyship by one of the makers.—*McCoy v. Lockwood*, 71 Ind. 319.

Code, § 672 (2 Rev. St. 1876, p. 276), provides that any person bound as surety on any contract in writing for the payment of money or the performance of any act when the right of action has accrued may require by notice in writing the creditor or obligee forthwith to institute an action on the contract. A surety on certain notes after the maturity thereof left at the residence of the holder a written notice to forthwith institute an action thereon. When the notice was left at the holder's residence, holder was temporarily absent from home, and the surety gave the notice to the holder's wife, and requested her to give it to the holder. *Held*, that the service of the notice was sufficient in view of section 792, providing that, in all cases where no notice is required by the act, it may be served by the proper officer or any other person.—*Id.*

Code, § 672 (2 Rev. St. 1876, p. 276), provides that any person bound as surety on any contract in writing for the payment of money or the performance of any act when the right of action has accrued may require, by notice in writing, the creditor or obligee forthwith to institute an action on the contract. Section 673 provides that, if the creditor or obligee shall not proceed within a reasonable time to bring his action on such contract and prosecute the same to judgment and execution, the surety shall be discharged from all liability thereon. *Held*, that an action commenced more than three years after the service of the notice under the statute is not commenced within a reasonable time.—*Id.*

[q] (Sup. 1880)

Under 2 Rev. St. 1876, p. 276, § 672, providing that, if a creditor fail to sue a principal debtor after notice by the surety to bring action forthwith, a notice by a surety to the holder of a note "to proceed at once to collect the note" is sufficient.—*Franklin v. Franklin*, 71 Ind. 573.

[r] (Sup. 1882)

Said provisions of Code 1852, §§ 672, 673 (Rev. St. 1881, §§ 1210, 1211), apply where the principal has died and the surety has notified the creditor to present his claim against the administrator of the principal.—*Daily v. Robinson*, 86 Ind. 382.

A surety on a note served notice on the holder of the note, who was the administrator of the maker, to sue on the note. The administrator took no steps in accordance with the notice within a reasonable time, but afterwards sued the maker. *Held* that, under the statute providing that a surety is discharged where the creditor fails to sue the principal after notice from the surety to do so, the surety could not be held liable; the maker having left an estate from which the note might have been collected.—*Id.*

[s] (Sup. 1884)

Where one of several co-sureties notifies the creditor to sue the principal, a failure to do so will not discharge the other sureties.—*Cochran v. Orr*, 94 Ind. 433; *Martin v. Same*, 96 Ind. 491.

[t] (Sup. 1884)

Under Rev. St. 1881, § 1210, providing that "a surety * * * may require, by notice in writing, the creditor * * * forthwith to institute an action on the contract," the failure of the payee of a note to bring suit thereon at maturity, in the absence of such notice, does not discharge the surety.—*Cochran v. Orr*, 94 Ind. 433.

[u] (Sup. 1884)

Where a surety did not give notice to institute an action on the note, but relied on the notice given by a co-surety, such notice could not operate in his favor, and while an unreasonable delay in bringing suit or taking out execution would have discharged such co-surety from all liability on the note and judgment, it did not have that effect as to such surety.—*Martin v. Orr*, 96 Ind. 491.

Delay of a creditor, after notice by the surety, to take out execution against the principal, for 52 days after judgment, will discharge a surety.—*Id.*

[v] (Sup. 1886)

The notice contemplated in section 1210, Rev. St. 1881, whereby a surety may require the creditor to bring suit forthwith, cannot be given before a cause of action accrues to the creditor; and delay of the creditor to bring suit will not discharge the surety where no other notice has been given.—*Scales v. Cox*, 106 Ind. 261, 6 N. E. 622.

Such statute is a remedial statute and also a statute authorizing an arbitrary abridgement of the common-law right of the creditor or obligee to extend such indulgence as he might choose to extend to his debtor or obligor, and, where relief under it is sought to be obtained, the party interested must rely on the express terms of the statute.—*Id.*

[w] (Sup. 1891)

The failure of the holder of a note to seek judgment against the principal, after an action brought by the surety against him and the principal and others, to set aside as fraudulent a deed by the principal of land for which the note was given, and to compel the holder to collect the note, will not release the surety; but to entitle him to a release he must have followed the remedy prescribed by Rev. St. 1881, §§ 1210, 1211, providing that the surety upon a contract for the payment of money may serve notice on the creditor to sue thereon, and will be released from liability on the creditor's unreasonable delay in doing so.—*Barnes v. Mowry*, 129 Ind. 568, 28 N. E. 535.

A creditor does not lose his right to hold the surety by inaction or passiveness except in

case where the surety has taken such steps as will compel the creditor to proceed or lose his claim.—Id.

[x] (App. 1891)

Where a joint and several negotiable note is made by two, one of whom in fact signed as surety, though his suretyship is not in any way indicated in the note, such surety may avail himself of the provisions of Rev. St. 1881, §§ 1210, 1211, that "any person bound as surety" on any contract may require the creditor or obligee to institute suit on it within a reasonable time after the right of action has accrued, and shall be released by the creditor's failure to bring suit in a reasonable time after notice to do so.—Hamrick v. Barnett, 1 Ind. App. 1, 27 N. E. 106.

Where the payee is notified by the surety on March 31st to bring suit, and that the circuit court of the county in which the principal resides is in session, and will be for three weeks, so that under Rev. St. 1881, § 516, suit might have been brought returnable and triable at that term, an action commenced on April 2d, in the county where the surety resides, and returnable to the June term in the latter county, is not brought within a reasonable time after the notice, and the surety is released under sections 1210, 1211, above.—Id.

[y] (App. 1897)

Burns' Rev. St. 1894, § 1224 (Horner's Rev. St. 1897, § 1210), provides that one bound as surety on a contract in writing, upon which the right of action has accrued may, by written notice, require the obligee "forthwith" to institute an action on the contract; and section 1225, Burns' Rev. St. 1894 (section 1211, Horner's Rev. St. 1897), provides that, if the obligee does not comply, the surety shall be discharged. *Held*, that notice to "sue the note which I signed as surety, * * * or I will not continue to be responsible as surety," is insufficient.—McMillin v. Deardorff, 48 N. E. 233, 18 Ind. App. 428.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & S. §§ 329-351.

See, also, 32 Cyc. pp. 101, 102.

§ 128. Consent by surety to transactions between creditor and principal.

[a] (Sup. 1880)

Where a party signed a note payable one day after date, as surety, with knowledge of an agreement between his principal and the payee that the note might run for an indefinite time, so long as interest was paid, and several years' interest was paid, the surety was not discharged from liability on the note.—Starret v. Burkhalter, 70 Ind. 285.

[b] (App. 1893)

The consent of a surety to "any extension of the time of payment," embodied in a note,

is binding for at least one extension.—Hodge v. Farmers' Bank of Frankfort, 7 Ind. App. 94, 34 N. E. 123.

[c] (App. 1893)

After one extension of time of payment in accordance with the terms of the note, a second extension releases a surety on the note from liability.—Oyler v. McMurray, 7 Ind. App. 645, 34 N. E. 1004.

A person who signs his name across the back of a nonnegotiable note which gives the holder the option, at any time before as well as after the time of payment stated in the note, to extend to the drawers and indorsers, or either of them, the time of payment, though he does not incur the liability of an indorser of commercial paper, must be deemed a joint maker, and, though in fact a surety, he is not released from liability thereon by an extension of time of payment of such note for one year, under an agreement between his comakers and the holder which he had no knowledge of and did not consent to.—Id.

[d] Indulgence granted a principal debtor with the consent of the surety will not release him.—(App. 1898) Voris v. Shotts, 50 N. E. 484, 20 Ind. App. 220; (1898) Olson v. Chism, 51 N. E. 373, 21 Ind. App. 40; (1905) Durbin v. Northwestern Scraper Co., 73 N. E. 297, 36 Ind. App. 123.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & S. §§ 356-365.

See, also, 32 Cyc. pp. 159-162.

§ 129. Waiver or estoppel of surety.

[a] (Sup. 1871)

Where a surety on a note, after his release from liability by an extension of time given to the principal without his consent, receives an indemnity against his liability, without the knowledge of the holder, and subsequently surrenders the same to the principal, he may still avail himself of his discharge.—Rittenhouse v. Kemp, 37 Ind. 258.

The fact that the surety returns such indemnity, without the knowledge of the holder of the note, at a date anterior to the second extension of time, given without the consent of the surety, does not render the latter liable, where the holder of the note had no information in regard to an indemnity having been given to the surety when he extended the time of payment.—Id.

[b] (Sup. 1890)

It is a sufficient reply to a plea in abatement by a surety on a note of an extension of time to the principal that after such extension the surety gave the holder of the note written notice to sue on the note.—Brink v. Reid, 122 Ind. 257, 23 N. E. 770.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

[c] (Sup. 1907)

Where a surety has a defense to an action owing to prior changes in the contract made without his consent, a renunciation of his right of defense rests on the doctrine of waiver, and the elements of knowledge and intent, in the absence of estoppel, are essential to a waiver.—*Cleveland, C. & St. L. Ry. Co. v. Moore*, 170 Ind. 328, 82 N. E. 52, 84 N. E. 540.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 366-372.

See, also, 32 Cyc. pp. 162-164.

§ 130. New promise after release.

[a] (Sup. 1873)

Where the payee of a note has for a good consideration given an extension of the time of payment to the principal without the consent of the surety, a promise afterwards by the surety to pay the debt, made in ignorance of the fact that the time of payment had been extended, is not binding on him.—*Montgomery v. Hamilton*, 43 Ind. 451.

[b] (Sup. 1881)

The liability of a surety on a note, who has been released by an extension of the time of payment given the maker without his knowledge or consent, is revived by his subsequent promise to pay the note, made with knowledge of all the facts.—*Williams v. Boyd*, 75 Ind. 286.

[c] (App. 1892)

The surety on a promissory note, having a right to insist upon his discharge because of a material alteration of the note by the addition, without his consent, of the signature of a new surety, may renew his liability without any new consideration by consenting to the alteration with full knowledge of all the facts.—*Owens v. Tague*, 3 Ind. App. 245, 29 N. E. 784.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 373-376.

See, also, 32 Cyc. pp. 163, 164.

§ 131. Payment or other satisfaction by surety.

Rights of surety after payment or satisfaction by him as against principal, see post, §§ 181-185.

[a] (Sup. 1880)

A. held a note against B., who agreed with C. that, if C. would get the note, he would accept it as payment for certain work. C. obtained said note by giving his own note to A., with D. as surety. C. then borrowed money of L., wherewith he paid his note to A., and gave L. another note, with D. as surety. D. paid this latter note. *Held*, that D. was not to be considered as having paid B.—*Gerdone v. Gerdone*, 70 Ind. 62.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 377-380.

See, also, 32 Cyc. p. 168.

IV. REMEDIES OF CREDITORS.

Allowance of note against principal's estate as barring action against sureties, see JUDGMENT, § 629.

Application by bank of money due depositor to note on which he is surety, see BANKS AND BANKING, § 134.

Right of obligee of bond to attack fraudulent conveyance by surety, see FRAUDULENT CONVEYANCES, § 218.

Solvency of surety affecting right of creditor to have fraudulent conveyances by principal set aside, see FRAUDULENT CONVEYANCES, § 60.

Solvency of surety as precluding ne exeat as against principal, see NE EXEAT, § 3.

Sufficiency as against creditors of assumption of debt by surety as consideration of conveyance by principal, see FRAUDULENT CONVEYANCES, § 84.

§ 132. Nature and form.

[a] (Sup. 1880)

Where a bond is executed to secure the indebtedness of the principal to the obligee, an action based on the failure of the principal to pay a note is founded on the note and not on the bond; the bond being merely ancillary to the note, and passing as an incident thereof.—*Morgan v. Smith American Organ Co.*, 73 Ind. 179.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. § 381.

See, also, 32 Cyc. pp. 89-91.

§ 136. Rights of action against surety.

[a] (Sup. 1878)

Where a bond was conditioned to secure the payment by the principal of a note of the obligee assumed by the principal, the payee of the note, although not a party to the bond, could enforce the same against the sureties as a contract made for its benefit.—*South Side Planing Mill Ass'n v. Cutler & Savidge Lumber Co.*, 64 Ind. 560.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. § 385.

See, also, 32 Cyc. pp. 89-91.

§ 137. Conditions precedent to action against surety.

Performance by creditor of conditions of surety's liability, see ante, § 75.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 387-389, 472½.

See, also, 32 Cyc. pp. 99-109.

§ 138. — In general.

Discharge of surety by neglect of creditor to proceed against principal, see ante, §§ 124–126.

Right of surety to require exhaustion of remedy against principal, see post, § 168.

[a] (Sup. 1878)

A complaint in an action against a surety on a note, alleging the utter insolvency of the maker of the note at, before, or after maturity of the note, is not defective for failure to allege that execution had been issued on a judgment recovered against the maker and returned nulla bona, as required by 2 Rev. St. 1876, § 635 et seq.—*Blinford v. Willson*, 65 Ind. 70.

[b] (Sup. 1881)

A. held B.'s note, on which C. and D. were sureties. B. subsequently paid the interest on the note, and presented a new one, nonnegotiable, with the same names forged thereon, and received the old note. *Held* that, there being no such extension of time as would discharge the sureties, A. could sue on the old note, without surrendering or canceling the new one.—*Albright v. Griffin*, 78 Ind. 182.

[c] (App. 1892)

Where one breaks his promise to become a surety on a note given for the price of goods, the seller may sue on the promise without having first retaken possession of the goods and applied them on the note.—*Webster v. Smith*, 4 Ind. App. 44, 30 N. E. 139.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 387, 472½.

See, also, 32 Cyc. pp. 99–101.

§ 139. — Notice and demand.

Discharge of surety by neglect of creditor to give notice of default of principal, see ante, § 123.

[a] (Sup. 1869)

An ordinary surety in a bond for the payment of money loaned is not entitled to notice of the default of his principal before suit brought against himself, although a guarantor may be entitled to such notice.—*McMillan v. Bull's Head Bank*, 32 Ind. 11, 2 Am. Rep. 323.

[b] (Sup. 1909)

Compliance with a provision in a contractor's bond for written notice to the surety of any act of the principal, or his employés, which may involve a loss for which the surety is responsible, within 10 days after occurrence of such act, with a verified statement of facts, etc., is a condition precedent.—*Knight & Jillson Co. v. Castle*, 172 Ind. 97, 87 N. E. 976, transferred from the Appellate Court (1908) 42 Ind. App. 689, 85 N. E. 1049.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. § 388.

See, also, 32 Cyc. pp. 106–109.

§ 141. Defenses by surety.

Payment of usurious interest by principal as payment on part surety, see USURY, § 127.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 390–396.

See, also, 32 Cyc. pp. 149–233.

§ 142. — In general.**[a] (Sup. 1861)**

Ordinarily a surety is liable in like manner and extent with the principal; but he may set up in defense any matters which ought in equity to go to his personal exoneration.—*Campbell v. Gates*, 17 Ind. 126.

[b] That a defendant is a surety on a note or bill is no defense to the action, and should not delay plaintiff's proceedings. The issue made by an averment of this fact is between the surety and his principal.—(Sup. 1867) *Smith v. Muncie Nat. Bank*, 29 Ind. 158; (1872) *Pattison v. Vaughan*, 40 Ind. 253.

[c] (Super. 1873)

In an action upon a joint and several promise, where one of the defendants, claiming to be a surety of the other defendant, resists recovery by setting up a defense going to the merits of the whole case, he cannot complain because the proceeding is not more diligently prosecuted against his codefendant.—*Kirtz v. Spaugh*, Wils. 267.

[d] (Sup. 1874)

One of the several defendants who claims to be a surety may have that question determined in the trial of the action, or he may file his complaint for that purpose after the trial of the original case.—*Richardson v. Howk*, 45 Ind. 451.

[e] (Sup. 1877)

A surety cannot defend an action on a replevin bond on the ground that he executed it, relying on the statement of his principal that the property levied on was his; that a judgment was taken against such principal without the knowledge of the surety, and by default; and that he afterward attempted, but failed, to have the default set aside, so as to allow him to prosecute the action in the name of the principal.—*Fuller v. Wright*, 59 Ind. 333.

[f] (Sup. 1884)

In an action on a joint note, an answer setting up that defendant was surety, and that his appeal of the case remained in the Supreme Court for three years or more, and during the time plaintiff took no steps to bring his joint obligor into court to be bound by that judgment, and that during the time the joint obligor was solvent, and since had become wholly insolvent, was insufficient, where it appeared that defendant got the judgment reversed, as that would have unbound his co-obligor, and left the matter standing as though no judgment had been rendered on the note.—*Clodfelter v. Hulett*, 92 Ind. 426.

[c] (App. 1898)

In an action against a surety on a bond conditioned for the performance of a contract to supply a town with lights at \$50 a light per annum, no defense was presented by an answer alleging that, after the contract was abandoned by the contractor, a bid was submitted at \$57 per light; that it was temporarily withdrawn for changes, when the bidder was informed that a bid for over \$50 would not be considered; and that within three days thereafter a bid at \$63 was accepted.—*Town of Sullivan v. Cluggage*, 52 N. E. 110, 21 Ind. App. 667.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & S. §§ 390, 391.
See, also, 32 Cyc. p. 149.

§ 143. — Defenses of principal available to surety.

[a] (App. 1891)

Under Rev. St. 1881, § 349, providing that, in an action upon a note against a principal and sureties, any claim upon contract in favor of the principal, and against the plaintiff, may be set off, a surety on a note given for the purchase of an engine may plead a breach of warranty of the engine as a defense to the note, notwithstanding that the maker, when sued thereon, failed to avail himself of such defense, especially where the maker is insolvent.—*Springfield Engine & Thresher Co. v. Park*, 3 Ind. App. 173, 29 N. E. 444.

[b] (App. 1894)

Machinery agents who indorse the buyer's note to the seller of a machine are the buyer's sureties, and, when sued with him on such notes, are entitled to any defense he may have on the warranty.—*Ohio Thresher & Engine Co. v. Hensel*, 9 Ind. App. 328, 36 N. E. 716.

[c] (App. 1894)

Rev. St. 1894, § 352 (Rev. St. 1881, § 349), gives the surety the right to take the benefit of any claim in favor of the principal debtor arising out of the contract.—*Crist v. Jacoby*, 38 N. E. 543, 10 Ind. App. 688.

Under Rev. St. 1894, § 352, a surety on a note given for the price of a chattel may, in an action on the note, set up the breach of a warranty in the contract of sale.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & S. § 302.
See, also, 32 Cyc. p. 149.

§ 144. — Set-off or counterclaim of principal.

Breach of warranty as defense, see ante, § 143.

[a] (Sup. 1857)

In an action against principal and surety, a claim in favor of the principal against plaintiff may be set off against his demand.—*Slayback v. Jones*, 9 Ind. 470.

[b] (Sup. 1861)

Under 2 Rev. St. p. 40, § 58, providing that, in actions on contracts against several defendants as principal and sureties, any contract claim in favor of the principal defendant against the plaintiff may be pleaded as a set-off by the principal or any other defendant, the accommodation indorser and the drawer of a bill of exchange drawn on a firm by one of the partners for the firm's use are entitled, in an action thereon against them and the firm by the discounting bank, to set off an indebtedness due the firm from the bank.—*Larrimore v. Heron*, 16 Ind. 350.

[c] (Sup. 1873)

The sureties on the bond of a guardian, in a suit upon the bond, may plead by way of set-off an indebtedness of the relator to the guardian.—*Myers v. State ex rel. Appleton*, 45 Ind. 160.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & S. §§ 393-396.
See, also, 32 Cyc. p. 231; note, 17 L. R. A. 400.

§ 145. Conclusiveness of former adjudication in action against principal or surety.

Conclusiveness as against principal of adjudication against surety, see post, § 187.

Conclusiveness, as between co-sureties, of former adjudication, see post, § 197.

On bond of assignee for benefit of creditors, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, § 413.

On bond of city marshal, see MUNICIPAL CORPORATIONS, § 183.

On bond of executor or administrator, see EXECUTORS AND ADMINISTRATORS, § 535.

On bond of guardian, see GUARDIAN AND WARD, § 180.

[a] (Sup. 1826)

In an action against an administratrix on a bond on which her decedent was surety, a judgment previously entered against the principal on the same bond is inadmissible.—*Governor v. Shelby*, 2 Blackf. 26.

[b] (Sup. 1835)

In an action against the sureties of a constable for neglect of duty, plaintiff filed the official bond of the defendants, and alleged as a breach that he had obtained judgment against the constable for neglect of duty, and that the execution against such constable had been returned "No property found." *Held*, such averment did not state a cause of action against the defendants, as the sureties had no opportunity to defend a suit brought against the constable alone, and could not be bound by the judgments in those suits.—*White v. State*, 1 Blackf. 557.

[c] (Sup. 1844)

To debt on a replevin bond a plea that the goods replevied belong to the principal obligor is bad.—*Wallace v. Clark*, 7 Blackf. 298.

[d] (Sup. 1874)

In replevin by a chattel mortgagee against an attaching officer, defendant entered a general denial, and alleged that he seized the property by virtue of an execution, and that the property was then in the possession of the execution defendant and was subject to levy. The record showed that, after the demurrer was sustained to a reply by the mortgagee, the cause was "submitted to the court for trial as to the value of the property," and the court found the value of the goods, and that the sheriff was entitled to a return thereof, or, on failure to return the goods, that he was entitled to value thereof. *Held*, that a judgment entered on such findings was conclusive on plaintiff in a subsequent suit on the replevin bond.—*Landers v. George*, 49 Ind. 309.

[e] (Sup. 1881)

Where a surety on a note fails to have the issue of suretyship determined in an action thereon, as provided by 2 Rev. St. 1876, p. 266, § 675, and permits judgment by default to be taken against him jointly with the parties primarily liable, such surety will be presumed to be a principal in determining the rights of third persons dealing with the judgment without notice.—*Reissner v. Dessar*, 80 Ind. 307.

[f] (Sup. 1882)

Where an action is brought on the attachment bond, defendants are concluded by the judgment in attachment on the question as to whether the writ was rightfully issued, and an averment in the answer that the proceedings were not wrongful adds nothing to it.—*Trentman v. Wiley*, 85 Ind. 33.

[g] (Sup. 1903)

Where, on proceedings under a petition for the establishment of a drain, no motion was filed to strike out certain items of costs which had been paid by the county, in an action on the bond given by the petitioners the principals and sureties in the bond could not raise the question as to whether the items allowed were properly taxed as costs.—*Spriggs v. State ex rel. Board of Com'rs of Jasper County*, 161 Ind. 225, 66 N. E. 693, 67 N. E. 992.

[h] (Sup. 1906)

A judgment in replevin for damages is conclusive in an action on the replevin bond as to the damages up to the time of the trial.—*Jackson v. Morgan*, 167 Ind. 528, 78 N. E. 633.

The failure of the verdict and judgment in replevin to find the value of the property and the damages for detention is not conclusive that there were none in an action on the replevin bond.—*Id.*

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Princ. & S. §§ 397-401; 43 Cent. Dig. Sheriffs, §§ 351, 352.

See, also, 32 Cyc. pp. 301, 302; note, 52 L. R. A. 165; notes, 32 Am. Dec. 202, 83 Am. Dec. 380; note, 33 Am. Rep. 802; note, 132 Am. St. Rep. 759.

§ 146. Remedies against estate of deceased surety.

Effect of death of surety, see ante, § 92.

Remedies against estate of deceased principal, see EXECUTORS AND ADMINISTRATORS, § 203.

Rights of surety against estate of deceased co-surety, see post, § 194.

Rights of surety against estate of deceased principal, see post, § 185½.

[a] (Sup. 1868)

The maker of a note and surety thereon both died—the former intestate and the latter testate. The holder of the note filed it as a claim against the estate of the maker only on final settlement of which he received part payment; the estate being insolvent. After both estates had been finally settled, the creditor brought suit against the devisees of the surety for the balance due on the note. *Held*, that the facts that the claim was filed against the estate of the principal, and that it could not be known what portion of the note would be paid by the estate until final settlement thereof, did not prevent the creditor from filing the claim against the estate of the surety also at any time after the grant of letters testamentary, or excuse him from so filing it, and, as the complaint did not bring the case within 2 Gav. & H. Rev. St. p. 534, § 178, *held*, that the suit was barred.—*Ratcliff v. Leunig*, 30 Ind. 289.

[b] (Sup. 1879)

The personal representatives of a surety on a joint note are liable thereon, under 2 Rev. St. 1876, p. 309, § 783.—*McCoy v. Payne*, 68 Ind. 327.

[c] (App. 1896)

Under Rev. St. 1894, § 2468, exempting the estate of a deceased surety from liability unless the principal is a nonresident, or is insolvent, provided that, though the principal be a resident, and his insolvency be not proved, the claim may be allowed, and a sufficient amount to satisfy it be paid into court, which the creditor may thereafter obtain on showing that he has diligently prosecuted the principal to insolvency, or that such prosecution would not avail, it is enough to prove insolvency of the principal at the time of the trial, without proof that the payee used due diligence to prosecute him; it not being shown that the surety gave notice to the payee, as provided by sections 1224, 1225, Rev. St. 1894, to proceed against the principal.—*Tremain v. Severin*, 45 N. E. 620, 16 Ind. App. 447.

[d] (App. 1899)

The claim on a mortgage signed by a wife and husband being filed severally against the husband's estate for the debt, it was immaterial, as to the creator, whether the husband signed as principal, or as surety for the wife.—*Foster v. Honan*, 53 N. E. 667, 22 Ind. App. 252.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Princ. & S. § 386.

See, also, note, 58 L. R. A. 82.

§ 147. Recourse to indemnity to surety.

Recourse by surety to indemnity, see post, § 180.

Recourse to indemnity to co-surety, see post, § 193.

[a] (Sup. 1881)

A mortgage to a surety, containing an obligation to pay the debt as well as indemnify the surety, inures to the benefit of the creditor as well as the surety, so that, after acceptance by the creditor, the surety cannot satisfy it, release it, or otherwise dispose of it, without consent of the creditor, and, when duly recorded, the record is notice of its contents to a purchaser.—*Durham v. Craig*, 79 Ind. 117.

[b] (Sup. 1883)

An indemnifying mortgage by the debtor to his surety, containing also a covenant to pay the debt, inures to the benefit of the creditor, and may be foreclosed by him.—*Loehr v. Colborn*, 92 Ind. 24.

[c] (Sup. 1885)

A surety, to whom the principal pays a sufficient sum for his indemnity, occupies the position of a debtor, and holds the money for the creditor's benefit.—*Crim v. Fleming*, 101 Ind. 154.

[d] (Sup. 1892)

A., to secure certain notes running to his wife, executed to her a chattel mortgage, which provided, also, that, A. being indebted to plaintiff on two notes which his wife had become liable to pay, the mortgage should be void if A. should pay the notes to plaintiff, and hold his wife harmless. *Held*, in an action to foreclose, making A. and his wife, and the sheriff who had attached the mortgaged property, defendants, that plaintiff could maintain his action; the mortgage having inured to his benefit.—*Plaut v. Storey*, 131 Ind. 46, 30 N. E. 886.

[e] (Sup. 1892)

Where action is brought on a note, and to foreclose a mortgage, failure to establish his rights under such mortgage does not interfere with plaintiff's right to enforce collection of the note, and to that end he may proceed by attachment or garnishment. *Coffey, J.*, dissenting.—*Jaseph v. People's Sav. Bank*, 132 Ind. 39, 31 N. E. 524.

[f] (Sup. 1907)

Where a mortgage given to a surety on the mortgagors' notes to save her harmless thereon stipulated that the mortgagors would pay all the sums of money secured without relief, the payees of the notes had an interest in the mortgage.—*Griffis v. First Nat. Bank*, 168 Ind. 546, 81 N. E. 490.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & S. §§ 402-412.
See, also, 32 Cyc. pp. 145-148.

§ 149. Time to sue and limitations.

Effect of absence, nonresidence, or concealment of person or property on limitation of actions against sureties, see **LIMITATION OF ACTIONS**, § 94.

Payment by principal as removing bar of limitations against surety, see **LIMITATION OF ACTIONS**, § 155.

[a] (Sup. 1879)

The action of a creditor against a surety cannot be delayed by the cross-action of the surety against his principal, authorized by 2 Rev. St. 1876, p. 277, § 674.—*Chrisman v. Perlin*, 67 Ind. 586.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & S. § 414.

§ 150. Parties.**FOR CASES FROM OTHER STATES,**

SEE 40 CENT. DIG. PRINC. & S. §§ 415-420.
See, also, 32 Cyc. pp. 125-127.

§ 151. — In general.**[a] (App. 1898)**

Burns' Rev. St. 1894, § 1226 (Horner's Rev. St. 1897, § 1212), provides that "when any action is brought against two or more defendants upon a contract, any one or more of the defendants being surety for the others, the surety may upon written complaint to the court, cause the question of suretyship to be tried and determined upon the issue made by the parties at the trial, or at a subsequent term; but such proceeding shall not affect the proceedings of the plaintiff." *Held*, that the maker of a note sued by the payee, cannot, by a cross-complaint, bring a stranger to the note into the action, who had, for a valuable consideration, agreed with the maker to pay the note.—*Hinkle v. Hinkle*, 50 N. E. 829, 20 Ind. App. 384.

[b] (App. 1899)

In an action to enforce the liability of the sureties on a contractor's bond in favor of a school board, conditioned on his performance of a contract to erect a school house, and requiring the payment of all claims for material furnished, the school board is not a necessary party.—*American Surety Co. v. Lauber*, 53 N. E. 793, 22 Ind. App. 326.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & S. §§ 415, 420.
See, also, 32 Cyc. pp. 125-127.

§ 152. — Joinder of defendants.**[a] (Sup. 1838)**

If, some weeks after the execution of a lease of real estate, a third person by writing obligatory becomes surety for the lessee, the lessee and surety cannot be joined as defendants in an action on the contracts.—*Tourtelott v. Junkin*, 4 Blackf. 483.

[b] (Sup. 1869)

Where parties are described in a joint and several contract as sureties, and expressly con-

tract to answer as sureties of the principal debtor, who is also a party to it, all may be sued together.—*McMillan v. Bull's Head Bank*, 32 Ind. 11, 2 Am. Rep. 323.

[c] (App. 1899)

Principal and surety on a bond may be sued in the same action, their liability accruing at the same time, and arising from one breach of the same contract.—*Wheeler v. Rohrer*, 52 N. E. 780, 21 Ind. App. 477.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Princ. & S. §§ 416-419;
37 CENT. DIG. Parties, § 34.

See, also, 32 Cyc. pp. 125-127.

§ 153. Process and appearance.

[a] (Sup. 1879)

In an action on a note, the surety admitted its execution, and asked that the record might show that he was the surety on the note, and that his principal's property be first levied on. *Held*, that it was error to call and default the principal on the surety's answer without notice to him, but not such as would affect the judgment as far as the plaintiff was concerned.—*Baldwin v. Webster*, 68 Ind. 133.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Princ. & S. § 421.

See, also, 32 Cyc. p. 127.

§ 154. Pleading.

Duplicity, see PLEADING, § 99.

Pleading matters of fact or conclusion, see PLEADING, § 8.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Princ. & S. §§ 422-427.

See, also, 32 Cyc. pp. 127-132.

§ 155. — Declaration, complaint, or petition.

[a] (App. 1897)

A complaint alleging that defendant corporation, by its note, promised to pay plaintiff a specified sum, and that the other two defendants—whose names appear on the note, which is filed with the pleadings, as required by Rev. St. 1894, § 365 (Rev. St. 1881, § 362)—signed as "security," and that the note is unpaid, states a cause of action against the last-named defendants as sureties, though it does not aver any promise to pay on their part.—*Albany Furniture Co. v. Merchants' Nat. Bank*, 17 Ind. App. 93, 46 N. E. 479.

[b] (App. 1900)

Where a contract for work provides that the work shall be completed at a certain time, but the bond given to secure performance of the contract and payment by the contractor for labor performed and materials used on the work provides that an extension of the time shall not release the surety, a complaint on the bond, the bill of particulars filed as an exhibit with which showed that materials were furnished by

plaintiff at a time subsequent to that named in the contract for completion of the work, need not allege an extension of time for completion thereof; nor need there be a finding of this other than that the work was thereafter completed under the contract and accepted.—*Man-kedick v. Consolidated Coal & Lime Co.*, 57 N. E. 256, 25 Ind. App. 135.

[c] (App. 1901)

Where a complaint for breach of the bond of a beer sales agent alleged that the total sales made by him amounted to \$834, and that he collected the same and paid over to plaintiff \$1,089, and that there is due from him the balance of said money as collected, to wit, \$745, a judgment against his surety for \$92 would be reversed as contrary to law, since by the averments of the complaint the principal was not in default, and hence the surety had incurred no liability.—*Cummings v. Tell City Brewing Co.*, 60 N. E. 359, 26 Ind. App. 541.

[d] (App. 1906)

In an action on a corporate treasurer's bond, conditioned that he should honestly and faithfully perform the duties of his trust as treasurer according to law and the by-laws of the company, a complaint, alleging the breach as a refusal to pay money in his hands to his successor, who presented to him an order therefor, executed by the president and secretary of the corporation, and alleging the duty of the treasurer to pay over the money and to honor the order, states a cause of action.—*Renn v. United States Cement Co.*, 36 Ind. App. 149, 73 N. E. 269.

[e] (App. 1907)

A complaint on a contract of suretyship must show that plaintiff acted within the terms thereof.—*First Nat. Bank v. Goldsmith*, 40 Ind. App. 592, 82 N. E. 799.

[f] (Sup. 1939)

When the undertaking of the surety is generally to guarantee the performance of a contract without conditions, failure to notify the surety of a breach from which damage has resulted is a matter of defense and need not be negatived by plaintiff in an action on the bond, though it is otherwise, where the surety stipulates for notice within a certain time as a condition precedent to liability.—(Sup. 1909) *Knight & Jillson Co. v. Castle*, 172 Ind. 97, 87 N. E. 976, transferred from the Appellate Court (1908) 42 Ind. App. 689, 85 N. E. 1049.

[g] (App. 1909)

The complaint alleged that certain contractors gave a bond for the performance of a contract with a city for public improvements, with defendants as sureties, conditioned upon the fulfillment of the contract; that a provision of the contract was that the contractors would pay all moneys due any persons for materials; that the contractors became indebted to plaintiff's assignor for materials used in the work, as itemized in the complaint, and as evidence of

such indebtedness executed a note to him, and as part of the same transaction executed an instrument authorizing the city to retain a sum out of the improvement bonds for such assignor, and thereafter the assignor assigned all its rights and interest in the contractors' indebtedness to plaintiff, and indorsed its name on the back of the note, intending thereby to assign its interest in the claim for materials, and delivered it to plaintiff, together with the written instrument mentioned. *Held*, that the action against the sureties was not on the note, but on the indebtedness, because of the breach of the bond, and the allegations sufficiently showed plaintiff's title to the debt.—*Stevenson v. Stunkard*, 90 N. E. 106.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. § 422.

See, also, 32 Cyc. pp. 127-129.

§ 156. — Plea, or answer and subsequent pleadings.

Joint or separate answers of codefendants, see PLEADING, § 84.

Pleading matter in abatement, see PLEADING, § 107.

Proceedings by surety against principal after judgment for creditor and payment by surety, see post, § 189.

[a] (Sup. 1826)

A plea that the creditor had taken a judgment by confession from the principal debtor, with a stay of execution for six months, failing to allege that the creditor by ordinary proceedings at law could have collected the money sooner from the principal debtor than by the course which he had pursued, and that time was given to the principal without the surety's consent, was insufficient as a plea in bar to a proceeding against the surety.—*Barker v. McClure*, 2 Blackf. 14.

[b] (Sup. 1858)

An answer by a surety on a note, admitting the execution, alleging payment as to part, and a binding agreement for money paid, to forbear, for a fixed time, without his consent, as to the residue, not stating the terms or time, is good on demurrer; it being presumed that the forbearance was on a valid consideration.—*Shaw v. Binkard*, 10 Ind. 227.

[c] (Sup. 1858)

To a suit on a bond against sureties, an answer that the principal's liability arose before the bond was in force is a mere denial of liability on the bond, and so requires no reply.—*Cooke v. Williamson*, 11 Ind. 242.

[d] (Sup. 1861)

In a suit on a note, a demurrer is rightly sustained to an answer which sets up in bar of the action that two of the defendants were only sureties, as this is only matter to direct the execution issued on the judgment.—*Moorman v. Barton*, 16 Ind. 206.

[e] (Sup. 1871)

In an action upon a bond given with surety, by one partner to another, to indemnify the latter against the partnership liabilities, while false and fraudulent representations as to the amount of these liabilities, made to the surety for the purpose of inducing him to execute the bond by the partner to whom the bond was given, would constitute a good defense to the action against such surety, the answer must aver that such representations were fraudulently made; and an allegation that the party receiving the bond guaranteed that the firm liabilities should not exceed a certain sum is not sufficient, where there was no guaranty contained in the bond.—*Fishburn v. Jones*, 37 Ind. 119.

[f] (Sup. 1872)

To a suit on a joint note for \$2,400, a surety thereon answered that, before the maturity of the note, plaintiff released him from all liability thereon, in consideration of an order given by him on two other defendants, on his own funds, for \$500, which order was accepted by them. *Held*, that this constituted a defense as to said surety, and, as the order was not the foundation of the defense, it was not necessary that a copy of it should be given with the answer.—*Stockton v. Stockton*, 40 Ind. 225.

[g] (Sup. 1872)

2 Gav. & H. St. p. 308, § 674, providing that, "when any action is brought against two or more defendants upon a contract, any one or more of the defendants being surety for the others, the surety may, upon a written complaint to the court, cause the question of suretyship to be tried and determined upon the issue made by the parties at the trial of the cause, or at any time before or after the trial, or at a subsequent term, but such proceeding shall not affect the proceedings of the plaintiff," contemplates a written complaint by the surety in the nature of a cross-complaint against the principal, and pleadings, issue, and trial thereon, the same as upon any other cross-complaint.—*Dodge v. Dunham*, 41 Ind. 186.

[h] (Sup. 1873)

In an action on a note, an answer by a surety alleging that the time of payment of the note was for a valuable consideration extended for six months, without the surety's knowledge or consent, where the facts alleged are such that the law will imply an extension of time for a shorter period, is good on demurrer.—*Hamilton v. Winterrowd*, 43 Ind. 393.

[i] (Sup. 1873)

In an action on a note, an answer by sureties alleging that at the maturity of the note the creditor, without the knowledge of the sureties, received of the debtor a certain sum of money being "the interest then due and the interest in advance for six months," and extended the time of payment of said note six months, is good, though the sum alleged to have been paid would not more than cover the amount of interest that appeared to be due at

the date of the payment; the answer not showing but that a part of the accrued interest had before that time been paid.—*Hamilton v. Winterrowd*, 43 Ind. 398.

[j] (Sup. 1873)

In a suit on a note against a surety, the defendant answered that the plaintiff agreed with the principal debtor, without the knowledge and consent of the surety, to extend the time of payment for 90 days, if the debtor would pay interest in advance for that time at the rate of 12½ per cent. per annum, and that the interest was accordingly paid and the extension given. *Held*, that the answer was good and sufficiently shows that the interest was paid in advance.—*Hamilton v. Winterrowd*, 43 Ind. 401.

[k] (Sup. 1875)

In a suit upon a promissory note, an answer by a surety, alleging that the payee, without the knowledge or consent of the surety, released a mortgage on real estate, executed by the principal maker to the payee to secure the payment of the note, and extended the time of payment for a definite period after maturity, in consideration of a new mortgage, executed by the principal maker and his wife on the same real estate, is good, whether copies of the mortgages are made parts of the answer or not.—*Holland v. Johnson*, 51 Ind. 346.

[l] (Sup. 1877)

In an action on a promissory note payable in bank, judgment by default was rendered against the principal, and the surety in his answer alleged that he had requested the sheriff to levy the execution issued on such judgment on certain personal property, but that the sheriff, at the request of the plaintiff, had held the execution without levy, and that the principal had subsequently died insolvent. There was no averment that such property was subject to the execution or was sufficient in value to satisfy it. *Held*, that the answer was sufficient.—*Scott v. Shirk*, 60 Ind. 160.

[m] (Sup. 1878)

Under 2 Rev. St. 1876, p. 277, § 674, providing that when action is brought against two or more defendants on a contract, any one or more of defendants being surety for the others, the surety may, on a written complaint cause the question of suretyship to be tried and determined, etc., in an action on a note against several alleged makers, a so-called answer by part of defendants alleging that they were merely sureties for their codefendant was only a written complaint against such codefendant, and there was therefore no answer filed to the complaint.—*Browning v. Merritt*, 61 Ind. 425.

[n] (Sup. 1878)

A surety's plea that the time of payment of the note had been extended by the plaintiff without his consent, is insufficient for failure to aver when, for how long, or for what considera-

tion, the extension was made.—*Brooks v. Allen*, 62 Ind. 401.

[o] (Sup. 1879)

In an action by the payee of a note, an answer by one of the makers, setting up the defense that he signed as surety, and that he has been discharged by an extension of time granted by the creditor, must allege that the payee of the note had notice that he signed as surety.—*McCloskey v. Indianapolis Manufacturers' & Carpenters' Union*, 67 Ind. 86, 33 Am. Rep. 76.

[p] (Sup. 1879)

In a suit by the obligee against principal and surety on a penal bond for the accounting by the principal to the obligee for money received as the latter's agent, the surety set up that the principal had executed to the obligee a promissory note without knowledge of the surety. *Held*, that the answer was bad, either as a plea of payment or of extension of time.—*Lindeman v. Rosenfield*, 67 Ind. 246, 33 Am. Rep. 79.

[q] (Sup. 1880)

In an action on a note and to foreclose a mortgage securing the same, where the surety by answer set up an extension of time as a defense to the note, a contention that the reply thereto was demurrable for failing to allege that the surety's consent to the extension had been obtained at the time the extension was given is untenable; it not being necessary that the reply should contain any affirmative matter.—*Jordan v. D'Heur*, 71 Ind. 199.

[r] (Sup. 1880)

Where the creditor, by the terms of an agreement, could not maintain a suit against the surety until it had been ascertained what amount a certain estate could pay on a certain note, and the surety sought to avoid liability by reason of delay on the part of the creditor to bring suit after notice to him to do so, an averment by the surety, in his answer, that the amount which the estate would pay had been ascertained, was necessary for the purpose of showing that the creditor might have maintained a suit at the time he was notified to sue.—*Field v. Burton*, 71 Ind. 380.

[s] (Sup. 1880)

In an action on a note, the complaint averred the death of one of the makers. The answer admitted the execution of the note, but averred that defendant executed it as surety for the decedent, who executed the same as principal; that at and after the maturity of the note, and before the death of the principal, defendant gave to plaintiff written notice informing him that the principal was then able to pay the note, and directed him to proceed at once to collect the same, which notice plaintiff failed to obey. *Held*, that as the principal's death was admitted, and as it was not shown but that it occurred so soon after the service of the notice as to prevent the bringing of an

action, the answer was demurrable, in the absence of an averment that the principal left in the county or state an estate on which administration had been or could be granted, or that he lived in the state, or could have been sued in the courts of the state, notwithstanding the notice was a sufficient compliance with Code, § 672, providing for notice by the surety to the obligee to forthwith institute an action on the contract.—*Franklin v. Franklin*, 71 Ind. 573.

[t] (Sup. 1880)

In an action against a surety on a note, an answer alleging that the effect of the instrument was misrepresented to defendant by the agents of plaintiff, in which agents defendant reposed great confidence, did not show the existence of a relation of trust or confidence excusing defendant from exercising ordinary diligence to guard against fraud and imposition.—*Clodfelter v. Hulett*, 72 Ind. 137.

[u] (Sup. 1880)

Under 2 Rev. St. 1876, p. 277, §§ 674, 675, relating to the remedies of sureties against their principals, the surety's complaint should be filed in and during the pendency of the action of the creditor or obligee, and the question of suretyship must be determined in and by the same court in which judgment upon the contract had been, or might be, rendered against both principal and surety.—*Boys v. Simmons*, 72 Ind. 593.

[v] (Sup. 1882)

In an action against a surety on a note, an answer setting up that defendant had notified the creditor to sue forthwith is insufficient, under Code, § 672, requiring a "notice in writing."—*Mendel v. Cairnes*, 84 Ind. 141.

[w] (Sup. 1882)

An answer, by a surety in an action on a note, that he was such surety, of which the payee had knowledge, and that without his knowledge or consent the payee received from the principal, after maturity of the note, a given sum, which they agreed should be in full satisfaction of interest on the note to a certain future day, whereby the time of payment was extended, is good on demurrer.—*Starret v. Burkhalter*, 86 Ind. 439.

A plea by a surety that the time of payment of a note was extended, and that the consideration for the extension was the receipt of interest for one month in advance, is not insufficient, as not containing a specific statement of the time of the extension, as it impliedly states an agreement to extend the time for one month.—Id.

In an action on a note against the maker, L., and surety, B., thereon, an answer of the latter setting up a contract between plaintiff and the principal extending the time of payment of the note, "all of which was done by said L. and said plaintiff without the knowledge and consent of said B., and was never afterwards ratified or consented to by him," was

sufficient as an averment that the extension was without the consent of the surety.—Id.

[x] (Sup. 1885)

In an action against a surety on a note, an answer averring that plaintiff had been requested to bring suit on the note, but not alleging that plaintiff failed to do as requested, was insufficient on demurrer.—*Marshall v. Mathers*, 3 N. E. 120, 103 Ind. 458.

[xx] (Sup. 1890)

In an action on a note, and to foreclose a mortgage securing it, a cross-complaint by one of the defendants alleging that he executed the note and mortgage as security for a codefendant, and asking that the latter's interest in the land be sold before that of the cross-complainant, is good under Rev. St. § 1212, providing that, in a suit on a contract where one of the defendants is surety for the other, he may on complaint have the question of suretyship determined.—*Chaplin v. Baker*, 124 Ind. 385, 24 N. E. 233.

An answer thereto alleging that the cross-complainant agreed with plaintiff and said codefendant, for a valuable consideration, to pay and satisfy the note and mortgage, is good.—Id.

[y] (Sup. 1891)

In an action against principal and sureties on a bond, an answer by the sureties that the obligee had agreed to cancel the bond in consideration of certain acts to be done by the principal, without alleging performance of such acts or any offer to perform them, is bad.—*Kempshall v. East*, 127 Ind. 320, 26 N. E. 836.

[yy] (App. 1892)

To a surety's answer in an action on a promissory note that the name of a new surety was added without his consent, after its delivery, the payee replied that defendant, with full knowledge of all the facts and circumstances of the execution of such note, and that the name of a co-surety was added, fully ratified the note, and agreed to pay one-half as surety, on the agreement that the co-surety would pay one-half thereof, which he agreed to do. *Held*, that the reply sufficiently alleged a ratification.—*Owens v. Tague*, 3 Ind. App. 245, 29 N. E. 784.

To an answer by the second surety on a note sued on, alleging that the same was signed without consideration after the note was delivered, the payee replied that the second surety agreed to pay the payee one-half the note as surety of the maker in consideration that the first surety would pay one-half, and that the first surety had agreed so to do. *Held*, that the reply was insufficient in not showing with whom the agreement was made, or the performance of the condition alleged.—Id.

[z] (App. 1906)

In an action on a note executed by a corporation and individuals, one of them answered that she signed the note as a surety, merely, and that at that time the corporation was the owner of personal property subject to execu-

tion in excess of the amount of the note, and that the holders of the note, without the knowledge or consent of defendant, agreed with the corporation and the other signers for the appointment of a receiver, and that a receiver was appointed in pursuance of the agreement. *Held*, that the answer did not state facts constituting a defense; it not being material that there was a prior agreement as to the receiver, and the allegation as to the corporation's property not aiding the pleading; it not being claimed that the surety was released by the holders' failure to bring suit after notice from the surety, as provided for in Burns' Ann. St. 1901, §§ 1224, 1225.—*Durbin v. Northwestern Scraper Co.*, 73 N. E. 297, 36 Ind. App. 123.

[12] (Sup. 1909)

A cross-complaint by a surety in an action on a note alleged that the president of the holder caused certificates of stock, pledged as collateral, to be surrendered, and new certificates issued in his individual name, that this transfer was a conversion, and the stock so converted at the time equaled in value the amount due the holder, and the prayer was that the value of the stock at time of conversion be credited on the note. *Held*, that the cross-complaint was demurrable, as it was not shown that the surety was deprived of the benefit of the collateral, or that it was converted to the use of another, but for anything that appeared he still held the stock to secure the payment of the note.—*Hunter v. First Nat. Bank*, 172 Ind. 62, 87 N. E. 734.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & S. §§ 423-426.
See, also, 32 Cyc. pp. 129-132.

§ 157. — Issues, proof, and variance.

[a] (Sup. 1870)

Where the answer of a surety alleged that he was induced to sign the note sued on by the representations of the payee that the note was for the price of goods to be sold by the payee to the maker, and that the note was not used for that purpose, but was used to pay another debt due the payee from the maker, a further allegation that the defendant had previously sold a stock of goods to the maker, to secure the price of which the latter had agreed to execute a mortgage, and that the payee represented to defendant that the goods he was about to sell the maker were to be added to such stock, was immaterial, and it was not error to exclude evidence of such agreement to execute the mortgage to defendant.—*Ham v. Greve*, 34 Ind. 18.

[b] (App. 1894)

Rev. St. 1894, § 1226, provides that, when an action is brought against two or more defendants on a contract in which any one or more of defendants are surety for the others, the surety may on complaint to the court cause the question of suretyship to be tried on the issues made by the parties at the trial, or at any time before trial or at a subsequent term,

but such proceedings shall not affect the proceedings of the plaintiff. *Held*, that the question of suretyship can be tried only by the filing of a cross-complaint by the surety and the formation of issues thereon.—*Newton v. Pence*, 38 N. E. 484, 10 Ind. App. 672.

[c] (App. 1889)

The mere fact that a complaint alleges that a contractor's bond was executed at the same time as his contract, and was made a part thereof, and that the bond bears a date a few days later than the contract, does not show a variance, where the bond identifies the contract as being given to secure the "contract annexed hereto."—*Brown v. Markland*, 53 N. E. 295, 22 Ind. App. 652.

[d] (Sup. 1939)

Under a plea of non est factum, a surety on a note may show discharge by failure to secure signature of a co-surety, as agreed, when the note, of which the note in question was a renewal, was executed.—*Hunter v. First Nat. Bank*, 172 Ind. 62, 87 N. E. 734.

[e] (App. 1910)

The surety on the bond of an agent for the faithful discharge of his duties, in order to defend on the ground of a material alteration in the agent's contract without the surety's consent or knowledge, must plead it.—*Security Mut. Life Ins. Co. v. Frankel*, 92 N. E. 183.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & S. § 427.
See, also, 32 Cyc. pp. 127-132.

§ 158. Evidence.

Competency of plaintiff as witness in action against administrator of deceased surety, see WITNESSES, § 149.

Evidence as to existence of relationship of principal and surety, see ante, § 45.

Existence of suretyship, see ante, § 45.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & S. §§ 428-441.
See, also, 32 Cyc. pp. 132-138.

§ 159. — Presumptions and burden of proof.

[a] (Sup. 1874)

It will not be presumed that a deceased principal debtor left property sufficient to pay his debts, that his estate is situated within the state, or that administration has been had upon his estate.—*Whittlesey v. Heberer*, 48 Ind. 260.

[b] (Sup. 1880)

Where the surety in an action on a note sets up an agreement for an extension of time for payment without his consent, the reply of denial places on him the burden of showing the agreement.—*Barclay v. Miers*, 70 Ind. 346.

[c] (Sup. 1881)

Knowledge of the fact that other persons were sureties when time was given the principal debtor is not presumed in favor of the sureties,

but must be proved.—*Mullendore v. Wertz*, 75 Ind. 431, 39 Am. Rep. 155.

[d] (App. 1898)

A note for \$1,000 was made by a principal and surety July 24, 1893, due after 30 days, interest from maturity. The note was indorsed, "Paid on within note \$80, July 24, '94." The surety did not know of the interest payments. *Held*, that the burden was on the payee, in order to hold the surety, to show that principal's payment of one month's interest in advance was not in consideration of an extension of time, and therefore operated to release surety.—*Schieber v. Traudt*, 49 N. E. 605, 19 Ind. App. 349.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Princ. & S. §§ 428-435.
See, also, 32 Cyc. pp. 132-134.

§ 160. — Admissibility.

Declarations by principal as evidence against surety, see EVIDENCE, § 250.

[a] (Sup. 1878)

In an action on a note by an assignee thereof, where a surety alleges that the payee secured his signature by means of alleged false and fraudulent representations, on which he relied, a mortgage executed by the principal to such surety about 18 months prior to the date of the note sued on, to secure the surety against any loss he might thereafter sustain by reason of becoming surety on any note, is admissible in evidence.—*Crandall v. First Nat. Bank of Auburn*, 61 Ind. 349.

[b] (Sup. 1881)

In an action against a surety on a promissory note, the defense was a release by an extension of time to the principal. *Held*, that evidence that an indorsement, "Received on within, Oct. 15, 1878, \$40, interest to Feb. 23, 1879," had been altered by striking out "interest," etc., was admissible, as tending to show what was the original contract.—*Mennet v. Grisard*, 79 Ind. 222.

[c] (Sup. 1882)

The maker of a note with surety renewed the same by giving the payee bank another note executed by him on which the name of the surety was forged, and, in an action by the bank against the surety, the cashier of the bank testified that the money would not have been loaned to the maker if defendant or some other good surety had not gone on the note. *Held*, that the evidence was irrelevant.—*Lovinger v. First Nat. Bank of Madison*, 81 Ind. 354.

Where the maker of a note renewed it by giving the payee bank another one, on which the name of a surety was forged, in an action by the bank against the surety, testimony of defendant that at the time the maker destroyed the original note in the surety's presence the maker stated that the note had been paid was inadmissible.—*Id.*

Where the maker of a note renewed it by giving the payee bank another one, on which the name of the surety was forged, in an action by the bank against the surety, testimony of the surety was a man of good financial standing and credit was irrelevant.—*Id.*

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Princ. & S. §§ 436-439.
See, also, 32 Cyc. pp. 134, 135; note, 3 Am. St. Rep. 234; note, 3 Am. St. Rep. 234.

§ 161. — Weight and sufficiency.

[a] (Sup. 1880)

A written agreement, signed by a surety, indorsed on a note, consenting to an extension of time for the payment thereof, is sufficient evidence to support a finding that such consent was given at the date of the indorsement, though there is other evidence tending to show that the indorsement was made at a different time than its date.—*Jordan v. D'Heur*, 71 Ind. 190.

[b] (Sup. 1890)

Where a judgment creditor buys and closes a mortgage constituting a prior lien on his judgment, and bids in the land at the sale for the amount realized therefor at the sale is conclusive as to the value of the land, as between him and sureties of the debtor.—*Moorman v. Hudson*, 125 Ind. 504, 25 N. E. 593.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Princ. & S. §§ 439-442.
See, also, 32 Cyc. p. 138.

§ 162. Trial.

Dismissal of action as against joint defendants, see DISMISSAL AND NONSUIT, § 25.
Order of trial of issues between defendant and surety, question of suretyship, see TRIAL, § 4.
Right to open and close, see TRIAL, § 25.

[a] (Sup. 1892)

Where, in an action against the principal and sureties on a note, one of the defendants pleaded want of consideration, an instruction that a valid consideration as between the principal and his creditor was sufficient to support the undertaking of the sureties was proper as applied to such issue.—*Eppert v. Hallock*, 74 N. E. 713, 133 Ind. 417.

[b] (Sup. 1904)

In an action against a building contractor and the surety on his bond, a verdict, "We find for the defendant S. release from bond," was general, and not objectionable, containing the words "release from bond," the words being mere surplusage.—*Guthrie v. Penner*, 70 N. E. 486, 162 Ind. 417.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Princ. & S. §§ 442-445.
See, also, 32 Cyc. pp. 138-140.

§ 163. Judgment.

Equitable relief against by confession, see JUDGMENT, § 405.

Joint judgment in justice's court against principal and surety on note, see **JUSTICES OF THE PEACE**, § 124.

Proceedings by surety to have execution on judgment for creditor directed first against property of principal, see post, § 164.

[a] (Sup. 1860)

The same judgment should pass against both the principal and the sureties. Therefore the surety on a note has no cause of complaint, unless the court refuses to direct the sheriff first to exhaust the property of the principal.—*Rooker v. Wise*, 14 Ind. 276.

[b] (Sup. 1865)

Where a suit is brought against the principal and surety upon a bond, and the finding is for the plaintiff, it is error to enter judgment against the surety alone, and the judgment must be reversed.—*Rutherford v. Moore*, 24 Ind. 311.

[c] (Sup. 1837)

Although the liability of one who, without consideration, writes his name on the back of a promissory note, is prima facie that of an accommodation indorser, still a complaint by the creditor, showing the indorsement, will not confer jurisdiction to render judgment that the indorser was a surety for those whose names appear as makers.—*Knopf v. Morel*, 112 Ind. 570, 13 N. E. 51.

[d] (Sup. 1905)

Where one of the parties against whom a foreclosure decree was rendered was in fact a surety, but such relationship did not appear from the decree, he was entitled to obtain an adjudication of his suretyship thereafter, and enforce the decree to the extent of his equitable interest therein, as against one claiming under one of his codefendants with notice of the facts.—*Oglebay v. Todd*, 166 Ind. 250, 76 N. E. 238.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Princ. & S. §§ 446-454.

See, also, 32 Cyc. pp. 140-142.

§ 164. Execution.

Enforcement against exempt property, see **EXEMPTIONS**, § 75.

Enforcement, by surety against co-surety, of execution against himself, see post, § 198.

Enforcement, by surety against principal, of execution against surety, see post, § 188.

Proceedings by surety against principal after payment by surety of judgment for creditor, see post, § 180.

Reversal of judgment as affecting proceeding to determine question of suretyship, see post, § 165.

[a] (Sup. 1862)

Under 2 Rev. St. 1852, p. 186, §§ 674, 675, providing that in an action against two or more defendants upon a contract, any one or more of the defendants, being surety for the others, may, upon a written complaint to the court, cause the question of suretyship to be tried and

determined, and that, if it be determined that such defendant is a surety, judgment shall be enforced against the property of the principal debtor before resorting to that of the surety, the question of suretyship cannot be raised, unless the court has jurisdiction of the principal, so that judgment may be rendered against him; and where process was returned "Not found" as to the principal, and judgment entered against the surety alone, the statute did not apply.—*Watson v. Beabout*, 18 Ind. 281.

[b] (Sup. 1866)

One who draws a bill of exchange for the accommodation of the payee is the surety of the latter, within the meaning of the statute on the subject of "the remedies of sureties against their principals" (2 Gav. & H. § 674, p. 308), and as such may, upon proper application, have execution directed first against the property of his principal.—*Lacy v. Lofton*, 26 Ind. 324.

[c] (Sup. 1870)

2 Gav. & H. St. p. 308, § 674, which enables a surety to have an order of the court that execution shall be first levied on the property of his principal, is not applicable in an action on a note against a surety sued alone.—*Brush v. Raney*, 34 Ind. 416.

[d] (Sup. 1871)

Where no pleading raises the question of suretyship, the court need not make an order for the levy of the execution first on the property of the principal.—*Riley v. Butler*, 36 Ind. 51.

[e] (Sup. 1873)

When two sureties are sued upon a note, one of them, who has paid half the note, is not entitled to an order directing the sheriff to levy, an execution that may be issued to collect the residue upon the property of his co-surety exclusively.—*Schooley v. Fletcher*, 45 Ind. 86.

Code, §§ 674, 675, authorizing the court to order that the property of a principal shall be sold before resort is made to that of the surety, does not authorize an order requiring a surety, whose co-surety has paid one-half of the debt, to turn over his property for the satisfaction of the remainder.—*Id.*

[f] (Super. 1873)

A general execution, directed against a principal and surety, though levied on the property of both, must be satisfied in the order of their relation to the suit.—*Rogers v. Voss*, Wils. 376.

[g] (Sup. 1879)

Under Code, §§ 416, 674, 675, as between principal and surety, when they are judgment defendants in the same action, the sheriff must first sell and exhaust the property of the principal before he can levy on the property of the surety; and a levy upon the property of the surety before he has sold and exhausted the property of the principal is irregular, and cannot be upheld.—*Johnson v. Harris*, 69 Ind. 305.

[h] (Sup. 1880)

The statute providing for the levy and sale of a principal's property before resorting to that of a surety has no application to cases where such property is in the control and custody of the court by its receiver.—*Knode v. Baldrige*, 73 Ind. 54.

[i] (Sup. 1881)

The court has no power to make an order that the property of one of the defendants against whom a judgment has been obtained shall be first levied upon and sold, on the ground that the other defendant was a surety, unless the question of suretyship was tried and determined upon an issue made by the party as provided by statute; there being nothing in the note or in the complaint thereon to indicate the existence of such relation.—*Douch v. Bliss*, 80 Ind. 316.

[j] (Sup. 1887)

A party who occupies the relation of surety may have that fact established, and an order for an execution in his favor, by proceedings subsequent to judgment rendered in the action against his principal.—*Montgomery v. Vicory*, 110 Ind. 211, 11 N. E. 38.

[k] (Sup. 1888)

Plaintiff being replevin bail on a judgment against another, execution issued jointly against them was levied by defendant, a constable, upon the property of plaintiff, who brought replevin. *Held*, under Rev. St. §§ 697, 698, which authorize a joint execution in such case, that, while it was defendant's duty to exhaust the principal debtor's effects before seizing the surety's, yet, if the property so seized were subject to execution, replevin was not plaintiff's proper remedy.—*Miller v. Hudson*, 114 Ind. 550, 17 N. E. 122.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Princ. & S. §§ 456-465.

See, also, 32 Cyc. pp. 142-144.

§ 165. Appeal and error.

[a] (Sup. 1881)

A complaint by an alleged surety to determine the question of suretyship, under Civ. Code 1881, §§ 738, 739, is an independent action, and is entirely unaffected by any reversal of judgment in the principal action wherein the surety is sought to be held.—*Williams v. Pleenor*, 77 Ind. 36.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Princ. & S. §§ 466, 467.

See, also, 32 Cyc. p. 145.

§ 166. Costs.

Liabilities of sureties for attorney's fees in action against principal, see ante, § 73.

[a] (App. 1908)

A materialman suing on a bond conditioned on the contractor performing his contract and paying laborers and materialmen and stipulat-

ing that all payments contracted to be made shall be made with attorney's fees is entitled to recover reasonable attorney's fees.—*United States Fidelity & Guaranty Co. v. American Blower Co.*, 41 Ind. App. 620, 84 N. E. 555; *Same v. American Radiator Co.*, 41 Ind. App. 712, 84 N. E. 558.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. § 455.

V. RIGHTS AND REMEDIES OF SURETY.

Injunction against judgment till surety is secured against liability, see JUDGMENT, § 459.

Nature of right of surety to subrogation, see SUBROGATION, § 1.

Right of surety against receiver, see RECEIVERS, § 169.

Right of surety paying judgment to redeem property of principal sold on execution, see EXECUTION, § 293.

Right of surety to compel proof against principal, see EQUITY, § 43.

Subrogation of sureties, see SUBROGATION, §§ 5-9.

(A) AS TO CREDITOR.

Complaint by sureties to review judgment, see JUDGMENT, § 335.

Complaint by surety to review judgment and restrain levy on execution, see JUDGMENT, § 433.

Replevin bail, see EXECUTION, § 177.

Right of surety to equitable relief against judgment, see JUDGMENT, § 452.

§ 168. Recourse to and exhaustion of remedy against principal.

Conditions precedent to action against surety, see ante, §§ 137-139.

Neglect to act or proceed against principal as discharge of surety, see ante, §§ 124-126.

Proceedings by surety to have execution on judgment for creditor directed first against property of principal, see ante, § 164.

[a] (Sup. 1863)

Where, after a decree of foreclosure, a replevin bail is given, and, the period of stay having expired, an order of sale is issued on the decree, which by the plaintiff's order is returned without a sale having been made, the surety may compel the creditor to proceed or exonerate him from liability.—*Nunemacher v. Ingle*, 20 Ind. 135.

[b] (Sup. 1878)

In an action on a joint and several note against one of the makers, the answer alleged that the defendant signed the note merely as surety for the other maker; that he had since deceased, and the plaintiff had proved the note against his estate, which was solvent; and that the administrator was about to sell some of the real estate of the deceased to realize funds to

pay off this and other debts against the estate. The answer also asked that the administrator be made a party and that execution be first levied upon the estate. *Held*, that the answer was insufficient.—*Hayes v. Hayes*, 64 Ind. 243.

[c] (Sup. 1881)

Where a husband and wife executed a mortgage on her real estate as security for the debts of a firm of which he was a member, she was entitled to have the firm property exhausted before hers could be subjected.—*Moffitt v. Roche*, 77 Ind. 48.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 468-473.

See, also, 32 Cyc. pp. 233-236; note, 34 Am. Rep. 580.

§ 169. Recourse to and exhaustion of other securities.

Misapplication, release, or loss of securities as discharge of surety, see ante, §§ 114, 115.

Right to require recourse to property of co-surety as to part of note, see ante, § 65.

[a] The surety cannot compel the creditor to first exhaust liens and collaterals held by him.—(Sup. 1860) *Jones v. Tincher*, 15 Ind. 308, 77 Am. Dec. 92; (1861) *Brown v. Brown*, 17 Ind. 475.

[b] (Sup. 1861)

A sheriff, having levied the execution on the property of the principal, took from him a delivery bond, with surety, which was afterward forfeited by nondelivery. The principal having no other property, it was *held* that a levy on the property of the judgment surety was proper, without a prior resort to the surety on the delivery bond.—*Brown v. Brown*, 17 Ind. 475.

[c] (Sup. 1865)

A. executed to B. a mortgage upon certain real estate to secure a note of \$300. On the same day C. also executed to B. a mortgage to secure the payment of A.'s note to B. for \$300, and also to secure a note of \$169 made by C. to B. B. brought suit to foreclose both mortgages. D., who claimed, as the vendee of C., the lands mortgaged by him to B., filed his cross-complaint, alleging that the mortgage made by C. was, as to the \$300 note, only collateral to the mortgage of A., and that the mortgage of A. was the primary security, and asking that the land mortgaged by A., and all other property of his subject to execution, might be exhausted before resorting to the land mortgaged by C. A. also filed a cross-complaint against C. and D., alleging that C. was, at the time of the execution of the mortgage, indebted to him (A.) in the sum of \$200, and in consideration of that indebtedness assumed to pay that amount of the \$300 note to B., and gave said mortgage to secure the payment thereof, and asking that, as to said sum, of \$200, the mortgage of C. might be decreed to be the primary security. A demurrer was sustained to this cross-complaint. *Held*, that it is a well-settled principle of equi-

ty jurisprudence, which is expressly recognized by our statute, that in cases of principal and surety, both being before the court, the creditor may be compelled to first exhaust the property of the principal, and that the court erred in sustaining the demurrer to the cross-complaint.—*Wright v. Crump*, 25 Ind. 339.

[d] (Sup. 1890)

Where principal and surety both mortgage land to secure the former's debt, the heirs of the surety have the right, after his death, to have the property of the principal first sold to satisfy the debt.—*Hoppes v. Hoppes*, 123 Ind. 397, 24 N. E. 139.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 474-489.

See, also, 32 Cyc. pp. 234-236; note, 12 L. R. A. 131.

(B) AS TO PRINCIPAL.

As to heirs of co-surety, see DESCENT AND DISTRIBUTION, § 123.

Discharge of claim of surety against bankrupt principal, see BANKRUPTCY, § 421.

Right of surety to attack fraudulent conveyance by principal, see FRAUDULENT CONVEYANCES, § 218.

Validity of conveyance by principal to secure surety, as to creditors of principal, see FRAUDULENT CONVEYANCES, § 128.

§ 173. Right of recourse to principal in general.

[a] (Sup. 1857)

The agreement of one of the promisors on a note to pay the whole is no consideration for a release by a surety of the other.—*Cameron v. Warbritton*, 9 Ind. 351.

[b] (Sup. 1904)

Where several bonds were executed by different sureties at different times, conditioned for the faithful performance of a guardian's duties, and the guardian breached his bond, the sureties could not arbitrarily apportion among themselves the amounts to be paid by each irrespective of the breach charged or the date when it occurred, and look to the guardian or indemnifying securities given by him for the repayment of the sum, thus expended by them, but, in order to hold the guardian or securities, each surety must show his individual legal liability on his particular bond for the sum actually paid by him.—*Howe v. White*, 69 N. E. 684, 162 Ind. 74.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 497-499.

See, also, 32 Cyc. pp. 233, 239.

§ 175. Contracts and conveyances for indemnity.

Authority of administrator of surety to take, see EXECUTORS AND ADMINISTRATORS, § 91.

[a] (Sup. 1853)

Where, a judgment having been recovered upon a promissory note, a fraudulent conveyance made by a surety thereon was set aside at the suit of the creditor, and the land sold by decree of court to pay the judgment, it was *held* that the surety was entitled to the benefit of the payment, and could claim the indemnity secured to him by a mortgage from his principal, as against his grantee, party to that suit, with notice by record of the mortgage.—*State Bank v. Davis*, 4 Ind. 653.

[b] (Sup. 1879)

J. gave his note to H., with G. as surety. To induce G. to renew the note at its maturity, J. and A. gave him a note, secured by a mortgage made by A. *Held*, that there was a sufficient consideration for the mortgage.—*Mayer v. Grottendick*, 68 Ind. 1.

[c] (Sup. 1881)

Where plaintiffs were sureties for defendant's son to secure his conduct in his employment, and he embezzled certain money from his employer, plaintiffs were entitled to contract with defendant to reimburse them for the money paid by them as sureties for the son, if there was no contract to suppress his prosecution.—*Crowder v. Reed*, 80 Ind. 1.

[d] (Sup. 1890)

A surety who pays the debt has no equitable lien on land purchased with the money for which it was contracted, though induced to become liable by the oral promise of his principal that he should have a lien.—*Wood v. Wood*, 124 Ind. 545, 24 N. E. 751, 9 L. R. A. 173.

[e] (Sup. 1900)

A bill of sale was executed by a principal on a note to his surety to save him harmless, but delivery was not made. Subsequently the principal became insolvent, and executed another bill of sale of the same property to the surety, and delivered the property. *Held*, that under *Burns' Rev. St. 1894*, § 6638 (*Horner's Rev. St. 1897*, § 4913), requiring the recording of chattel mortgages or assignments of goods where the goods are not delivered, the second bill of sale, under which the surety claimed title, was not void for failure to record it.—*Owens v. Gascho*, 56 N. E. 224, 154 Ind. 225.

[f] (App. 1908)

A mortgage executed by a husband and wife to secure the husband's surety upon his note is an indemnity contract.—*Druckamiller v. Coy*, 42 Ind. App. 500, 85 N. E. 1028.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. PRINC. & S. §§ 505-509.
See, also, 32 Cyc. pp. 239, 240.

§ 176. Rights of surety before payment or satisfaction of debt or liability.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. PRINC. & S. §§ 510-523.
See, also, 32 Cyc. pp. 240-250.

§ 177. — In general.

[a] A surety must first pay the debt for which he is liable, or some portion thereof, before he can maintain an action on account of such suretyship against his principal.—(Sup. 1878) *Stearns v. Irwin*, 62 Ind. 558; (1878) *Covey v. Neff*, 63 Ind. 391; (1909) *Hunter v. First Nat. Bank*, 172 Ind. 62, 87 N. E. 734.

[b] (App. 1839)

The maker of a note can recover against a third person who had assumed it only after paying it himself, since, as between themselves, the maker, as against the person assuming it, is a surety.—*Tibbet v. Zurbuch*, 52 N. E. 815, 22 Ind. App. 354.

[c] (App. 1903)

While a surety on a note assumes liability to the payee from the time of executing the note, he has no cause of action against his principal until he has been compelled to pay the debt, or has sustained some loss by reason of his suretyship.—*Christian v. Highlands*, 69 N. E. 266, 32 Ind. App. 104.

FOR CASES FROM OTHER STATES.

See 32 Cyc. pp. 244, 245.

§ 179. — Enforcement of payment by principal or other exoneration.

[a] (Sup. 1873)

A surety may, on the maturity of the debt and its nonpayment by the principal, at once have his action to compel the principal to pay the debt and exempt him from liability therefor.—*Ritenour v. Mathews*, 42 Ind. 7.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. PRINC. & S. §§ 512-519.
See, also, 32 Cyc. pp. 249, 250; note, 117 Am. St. Rep. 35.

§ 180. — Recourse to indemnity from principal.

Remedies of creditor as to indemnity from principal to surety, see ante, § 147.

[a] (Sup. 1856)

An administrator executed a mortgage to his sureties, conditioned that if he should faithfully administer, etc., and save the mortgagees harmless as such sureties, the mortgage should be void. *Held*, that the mortgagees could have no right to foreclose until a failure on the part of the administrator to administer faithfully.—*Ellis v. Martin*, 7 Ind. 652.

[b] (Sup. 1861)

Plaintiff, having mortgaged lands, afterwards sold them to defendant in consideration of his agreement to pay the mortgage. Defendant mortgaged back to secure performance. *Held*, that defendant's mortgage was not merely a contract of indemnity, but could be sued on at once, on his failure to keep his agreement, although plaintiff had paid nothing on his own mortgage.—*Wells v. Merritt*, 17 Ind. 255.

[c] (Sup. 1880)

A mortgage was given to secure the mortgagee from loss by reason of his having become surety on a promissory note executed by one of the mortgagors; the mortgage stipulating that the mortgagors would "pay the sum of money above secured." Held that, on the failure of the maker to pay the note at maturity, a right of action accrued to the mortgagee without his having first paid the note.—*Gunel v. Cue*, 72 Ind. 34.

[d] (Sup. 1883)

If A. takes a mortgage from B. to secure his liability as B.'s surety upon a debt to be paid by a day certain, and B. fails to pay the debt when due, and judgment is taken against both of them, A. may foreclose the mortgage without first paying the debt himself; B. having no property, except that mortgaged, subject to execution.—*Bodkin v. Merit*, 86 Ind. 560.

[e] (Sup. 1884)

Where an indemnifying mortgage contains the express agreement of the mortgagor to pay the debt secured, the mortgagee may foreclose without having paid the debt.—*Malott v. Goff*, 96 Ind. 496; *Reynolds v. Shirk*, 98 Ind. 480.

[f] (Sup. 1896)

Where debtors stipulate in their mortgage securing their sureties to pay the debts, the mortgagees, if the obligations are not paid when due, without first having paid them may foreclose and recover the total probable loss.—*Goff v. Hedgecock*, 144 Ind. 415, 43 N. E. 644.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Princ. & S. §§ 520-523.

See, also, 32 Cyc. pp. 246-248.

§ 181. Rights of surety after payment or satisfaction by him of debt or liability.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 524-549.

See, also, 32 Cyc. pp. 250-261; note, 16 L. R. A. 115.

§ 182. — In general.

[a] (Sup. 1881)

In an action on notes, an instruction that, if the notes were given by defendant before plaintiffs had paid a debt of defendant's son for which they were sureties, then there was at that time no debt due from the son to plaintiffs and there was no consideration, was erroneous, since a principal is liable to his surety from the moment the latter pays a debt which it was the duty of the former to pay.—*Crowder v. Reed*, 80 Ind. 1.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. § 524.

See, also, 32 Cyc. pp. 250, 251.

§ 183. — Necessity of payment or satisfaction.

[a] (Sup. 1874)

A surety may without the request of his principal pay the debt of his principal before its maturity, and after, but not before, maturity, sue his principal for the money thus paid.—*White v. Miller*, 47 Ind. 385.

[b] (Sup. 1874)

When a surety pays a debt, he must be legally bound for it, to enable him to recover the amount paid of the principal, and the principal must also at the same time be under a legal obligation to pay the debt.—*Hollinsbee v. Ritchey*, 49 Ind. 261.

[c] (Sup. 1887)

A surety on a note has the right, without compulsion, to pay it when due, and to immediately institute proceedings necessary for his reimbursement, and a written agreement by a third party to "secure and protect" the surety "at any time payment must be made," constitutes an unconditional contract to secure the surety, whenever the note became payable, whether the payee demanded it then or not.—*Nixon v. Beard*, 111 Ind. 137, 12 N. E. 131.

[d] (Sup. 1890)

A surety who pays the debt of his principal may recover the same from the principal, though he paid the debt before maturity.—*Ross v. Menefee*, 125 Ind. 432, 25 N. E. 545.

[e] (App. 1898)

A surety who voluntarily pays a note on which his principal is not liable cannot recover of the principal the amount paid.—*Sponhaur v. Malloy*, 52 N. E. 245, 21 Ind. App. 287.

[f] (Sup. 1904)

Sureties on a guardian's bond may pay the amount for which they are liable, without waiting for judgment to be recovered against them, as soon as liability, which the principal fails to meet, is found to exist.—*Howe v. White*, 69 N. E. 684, 162 Ind. 74.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 539-544.

See, also, 32 Cyc. p. 250.

§ 184. — Sufficiency of payment or satisfaction.

[a] (Sup. 1846)

The discharge of a note by a surety, by giving his own note, not negotiable by the law merchant, and which he has not paid, does not authorize him to sue his principal for money paid.—*Pitzer v. Harmon*, 8 Blackf. 112, 44 Am. Dec. 738.

[b] (Sup. 1851)

A surety, who has discharged a judgment rendered against him for the debt of his principal by giving his note secured by mortgage, cannot sue his principal for the amount until he

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has paid his note and mortgage, or some part thereof.—*Bennett v. Buchanan*, 3 Ind. 47.

[c] (Sup. 1873)

Where a surety has paid the debt of his principal, or any part of it, he may immediately have an action to recover the amount from the principal.—*Ritenour v. Mathews*, 42 Ind. 7.

[d] (Sup. 1874)

A surety, who gives his own note, with security, in lieu of the note of his principal, cannot sue his principal for money paid until he has paid his own note so held, where it does not appear that the holder of the note of the principal agreed to receive the note of the surety in payment or discharge of the original note.—*White v. Miller*, 47 Ind. 385.

[e] (Sup. 1877)

A surety, who has executed to the creditor his individual note for the debt, not payable in bank, cannot maintain an action against the principal therefor until payment of the note.—*Romine v. Romine*, 59 Ind. 346.

[f] (Sup. 1897)

Sureties paid to their principal sums necessary to meet payments on the note they had guaranteed as they became due. The principal at ~~one~~ paid such sums to its creditor, and new notes were executed by it and the sureties to the creditor, and thereupon the principal gave his note to each surety for the amount then paid by him. *Held*, that such payments were not loans to the principal, but were payments for the benefit of the creditor.—*Bray v. First Ave. Coal Min. Co.*, 47 N. E. 1073, 148 Ind. 599.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Princ. & S. §§ 545-549.

See, also, 32 Cyc. pp. 256-260.

§ 185. — Indemnity or reimbursement.

[a] (Sup. 1869)

Where a transferee of a note executed by the maker and a surety signed the same as surety for both the previous signers, and a judgment was obtained against the two original signers, which such second surety paid, he was entitled to execution on the judgment against the first surety: the maker being insolvent.—*Bowser v. Rendell*, 31 Ind. 128.

[b] (Sup. 1874)

A surety on a note, who has given his own note, with security, in lieu of the note of his principal, and afterwards paid his own note, may recover of his principal the rate of interest mentioned in the original note to the time when he paid his own note.—*White v. Miller*, 47 Ind. 385.

[c] (Sup. 1883)

Where a surety's lands are sold on execution issued on a judgment against him and the principal, the latter cannot, by buying them in, obtain title thereto.—*Madgett v. Fleenor*, 90 Ind. 517.

[d] (Sup. 1888)

A surety, paying a note which stipulates for attorney's fees for collection, cannot recover of his principal such attorney's fees which he did not himself pay them; the measure of recovery being the amount actually paid with interest.—*Gieseke v. Johnson*, 115 Ind. 17 N. E. 573.

[e] (App. 1896)

Where a surety pays a note he is entitled to recover of the principal the rate of interest on the amount so paid, specified in the note.—*Rev. St. 1881, § 1219 (Burns' Rev. St. 1896, § 1233)*.—*Goodwin v. Davis*, 15 Ind. App. 43 N. E. 881.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 525-529.

See, also, 32 Cyc. pp. 250-255.

§ 185½. Rights of surety against principal of deceased principal.

Effect of death of principal on liability of surety, see ante, § 91.

Necessity for presentation of claim, see ESTATES AND ADMINISTRATORS, § 224.

Remedies of creditor against estate of deceased principal, see ante, § 146.

Rights of surety against estate of deceased principal, see post, § 194.

[a] (Sup. 1879)

Money paid for an intestate after his death, cease on a contract of suretyship, entered into on his behalf during his life, cannot be recovered against a debt due to his estate by his surety.—*Convery v. Langdon*, 66 Ind. 311.

§ 187. Conclusiveness as against principal of adjudication against surety.

Conclusiveness, as against surety, of adjudication in action against principal, see ante, § 145.

Conclusiveness, as between cosureties, of former adjudication, see post, § 197.

[a] (Sup. 1821)

A judgment against the principal cannot be set aside on the bail. They cannot in an action against them plead any error in the judgment.—*v. Brackenridge*, 1 Blackf. 112.

[b] (Sup. 1880)

Where the validity of an award is in question on appeal in a controversy arising out of the award which was made a rule of court on which judgment was rendered, the decision is conclusive as to the validity of the award against the principal and sureties on the bond given to secure payment of the award.—*Marsh v. Curtis*, 71 Ind. 377.

[c] (Sup. 1890)

Where judgment has been rendered against a principal and surety on a note, a plea of fancy, in a subsequent action by the surety against the principal, to recover money

in satisfaction of the judgment, is bad, since the original judgment is conclusive as to the defendant's liability on the note.—*Dewitt v. Boring*, 123 Ind. 4, 23 N. E. 1085.

[d] (App. 1903)

Plaintiff, as surety for the defendant corporation, executed a supersedeas bond to stay execution on a judgment rendered against the corporation, and from which it had taken an appeal; it and the other defendant executing to plaintiff an indemnity bond. Afterwards the judgment against the corporation was affirmed. Plaintiff thereafter repeatedly urged it to settle the judgment and was told that suit would be brought on the supersedeas bond, and reminded that, as defendant corporation was a nonresident, the judgment would be against plaintiff alone. The corporation, in one letter, answered: "In case they should start suit there, kindly keep us posted, and we will take such steps as seem wise." Later plaintiff wrote that suit had been filed the day before. The defendant answered, noting what was said, and replying that "it will be a long time before we will pay on the basis of his demands. * * * If they want to sue, we have no way to prevent it but we will defend to the 'long limit.'" etc. Judgment went against plaintiff by default some three months thereafter. Held to show sufficient notice to the defendant corporation of the suit on the supersedeas bond, and the judgment therein was conclusive against it and its surety on the bond of indemnity.—*South Bend Pulley Co. v. Fidelity & Deposit Co. of Maryland*, 32 Ind. App. 255, 67 N. E. 269, 68 N. E. 688.

Defendant could not claim to have been prejudiced by the failure of plaintiff to defend the action on the supersedeas bond: defendant having had opportunity to itself defend the action, and there being no showing that the judgment rendered therein was in any way one not proper to be rendered in the absence of any defense.—*Id.*

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. PRINC. & S. §§ 554-556.

See, also, 32 Cyc. pp. 270, 271.

§ 188. Enforcement against principal of execution against surety.

[a] (Sup. 1861)

Where a judgment is joint against two defendants, both are regarded as principals, unless by proof aliunde one is shown to be a surety; and, where one of them pays the whole amount of the judgment, he is not therefore entitled to an execution, for use against his codefendant, unless he himself has been judicially determined to be only a surety.—*Laval v. Rowley*, 17 Ind. 36.

[b] (Sup. 1883)

Under 2 Rev. St. 1876, § 676, providing that "when any defendant surety in a judgment * * * has been, or shall be, compelled

to pay any judgment, or any part thereof, * * * by reason of such suretyship, * * * the judgment shall not be discharged by such payment, but shall remain in force for the use of the surety," where a judgment was rendered against several defendants, some of whom were sureties, one claiming as assignee of the sureties must show that it was paid by them, as such payment will not be inferred from the assignment.—*Johnson v. Amana Lodge*, No. 82, I. O. O. F., 92 Ind. 150.

[c] (Sup. 1890)

A judgment against principal and surety which does not disclose that relation cannot be enforced by the surety as a lien on land of the principal, until the fact of suretyship has been adjudicated as provided by Rev. St. 1881, § 1212 et seq.; and, having paid the judgment, he cannot have it declared a lien which will antedate a mortgage given by the principal after the rendition of the judgment, and before its payment.—*Smith v. Harbin*, 124 Ind. 434, 24 N. E. 1051.

[d] (App. 1891)

Where a joint judgment has been rendered against two defendants, and it appears from the pleadings that one defendant was merely surety for the other for the debt sued on, but there is no finding or decision on the question of suretyship, the surety, after paying the judgment in full, may by proceedings to revive it have the question of suretyship adjudicated, and obtain execution against his codefendant for his benefit.—*McClure v. Lucas*, 2 Ind. App. 32, 28 N. E. 153.

[e] (Sup. 1899)

Burns' Rev. St. 1894, § 1226 (*Horner's* Rev. St. 1897, § 1212), provides that a joint defendant who is a surety may cause the question of suretyship to be determined either before or after the trial and at a subsequent term. Section 1228 (1214) provides that, when any defendant surety pays a judgment, it shall remain in force for the surety's use. Held, that where the judgment paid by a defendant surety does not show the suretyship, and no proceeding has been brought to determine such question, it cannot be enforced by him by execution.—*Zimmerman v. Gaumer*, 53 N. E. 829, 152 Ind. 552.

When a judgment is paid by one of the judgment defendants, and the question of suretyship has not been judicially determined, even if he has taken an assignment of the judgment to himself, he is not entitled to an execution thereon until he has, in a proper action, had it determined either that he is surety on the contract upon which such judgment was rendered, or that he stood in that relation to the judgment when he paid the judgment, or that, as between himself and the other judgment defendants, he has paid more than his share of the judgment, in which case he is entitled to an execution on the original judgment against such

other judgment defendants for the amount he has paid more than his share.—Id.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & S. §§ 557, 558.
See, also, 32 Cyc. pp. 262, 272; note, 16 L. R. A. 115.

§ 189. Summary remedies against principal.

Replevin bail, see EXECUTION, § 177.

[a] (Sup. 1853)

A notice given by a surety to his principal, reciting the recovery of a judgment by the creditor against the principal and the surety in a court named, the payment of the judgment by the surety, and notice to the principal to show cause why proceedings should not be taken against him, is a substantial compliance with Rev. St. 1843, c. 51.—Bragg v. Cason, 4 Ind. 632.

[b] (Sup. 1882)

Under Code, § 674, providing that, in an action against a principal and surety, "the surety may, upon a written complaint to the court, cause the question of suretyship to be tried and determined on the issue made by the parties at the trial of the cause, or at any time before or after the trial, or at a subsequent term," a surety who has not had the fact of suretyship judicially determined, but who has been obliged to pay the judgment, may file a complaint to have the fact of suretyship judicially determined, to enable him to recover the amount paid from his principal.—Scherer v. Schatz, 83 Ind. 543.

A complaint under Code, § 674, providing that a surety may, upon a written complaint to the court, cause the question of suretyship to be tried and determined upon the issue made by the parties at the trial of the cause, or at any time before or after the trial, or at a subsequent term, need not set forth a copy of the judgment.—Id.

[c] (Sup. 1882)

Rev. St. 1876, § 676, providing that, when any surety has been compelled to pay any judgment by reasons of his suretyship, the judgment shall not be discharged, but shall remain in force for the use of the surety, and may be prosecuted to execution for his use, applies as well to those not declared sureties by proceedings in the original suit as to those so declared.—Stout v. Duncan, 87 Ind. 383.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & S. §§ 559-567.
See, also, 32 Cyc. pp. 262-264.

§ 190. Actions against principal.

Actions between co-sureties, see post, § 200.
Conformity of judgment to verdict and findings, see JUDGMENT, § 256.
Exhibits annexed to pleading, see PLEADING, § 307.

Right of executor of surety to sue, see EXECUTORS AND ADMINISTRATORS, § 86.

Right of surety to reimbursement after payment, in general, see ante, §§ 181-185.

Time for amendment to pleading, see PLEADING, § 245.

[a] (Sup. 1852)

To sustain a set-off for money paid in replevin bail, proof of the entry of the replevin bail must be made.—Walker v. Clymer, 3 Ind. 525.

[b] (Sup. 1857)

In an action by a surety against the principals in a note for money paid to them, the note is admissible in evidence.—Cameron v. Warbritton, 9 Ind. 351.

In an action by a surety against the principals in a promissory note, for money paid on their use, the note not being declared of question of variance can arise from the admission of the note in evidence.—Id.

[c] (Sup. 1861)

In a suit to recover money alleged to have been paid on an execution against plaintiff's surety for defendant, an instruction that plaintiff could not recover unless the money was paid on an execution against defendant on which plaintiff was surety for him is pertinent to the issue.—Jones v. Becker, 16 Ind. 452.

In a suit to recover money alleged to have been paid on an execution against plaintiff's surety for defendant, an instruction that the essence of the action was the payment of money by plaintiff on defendant's debt and for his benefit, and that it was immaterial whether the money was paid on an execution against defendant on which plaintiff was surety, was inadmissible to the evidence.—Id.

[d] (Sup. 1864)

Code §§ 674-677, giving a remedy to sureties against their principals, do not take away the remedy existing at common law.—Henderson v. Glidewell, 23 Ind. 219.

[e] (Sup. 1873)

A right of action against the maker of a note accrues to the surety thereon as soon as he pays the note.—Ritenour v. Mathews, 17 Ind. 7.

[f] (Sup. 1876)

Where a county treasurer fails to deliver to his successor public moneys, the county auditor, on request of the county board, should sue as relator on the treasurer's official bond, and may compromise such suit; and, on payment of the agreed sum by the sureties, they need not sue the auditor, in an action by them against said treasurer to recover such amount, that payment was made to the treasurer's successor in office.—Bel v. McCafferty, 53 Ind. 75.

[g] (Sup. 1877)

Where the surety in a delivery bond, in an action thereon for a breach of its condition, has been compelled to discharge the original

judgment, he may recover from the principal as for money paid to his use.—*Collins v. Paris*, 57 Ind. 151.

[h] (Sup. 1881)

A surety on a note, after having paid the same, cannot maintain an action against a third party, who has promised the maker to pay a note, without a previous demand.—*Rodenbarger v. Bramblett*, 78 Ind. 213.

[i] (Sup. 1888)

An action by a surety paying a note executed by the principal and himself, brought against the principal, is not on the note, but on the implied promise of indemnity.—*Gieseke v. Johnson*, 17 N. E. 573, 115 Ind. 308.

[j] (Sup. 1890)

A complaint which alleges that a third party recovered a certain judgment against plaintiff and defendant upon a note on which defendant was the principal maker, and the plaintiff was his surety; that the question of suretyship was not tried in such action; that plaintiff was forced to pay said judgment; and that the same is due and unpaid; and which prays that the question of suretyship be determined, and plaintiff have execution on said judgment,—states a good cause of action.—*Dewitt v. Boring*, 123 Ind. 4, 23 N. E. 1085.

[k] (Sup. 1890)

Where one of the joint makers of a note, who is in fact a surety, but which fact is not shown on the face of the instrument, pays the full amount thereof, his action against the principal for reimbursement must be brought within six years after the cause of action accrued, as provided by Rev. St. 1881, § 292, providing that all actions on accounts and contracts not in writing shall be brought within six years.—*Kreider v. Isenbice*, 123 Ind. 10, 23 N. E. 786.

[l] (App. 1894)

A complaint which alleges that plaintiff paid a judgment against himself as surety, and a deceased person as principal, and which seeks a recovery from the latter's estate of the money so paid, is an action on the implied promise growing out of the payment of the judgment by the surety, and is not an action on the judgment; and hence the complaint is not defective for its failure to allege that the court rendering the judgment was within the state, and that it had jurisdiction of the parties or the subject-matter.—*Hopewell v. Kerr*, 9 Ind. App. 11, 36 N. E. 48.

[m] (App. 1894)

In an action for money received from the sale of lots deeded to defendant by plaintiff to secure him as surety, there was not a fatal variance because the complaint stated that the deed to defendant was after he became surety, while the evidence showed that the deed was to secure him on subsequently becoming a surety.—*Warder v. Nolan*, 10 Ind. App. 334, 37 N. E. 821.

[n] (App. 1896)

A complaint alleged that defendant, as principal, and plaintiff, as surety, on a day named, executed to a certain person their note, due 12 months after date, for a specified sum, with interest and attorneys' fees; that defendant defaulted in the payment, and that plaintiff, as such surety, was compelled to pay the same. *Held*, that such complaint was not insufficient on the ground that it was based on a note "which the complaint shows, as does the exhibits and indorsements thereon, had been and was fully paid off and satisfied."—*Goodwin v. Davis*, 15 Ind. App. 120, 43 N. E. 881.

[o] (App. 1897)

A complaint alleging that plaintiff's ward, as surety for defendant's decedent and another on certain notes, was compelled to pay such notes, and that she had demanded of decedent, in his lifetime, payment of the sum so paid by her, which had been refused, and asking judgment therefor against his estate, presented a valid cause of action.—*Windle v. Williams*, 47 N. E. 680, 18 Ind. App. 158.

[p] (App. 1898)

Plaintiff, as surety, executed a note with defendant's husband, and, after the husband's death, plaintiff and defendant executed a note in renewal of the husband's note, which renewal note plaintiff paid. In an action to recover the amount paid on the renewal note, on the ground that plaintiff executed it as surety for defendant, *held*, that allegations in defendant's answer showing that her husband died insolvent were not superfluous, since they tended to show that, on the death of the husband, plaintiff became primarily liable on this note, and that defendant was therefore but a surety on the renewal note.—*Sponhaur v. Malloy*, 52 N. E. 245, 21 Ind. App. 287.

In an action to recover of defendant the amount paid on a note executed by plaintiff and defendant, and claimed by plaintiff to have been signed as surety for defendant, an answer alleging that defendant, after her husband had died insolvent, executed, at the request of plaintiff, the note in suit in renewal of a note of her husband on which the plaintiff was surety, is not defective on the ground that it omits to allege that fraud was practiced on defendant in inducing her to sign, and does not show that defendant did not know the legal consequences of her acts, since the defense is not founded on fraud, but want of consideration.—*Id.*

In an action to recover the amount paid by plaintiff on a note claimed by plaintiff to have been executed by defendant as principal and plaintiff as surety, the jury, in answer to special interrogatories, found that plaintiff was surety on a note given by defendant's husband; that, after the husband had died insolvent, defendant signed the note in suit with plaintiff in renewal of the husband's note, for the purpose of enabling plaintiff to gain more time to pay it; that, when the renewal note was presented

to the bank which held the husband's note, the bank, for convenience in keeping its accounts, credited her with the amount of the renewal note, and had her draw a check, which was applied to the payment of the husband's note. *Held*, that there was no conflict between the facts found and a general verdict for defendant.—*Id.*

[q] (App. 1901)

A co-surety who pays the debt of the principal may foreclose the mortgage executed to secure the sureties without joining the other surety; the latter, having no interest in the matter, not being a necessary party.—*Morgan v. Street*, 62 N. E. 99, 28 Ind. App. 131.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & S. §§ 568-577.

See, also, 32 Cyc. pp. 261-275; note, 13 Am. Dec. 122.

§ 190½. Return or recovery of deposit or security to indemnify surety.

[a] (Sup. 1832)

A principal debtor assigned a land certificate to his surety to indemnify him, reserving the right to redeem it, in case the surety paid the debt, on repaying the amount. The surety paid the debt, and assigned the certificate to an assignee, with notice of the principal's equity. *Held*, that the principal was entitled to redeem the certificate in the hands of the assignee by the payment of the amount of the debt.—*Holcroft v. Hunter*, 3 Blackf. 147.

FOR CASES FROM OTHER STATES,

SEE 4 CENT. DIG. ASSIGN. § 186.

See, also, 32 Cyc. pp. 243, 244.

(C) AS TO CO-SURETY.

As to heirs of co-surety, see DESCENT AND DISTRIBUTION, §§ 141, 143.

Release of co-surety as discharge, see ante, § 116.

Subrogation to rights of co-surety, see SUBROGATION, § 29.

§ 191. Relation between co-sureties.

Obligations constituting parties co-sureties, see post, § 192.

[a] (Sup. 1875)

In an action by B., who had paid a note made by A., B., and C., the court found from the evidence that, while B. and C. were both sureties for A., yet B. was also surety for C. Judgment was entered in favor of B. against C. for the full amount paid. *Held*, that the judgment should be affirmed.—*Nesbit v. Knowlton*, 51 Ind. 352.

[b] (Sup. 1886)

Where the relation of parties liable on a promissory note is shown to be that of sureties, the presumption is that they are co-sureties, and that all are equally bound to contribute to

the payment of the debt in case of the default of the principal.—*Houck v. Graham*, 106 Ind. 195, 6 N. E. 594, 55 Am. Rep. 727.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PRINC. & S. §§ 578-590.

See, also, 32 Cyc. pp. 276, 277.

§ 192. Obligations constituting parties co-sureties.

Relation between co-sureties, see ante, § 191.

[a] (Sup. 1864)

A promissory note made by A. and B. with C. as surety, was given to D. This D. indorsed to E. The principals, to a further time for payment, proposed to give a new note, with C. and F. as sureties, the holder of the old note declined to do so unless D. also became a party to it, and upon he signed it, "D., as Security." It was held that C., D., and F. were co-sureties.—*Worth v. Bowes*, 5 Ind. 276.

[b] (Sup. 1869)

Where the transferee of a note signed by A. as maker to induce a bank to discount the same, with the understanding with the bank that he should be liable as a surety for the other makers, he was not a co-surety with one of such makers, who signed the note merely as a surety.—*Bowser v. Rendell*, 3 Ind. 128.

[c] (Sup. 1869)

A surety is not discharged from liability to his co-surety for contribution by the fact that the former signed at the request of the latter.—*Bagott v. Mullen*, 32 Ind. 351, 35 Am. Rep. 351.

[d] (Sup. 1877)

A surety on a promissory note cannot demand contribution from an indorser, but only from a co-surety.—*Nurre v. Chittenden*, 50 Ind. 462.

A surety on a promissory note may maintain an action for contribution against an apparent indorser of the note, by affirming the fact that the defendant's real engagement was that of surety.—*Id.*

[e] (Sup. 1880)

Where B. signed a joint note at A. request as his surety, and left the note with A. to procure C.'s signature, and A. induced C. to sign by telling him that A. and B. were to renew a note to D., C. supposing at the time that A. and B. were principals, as they had nothing on its face to show the contrary, and B., as A. was insolvent, satisfied the demand recovered on the note, *held*, that C. was not to be made liable to contribute.—*Bobb v. Shryer*, 70 Ind. 513.

[f] (Sup. 1882)

A guardian, after the death of one of his wards on his bond, gave another bond, with co-sureties, conditioned like the first, though

larger penalty. *Held*, that the sureties on both bonds were co-sureties, and liable for contribution.—*Stevens v. Tucker*, 87 Ind. 109.

[a] (Sup. 1886)

If sureties undertake for the same principal and for the same debt, they are co-sureties, although they may have entered into the contract at different times, or have signed different instruments.—*Houck v. Graham*, 106 Ind. 195, 6 N. E. 594, 55 Am. Rep. 727.

[b] (Sup. 1887)

An accommodation indorser is not liable for contribution as a co-surety to one who signed the note as maker, unless there is proof that the indorser signed as a co-surety.—*Knopf v. Morel*, 111 Ind. 570, 13 N. E. 51.

[l] (Sup. 1890)

In the case of successive sureties who become bound by separate obligations for the payment of the secured debt where the first surety suffers loss, or his liability is increased or prolonged so as to render him liable to suffer loss, by the intervention of the second, the latter assumes all the risk arising from his voluntary interposition.—*Opp v. Ward*, 24 N. E. 974, 125 Ind. 241, 21 Am. St. Rep. 220.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. PRINC. & S. §§ 578-590;
22 CENT. DIG. EX. & AD. § 2368.

See, also, 32 Cyc. p. 277.

§ 193. Recourse to indemnity to co-surety from principal.

[a] (Sup. 1855)

Sureties are not only entitled to contribution from each other for moneys paid in discharge of their joint liabilities for the principal, but they are also entitled, as a general rule, to the benefit of all securities which have been taken by any one of them to indemnify him against such liabilities.—*Comegys v. State Bank of Indiana*, 6 Ind. 357.

Where one of several accommodation parties to a bill has procured a mortgage from the principal to indemnify them, he is entitled on the foreclosure thereof to be allowed a reasonable sum for his trouble and expense in procuring it.—*Id.*

[b] (Sup. 1859)

Several persons became sureties for A., who, as indemnity, executed a chattel mortgage to them jointly. The sureties paid in nearly equal proportions, and, A. having abandoned the property, a portion of the sureties, joining the others as defendants, brought suit to sell the property to reimburse themselves. These defendants were defaulted. An order was made for sale and distribution. *Held*, that in the distribution all the mortgagees were entitled to share pro rata.—*Whitehead v. Pitcher*, 13 Ind. 141.

[c] (Sup. 1870)

Where a note with surety was given on an agreement that the payee should deliver up to

the maker another note for the same amount previously executed by the same maker with another surety to the same payee, the new note being given to indemnify the surety on the old note, the new note became an additional security in the hands of the payee, so that the surety for whose indemnity it was given, having paid the debt and received the new note from the payee, was entitled to recover thereon against the new surety.—*Heeg v. Weigand*, 33 Ind. 289.

[d] (Sup. 1876)

Where a surety receives from the principal debtor an indemnifying chattel mortgage, a co-surety has no right of action against the mortgagee for failing to cause the mortgage to be recorded, if it was taken upon an agreement that it should not be placed on record.—*White v. Carlton*, 52 Ind. 371.

[e] (Sup. 1882)

Security placed by the principal in the hands of a surety for his indemnification inures to the benefit of his co-sureties.—*Whiteman v. Harriman*, 85 Ind. 49.

[f] (Sup. 1886)

When one of two or more co-sureties obtains a security for a debt, he does so for the benefit of all the sureties, and is chargeable to his co-sureties with the amount thereof in case the security depreciates or is lost.—*Sanders v. Weelburg*, 7 N. E. 573, 107 Ind. 266.

Where a surety pays a judgment against his principal, and, upon execution sale procured by himself, purchases the principal's property at a comparatively nominal price, his co-surety may show, in bar of an action for contribution, that such property, at its fair value, was more than sufficient to satisfy such judgment.—*Id.*

[g] (Sup. 1887)

The fact that an indorser received money from the principal to apply on a note is not of itself sufficient to entitle one signing as maker to contribution, as the indorser, being liable to the creditor, has a right to protect himself by taking money from the debtor without changing his position, though he is bound to apply the money so received to a reduction of the debt.—*Knopf v. Morel*, 13 N. E. 51, 111 Ind. 570.

[h] (Sup. 1889)

In an action by a surety to declare a judgment paid by his co-surety satisfied by a conveyance of land from the principal to the co-surety, there being no evidence that the property was worth more than the consideration mentioned in the deed, it is error to charge that, to the extent that the value of the property exceeded prior liens thereon, which had also been paid by such co-surety, the conveyance was a satisfaction of the judgment, the purchase being made in good faith, and for a price deemed reasonable, though the property was in fact of greater value.—*Keiser v. Beam*, 117 Ind. 31, 19 N. E. 534.

[i] (App. 1896)

Where land was conveyed to one surety by absolute deed upon a parol agreement for the security and protection of himself and his co-sureties, and the latter paid the debt of their principal, and the grantee sold the land and refused to account, a bill by the co-sureties to compel the grantee to account for their share of the indemnity was not demurrable as seeking to establish and enforce a parol trust in lands, which is void under Rev. St. 1894, § 3391 (Rev. St. 1881, § 2969).—*Kelso v. Kelso*, 16 Ind. App. 615, 44 N. E. 1013, 45 N. E. 1065.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. PRINC. & S. §§ 591-604.

See, also, 32 Cyc. pp. 291, 292; notes, 15 Am. Dec. 526, 43 Am. Dec. 563.

§ 194. Right to contribution in general.

Contribution among indorsers of bills or notes, see BILLS AND NOTES, § 260.

[a] (Sup. 1839)

A surety who voluntarily pays the debt after its maturity may sue his co-surety at law for contribution without showing that the principal is unable to pay it.—*Judah v. Mieux*, 5 Blackf. 171.

[b] A surety who pays the debt is not bound to prove the insolvency of the principal, in order to maintain an action against his co-surety for contribution.—(Sup. 1875) *Rankin v. Collins*, 50 Ind. 158; (1881) *Croy v. Clark*, 74 Ind. 597.

[c] (Sup. 1875)

Pending a suit against C. for the collection of a debt, A. and B., who were joined in the suit as sureties for C., agreed that judgment might be taken, and that, as A. had paid his share of the obligation before judgment, he should not be proceeded against until the property of both C. and B. was exhausted. *Held*, that the agreement was enforceable by A. against B. after the judgment.—*Mires v. Alley*, 51 Ind. 507.

[d] (Sup. 1876)

Where one of two co-sureties satisfies the debt by giving his own negotiable note, he may sue the co-surety for contribution, without waiting until he has paid the note.—*White v. Carlton*, 52 Ind. 371.

[e] (Sup. 1879)

A judgment upon a note against the maker and two sureties provided that the property of the maker and one surety should be first exhausted. *Held*, that the latter surety, who had been compelled to satisfy the judgment, as the maker was insolvent, might maintain an action to compel his co-surety to contribute.—*Githens v. Kimmer*, 68 Ind. 362.

[f] (Sup. 1881)

One who, at the request of the principal debtors, becomes replevin bail upon a judgment against them and the estate of a deceased sure-

ty, cannot enforce payment against such estate, where he is obliged to pay the judgment, but can claim reimbursement only from the principal debtors.—*Taylor v. Russell*, 75 Ind. 386.

[g] (Sup. 1882)

A surety who is compelled to pay the debt of his principal may maintain an action against his co-sureties for contribution.—*Whiteman v. Harriman*, 85 Ind. 49.

[h] (Sup. 1882)

Surviving sureties can maintain an action for contribution against the heirs of a deceased surety, when the liability to pay because of the insolvency of the principal could not be ascertained until after the final settlement of the estate of the deceased surety.—*Stevens v. Tucker*, 87 Ind. 109.

[i] (Sup. 1883)

The word "surety," after the name of one who signs a note after others have signed it, is not sufficient to rebut his implied promise to contribute as a co-surety with prior sureties on the note, in the absence of anything to show for whom he was surety.—*Baldwin v. Fleming*, 90 Ind. 177.

[j] (Sup. 1883)

In a suit against a principal and two sureties, one of the sureties procured in his favor a judgment directing that the property of his co-defendants be first exhausted. *Held*, that the other surety was not barred from enforcing contribution.—*Leaman v. Sample*, 91 Ind. 236.

[k] (Sup. 1886)

A surety who voluntarily pays a note may compel contribution from persons who had signed the note as sureties after he signed it, although he might have successfully resisted payment of the note upon the ground that it had been altered without his consent by the addition of another name as maker.—*Houck v. Graham*, 106 Ind. 195, 6 N. E. 594, 55 Am. Rep. 727.

[l] (Sup. 1890)

In an action for contribution against a co-surety on a note paid by plaintiff, it is a good defense that defendant indorsed the note after plaintiff, and that he did so with the understanding between himself and the makers and payee that he should be liable thereon only after those who had indorsed before him should be exhausted.—*Houck v. Graham*, 123 Ind. 277, 24 N. E. 113.

To show such understanding on the part of defendant, it is competent to prove conversations had between defendant and the makers, and officers of the payee bank, at the time of defendant's indorsement, though plaintiff was not present at such conversations, since defendant had a right to fix the extent of his liability without regard to the sureties who had indorsed before him.—*Id.*

[m] (App. 1891)

As soon as a debt becomes due any one of several co-sureties may, without suit or com-

pulsion, pay the debt and recover contribution from the co-sureties. It is not a voluntary payment.—*Reiter v. Cumbach*, 27 N. E. 443, 1 Ind. App. 41.

In a suit against a co-surety for contribution by several sureties on a note, who have taken it up by giving another therefor, an answer alleging that the maker of the note was a corporation; that the plaintiffs were directors, and in control thereof; that they combined together to deprive defendant of his right under Rev. St. 1881, §§ 1210, 1211, to relieve himself from liability by notifying the payee to bring suit thereon, and to prevent him from having the note reduced to judgment, by voluntarily and without compulsion renewing the note with another, so that they might apply the assets of the company to other purposes; that the company had at that time assets sufficient to pay the note, but that they had been otherwise applied—fails to state any defense, and a demurrer thereto was properly sustained.—*Id.*

Rev. St. 1881, §§ 1210, 1211, providing that any person bound as surety upon any contract in writing, where the right of action has accrued, may require by notice the creditor or obligor forthwith to sue on the contract, and that, if he fails to do so within a reasonable time, the surety shall be released, has no bearing upon the rights of co-sureties as against each other; and, where several sureties have taken up a note when due, the fact that another surety has notified them to bring suit thereon against the principal will not protect him in an action for contribution by his co-sureties.—*Id.*

[n] (Sup. 1894)

Under Rev. St. 1894, §§ 2465–2469 (Rev. St. 1881, §§ 2310–2314), relating to the filing and enforcement of claims against an estate, construed in connection with Rev. St. 1894, §§ 2484, 2491, 2505 (Rev. St. 1881, §§ 2331, 2338, 2350), relating to liens upon the realty of a decedent, the lien created in favor of cosureties with deceased, by their payment of a judgment rendered against themselves and deceased, as defendants, where the sums paid by them severally are entered as credits upon the docket of said judgment, continues against the realty of deceased until discharged by decree or payment, though such lien is not filed as a claim against the estate.—*Beach v. Bell*, 139 Ind. 167, 38 N. E. 819.

[o] (App. 1906)

Sureties on a corporation's note, who were secured by a mortgage, paid the balance due, whereupon the corporation executed new notes to each surety for the amount paid by him, which were also each signed by the sureties on the original note, except the surety to whom the note was given. On the insolvency of the corporation, the three sureties, each having paid an equal amount of the remaining indebtedness, contracted to pursue their claim for indemnity against the mortgaged property in receivership proceedings, but after an adverse judgment plaintiff re-

fused to join in an appeal which was prosecuted by the other two, and therefore failed to participate in the proceeds of the corporation's property which they recovered and which would have been sufficient to have paid his claim. *Held*, that plaintiff was not thereafter entitled to maintain an action for contribution against the others.—*Pollard v. Pittman*, 77 N. E. 293, 37 Ind. App. 475.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 605–623.
See, also, 32 Cyc. pp. 276–279.

§ 196. Measure of contribution.

[a] (Sup. 1856)

Where land was mortgaged to several sureties, to indemnify them, on which there was a previous mortgage to the state, payable in state bonds at par, and one of said sureties discharged the mortgage to the state, in said bonds, which were purchasable in market at a great discount, *held* that, in accounting with his co-sureties, he was entitled to be allowed the amount actually paid by him for the bonds, with interest, and no more.—*Comegys v. State Bank of Indiana*, 6 Ind. 357.

In a contribution among co-sureties, one is not entitled to be allowed by the rest for fees expended in defending himself in a suit brought against him as such surety.—*Id.*

[b] (Sup. 1865)

Where, in an action by a surety against a cosurety for contribution, it appears that the debt was paid by the transfer of land, the price at which the land was taken by the creditor will ordinarily constitute the proper basis for a calculation of the amount due from a cosurety; but, in any event, the value of the land at the time, without reference to its cost, not exceeding the amount of the debt, should be allowed.—*Jones v. Bradford*, 25 Ind. 305.

[c] (App. 1894)

Where a surety pays a judgment against him and two cosureties, one of whom is insolvent, he may recover in equity one-half the amount so paid, from the solvent cosurety.—*Newton v. Pence*, 38 N. E. 484, 10 Ind. App. 672.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 627–631.
See, also, 32 Cyc. pp. 285–290.

§ 197. Conclusiveness as between co-sureties of adjudication against principal or surety.

Conclusiveness as against principal of adjudication against surety, see ante, § 187.

Conclusiveness, as against surety, of adjudication in action against principal, see ante, § 145.

[a] (Sup. 1887)

The relation of suretyship must be judicially determined, and to secure such a determination it is essential that the parties should be be-

fore the court on that issue. The question cannot, as a general rule, be determined upon the complaint of the creditor, against all the debtors to enforce his debt, so as to make the judgment binding in an action between the sureties for contribution.—*Knopf v. Morel*, 111 Ind. 570, 13 N. E. 51.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 632, 632½.

See, also, 32 Cyc. pp. 301, 302.

§ 198. Enforcement against co-surety of judgment or execution against surety.

[a] (Sup. 1887)

Parties against whom judgment in an action on a note is rendered are deemed primarily liable, unless the judgment determines the question of suretyship, but, after judgment, one who occupies the relation of surety may have that fact established and an order for an execution in his favor.—*Knopf v. Morel*, 13 N. E. 51, 111 Ind. 570.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 633-635.

See, also, 32 Cyc. p. 301.

§ 199. Summary remedies between co-sureties.

Proceedings by surety to have execution on judgment for creditor directed first against property of co-surety, see ante, § 164.

[a] (Sup. 1821)

If a surety proceed by notice and motion under the statute (St. 1817, p. 116; St. 1823, p. 378) for contribution against his co-surety, the record must show the insolvency of the principal.—*Batson v. Lasselle*, 1 Blackf. 119.

[b] (Sup. 1843)

Under Rev. St. 1838, p. 233, § 8, authorizing, in the action wherein a surety's liability is adjudged, a recovery by notice and motion by the surety against his co-surety for contribution, and section 11, providing for 10 days' notice of such motion where such co-surety is a resident of the state, the notice of such motion may be served on the co-surety in any county in the state.—*Cating v. Stewart*, 6 Blackf. 372.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 636-640.

See, also, 32 Cyc. p. 302.

§ 200. Actions between co-sureties.

Conformity of judgment to verdict and findings, see JUDGMENT, § 256.

Dismissal of suit as affecting proceedings to determine suretyship, see DISMISSAL AND NON-SUIT, § 42.

Grounds for demurrer to pleading, see PLEADING, § 193.

Jurisdiction of justices of the peace in proceedings by notice and motion, see JUSTICES OF THE PEACE, § 49.

Right to trial by jury, see JURY, § 14.

Stipulations in action, see STIPULATIONS,

[a] (Sup. 1873)

In an action to enforce contribution co-surety, the complaint alleged that D., for purpose of negotiating a loan from the bank, executed a note, signed by himself as principal plaintiff as surety; that D. presented the note to defendants, who severally indorsed it as accommodation indorsers thereon and as co-surety with plaintiff; that neither plaintiff nor defendants had any actual interest in the note or loan sought to be secured thereby; that D. counted and sold the note to a bank, and upon its nonpayment at maturity the plaintiff brought suit and recovered judgment against the parties to the note; that execution had been issued and levied on plaintiff's property, whereby he was compelled to pay the judgment; that the principal maker was insolvent. It was held that these allegations were sufficient to show the character of the transaction and the liability of the parties to each other, so that an issue of fact could be formed between them as to whether they were co-sureties, as alleged.—*Harsanyi v. Armstrong*, 43 Ind. 126.

[b] (Sup. 1875)

In a complaint by a surety, who has paid the debt, against his co-surety, for contribution it is not necessary to allege the insolvency of the principal.—*Rankin v. Collins*, 50 Ind. 158.

[c] (Sup. 1877)

In an action by a surety on a note for contribution against one who is apparently an indorser, the burden of proof is on the plaintiff to show that the defendant's liability is in fact that of a surety.—*Nurre v. Chittenden*, 56 Ind. 109.

[d] (Sup. 1880)

A surety could not maintain an action for contribution against the heirs of a deceased co-surety until final settlement of the latter's estate.—*Stevens v. Tucker*, 73 Ind. 73.

[e] (Sup. 1882)

Where sureties on a guardian's bond were compelled to pay a judgment in an action against the guardian by co-sureties, where the judgment was or was not the foundation of the action, it was not necessary to make a transcript thereof a part of the complaint, and a transcript and all reference to it in the complaint are mere surplusage, and the refusal to strike it out is not an available error.—*Stevens v. Tucker*, 87 Ind. 109.

[f] (Sup. 1883)

Sureties are presumed, prima facie, to be co-sureties, and liable to contribution as between one another; but such presumption may be overcome by parol proof.—*Baldwin v. Fleming*, 73 Ind. 177.

[g] (Sup. 1887)

To secure a judicial determination of the question of suretyship, proper steps must be taken to invest the court with jurisdiction, jurisdiction is not conferred by a complaint.

an instrument not on its face fully disclosing the relation of the parties.—*Knopf v. Morel*, 13 N. E. 51, 111 Ind. 570.

The question of suretyship so far as it affects the rights of the debtors between themselves, is an independent one, not, as a general rule, determinable on plaintiff's complaint, though the facts may be so fully disclosed by the complaint that jurisdiction is conferred to adjudicate on all questions without a cross-complaint.—*Id.*

In an action for contribution by an alleged surety on a note, wherein an indorser thereon was alleged to be plaintiff's co-surety, a complaint alleging that they were co-sureties, neither of whom received any part of the consideration, is sufficient, and need not state a contract between the parties creating the relation of suretyship.—*Id.*

[h] (*Sup.* 1889)

In an action by one of two sureties against the other, to declare a judgment against them and their principal, which had been paid by and assigned to defendant, satisfied by a conveyance by the principal to the defendant of land on which the judgment was a lien, where the deed itself shows that it was for a pecuniary consideration, and this is corroborated by the uncontradicted evidence of the defendant and his grantor, who state that the conveyance was in consideration of the assumption and payment of incumbrances on the land prior to the judgment lien, a verdict for plaintiff is unsupported by the evidence.—*Keiser v. Beam*, 117 Ind. 31, 19 N. E. 534.

In an action by a surety against his co-surety to declare a judgment paid by the co-surety satisfied by a conveyance of land from the principal to the co-surety, an instruction that, to the extent that the value of the property exceeded prior liens thereon which had been paid by such co-surety, the conveyance was a satisfaction of the judgment, is erroneous in charging that the judgment is satisfied to the extent of the whole of the excess, instead of half, as, between themselves, the sureties are each liable for one-half of the judgment.—*Id.*

[i] (*Sup.* 1890)

One of several sureties to a note, in signing it as surety, wrote the name of a firm, of which he was a member, instead of his individual name. *Held*, that he need not make his co-partner in the firm a party defendant in his action for contribution after payment of the note, as the amount to be contributed by the co-surety was the same, whether one partner or the firm had been liable; and the firm, not having paid any part of the note, had no interest in the action.—*Voss v. Lewis*, 126 Ind. 155, 25 N. E. 892.

An action by a surety against a co-surety for contribution may be maintained without joining as defendant another co-surety, who is not within the jurisdiction of the court; the liability of co-sureties to each other being several, not joint.—*Id.*

One of several sureties on a note, upon which judgment had been recovered against all the parties thereto, paid the judgment, and sued a co-surety for contribution, alleging in his complaint certain facts affecting the liability of the parties to each other. *Held*, that a demurrer on the ground that the complaint sought to impeach the judgment in the action on the note could not be sustained, as it did not appear on the face of the complaint that the relation in which the defendants in that action stood to each other was settled therein.—*Id.*

[j] (*App.* 1897)

A complaint alleging that plaintiff's ward, as surety with defendant's decedent and another on certain notes, was compelled to pay such notes, and that the maker and the other surety were insolvent, and asking that the estate of decedent contribute one-half of the amount so paid, set up a valid cause of action.—*Windle v. Williams*, 41 N. E. 680, 18 Ind. App. 158.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Princ. & S. §§ 641-650.
See, also, 32 Cyc. pp. 294-302; note, 61 Am. Dec. 504.

PRINTER.

See—

State printer, compensation. STATES, § 60.
Duties. STATES, § 73.
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Appropriations for. COUNTIES, § 162.
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PRISONS.

Scope-Note.

[INCLUDES public buildings for confinement of persons held in judicial custody, in either civil or criminal proceedings, and either to secure their production as parties or witnesses in further proceedings, or as punishment by imprisonment, with or without hard labor, whether such buildings be designated as prisons or as jails, penitentiaries, houses of correction, or otherwise; establishment, maintenance, regulation, and management of such places; rights, powers, duties and liabilities of wardens, jailers, keepers, and other officers; and custody, care, and maintenance of prisoners in general.

[EXCLUDES reformatory institutions (see *Reformatories*); arrest and discharge from arrest, jail limits, prison bounds, poor debtors, etc. (see *Arrest; Bail; Execution*); sentences to imprisonment as punishment (see *Criminal Law*; and titles of particular offenses); regulation of convicts and their labor (see *Convicts*); and jail breaking, prison breach, etc. (see *Escape*). For complete list of matters excluded, see cross-references, post.]

Analysis.

- § 1. Establishment and maintenance.
- § 5. Officers.
- § 6. — In general.
- § 7. — Appointment, qualification, and tenure.
- § 8. — Compensation for services.
- § 10. — Liabilities in general.
- § 12. Management in general.
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- § 15. Reduction of term of imprisonment and discharge for good conduct.
- § 16. Escape of prisoners.
- § 18. Compensation for keeping and maintenance of prisoners, jail fees, and incidental expenses.

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CONVICTS.	Place of imprisonment of convict. CRIMINAL LAW, § 1218.
ESCAPE.	Prison limits—
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PARDON.	Of convict to recover for services rendered. WORK AND LABOR, § 4.
	Subjects and titles of acts relating to state prisons. STATUTES, § 119.
	Taxation for county jail. TAXATION, § 44.

§ 1. Establishment and maintenance.
Special and local laws, see STATUTES, § 75.

[a] (Sup. 1832)

The penal department of the Indiana reformatory institution is a state prison.—Walton v. State, 88 Ind. 9.

[b] (App. 1905)

Under the metropolitan police law (Acts 1897, p. 93, c. 59, as amended by Acts 1901, p. 24, c. 18), requiring the council in certain cities to provide, at the expense of the city, necessary accommodations for police station houses, and to provide food for any persons detained in any such station houses when such food is

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deemed necessary by the officer in charge, it is mandatory, and not merely optional, with a city, to provide a station house, and to provide food for any person detained therein when deemed necessary by the officer in charge.—*City of Kokomo v. Harness*, 74 N. E. 270, 35 Ind. App. 384.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Prisons, §§ 1, 2.

See, also, 32 Cyc. pp. 315-317.

§ 5. Officers.

Acceptance of office of mayor by director of state prison as vacating latter office, see OFFICERS, § 55.

Individual interest of officer in contract for boarding of prisoners, see MUNICIPAL CORPORATIONS, § 231.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Prisons, §§ 5-14.

See, also, 32 Cyc. pp. 318-326.

§ 6. — In general.

[a] (Sup. 1879)

Act March 5, 1859 (1 Gav. & H. St. p. 470) § 13, providing for the erection of a new prison north of the national road, continues in force the laws relating to prison officers.—*State ex rel. Manning v. Mayne*, 68 Ind. 285.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Prisons, § 5.

See, also, 32 Cyc. pp. 318, 319.

§ 7. — Appointment, qualification, and tenure.

[a] (Sup. 1865)

The warden of the Northern State Prison cannot be removed from office by the board of control, where no cause is given or assigned.—*Wood v. Selby*, 24 Ind. 183.

[b] (Sup. 1870)

A person elected director of a state prison, after the expiration of the term of his predecessor, is entitled to the office for four years from the date of his election, and until his successor is qualified.—*Baker v. Kirk*, 33 Ind. 517.

In the statute (1 Gav. & H. St. p. 464) providing for the election of directors of the state prison for terms therein fixed, and that, "as the term of office of any director shall expire, his successor shall be elected in like manner for the term of four years," the words "term of office" refer to the time of incumbency fixed by the act, and the provision applies only to the election of a successor to a director who has served out the full time, and not to the filling of a vacancy occurring before its expiration.—*Id.*

[c] (Sup. 1871)

The mayor of a city is a judicial officer, and the office is a lucrative one, and for both these reasons he is ineligible to the office of

prison director during his occupancy of office of mayor.—*Howard v. Shoemaker*, 35 Ind. 111.

[d] (Sup. 1879)

Directors of the state prison are elected by joint vote of the general assembly, and their office for a term of two years, and their successors are qualified.—*Manson v. ex rel. Lee*, 66 Ind. 78.

The provisions of Acts 1859, p. 470, do not refer to the election and terms of office of the directors of the State Prison. Those elected in 1877 were entitled to hold their offices until March 11, 1879.—*Id.*

[e] (Sup. 1879)

Under 1 Rev. St. 1876, p. 644, and Act March 15, § 2, the board of directors of the Northern Indiana State Prison have no power to remove the warden, because he refuses to move a deputy warden and certain officers and guards, appointed by him with the advice and consent of said directors.—*State ex rel. Manning v. Mayne*, 68 Ind. 285.

Under Act 1857, § 4, the warden is elected for four years, and cannot be sooner removed except for cause.—*Id.*

The deputy warden and guards are appointed by the board of directors, and hold during pleasure; and it is not cause for removal that the warden that he fails to comply with the order of the board of directors requiring him to remove those officers.—*Id.*

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Prisons, §§ 6-9.

See, also, 32 Cyc. pp. 318-320.

§ 8. — Compensation for services.

Compensation of sheriff or constable for custody and care of prisoners otherwise than in jail or prison keeper, see SHERIFFS AND CONSTABLES, § 39.

Fees of sheriff or constables for committing a prisoner, see SHERIFFS AND CONSTABLES, § 38.

Fees of sheriff or constable for transporting a prisoner, see SHERIFFS AND CONSTABLES, § 40.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Prisons, § 10.

See, also, 32 Cyc. pp. 321-323.

§ 10. — Liabilities in general.

[a] (Sup. 1885)

A sheriff is not chargeable with rent for the portion of the jail building occupied by him as a residence.—*Board of Com'rs of Marion County v. Harman*, 101 Ind. 551.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Prisons, § 12.

See, also, 32 Cyc. pp. 324, 325.

§ 12. Management in general.

[a] (Sup. 1859)

The lessee of our state prison is liable in assumpsit for work performed by one not legally imprisoned.—*Patterson v. Crawford*, 12 Ind. 241; *Berry v. Bolan*, 13 Ind. 259.

[b] (Sup. 1889)

Under Rev. St. 1881, §§ 6140, 6141, providing that the warden shall attend to the purchasing of all articles for the penitentiary, and that all accounts for claims against the penitentiary shall be drawn on the order of the warden, countersigned by at least one director, it is the imperative duty of the warden to draw a warrant for fuel sold and delivered to him for the use of the institution, actual fraud or mistake not being alleged; and he cannot excuse himself from doing so by simply alleging that the directors rejected the account because of fraud or mistake.—*Patton v. State ex rel. McCann*, 117 Ind. 585, 19 N. E. 303.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Prisons, §§ 15-19.

See, also, 32 Cyc. pp. 326-328.

§ 13. Custody and control of prisoners.

[a] (Sup. 1856)

The city of Lafayette has the right to use the county jail of Tippecanoe county.—*Board of Com'rs of Tippecanoe County v. City of Lafayette*, 7 Ind. 614.

[b] (Sup. 1864)

One sentenced to imprisonment in the county jail cannot be removed to the jail of another county.—*Huber v. Robinson*, 23 Ind. 137.

[c] (Sup. 1873)

The right of a city marshal to arrest and imprison in the county jail carries with it the right, on the part of the jailer, to receive and detain the prisoner.—*Boaz v. Tate*, 43 Ind. 60.

If a city marshal or police officer, having authority to make an arrest on view and to commit the prisoner to jail until such time as he can be brought before the proper authority, make an arrest and take the prisoner to a jail with the declaration that he has been arrested for an offense committed on view, that declaration stands in the place of a mittimus in other cases, and the jailer should receive the prisoner without regard to the question of his guilt or innocence.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Prisons, §§ 20-24.

See, also, 32 Cyc. pp. 329-334.

§ 15. Reduction of term of imprisonment and discharge for good conduct.

[a] (Sup. 1890)

A prisoner is entitled to his final release at the expiration of the time for which he was sentenced, less any credit for good time earned.

though for a part of the time he was out on parole.—*Woodward v. Murdock*, 124 Ind. 430, 24 N. E. 1047.

Under Acts 1883 (Elliott's Supp. § 2026), allowing credit of good time to a penitentiary convict "who shall have no infractions of the rules or regulations of the prisons or laws of the state recorded against him, and who performs in a faithful manner the duties assigned him," a prisoner cannot earn good time when out on parole.—*Id.*

[b] (Sup. 1909)

Acts 1883, p. 191, c. 131 (Burns' Ann. St. 1908, § 9886), provides for diminution of time from the sentence of any convict for good behavior. Acts 1897, p. 219, c. 143, provides for indeterminate sentences, whereby the commissioners of parole may authorize the release, on parole, of any convict confined on an indeterminate sentence whose minimum term has expired. *Held* that, as to a convict convicted for an offense committed after the taking effect of the indeterminate statute, under which law he was sentenced, the act of 1883 was repealed by implication.—*McCoy v. Reid*, 172 Ind. 182, 87 N. E. 1086.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Prisons, § 26.

See, also, 32 Cyc. pp. 331-334.

§ 16. Escape of prisoners.

Liability of officer for escape before commitment, see *SHERIFFS AND CONSTABLES*, § 104. Liability of sheriffs and constables in charge of persons in custody but not in prison, see *SHERIFFS AND CONSTABLES*, § 104.

Recovery of compensation of sheriff for recapturing prisoner, see post, § 18.

Scire facias against sheriff or constable for escape of prisoner, see *SCIRE FACIAS*, § 1.

[a] (Sup. 1841)

In debt against a sheriff for an escape on execution, the plea was that the execution defendant, being in custody, etc., made oath that he had no property, etc.; that, before the oath was administered, the plaintiff not being resident in the county, the defendant posted up in the clerk's office a written notice of the time and place of taking the oath; and that the execution defendant was thereupon discharged. *Held*, that the plea was insufficient for not stating that the plaintiff had no agent or attorney in the county, and for not showing that the notice contained the name of the officer before whom the oath was taken.—*Wells v. Rawlings*, 6 Blackf. 28.

[b] (Sup. 1870)

Where judgment has been recovered against the defendant in a prosecution for bastardy, and he is confined in jail for failing to pay the judgment, if the sheriff permits him to escape, the sheriff becomes liable to the plaintiff for the full amount of the judgment. The insolvency of the defendant makes no difference.—*State ex rel. Billman v. Hamilton*, 33 Ind. 502.

[c] (Sup. 1887)

In a suit on the official bond of a sheriff for voluntarily permitting the escape of a prisoner who had been committed by a justice to await the action of the circuit court, on a charge of bastardy made by the relatrix, where it appears that the prisoner was insolvent, and that he was rearrested by the sheriff after the action was brought on the bond, but before the trial thereof, the relatrix cannot recover in such action the whole amount of the judgment obtained against the prisoner in the circuit court, but only her attorney's fees and costs which accrued in the action on the bond prior to the rearrest.—State ex rel. Minor v. Newcomer, 109 Ind. 243, 8 N. E. 920.

[d] (App. 1895)

Where the judgment for the nonpayment of which a defendant in bastardy proceedings was committed was payable in installments, and also liable to reduction in case of the death of the child, it is error to render judgment against the sheriff voluntarily permitting such defendant to escape for the instant payment of the entire sum, as the sheriff is only required to answer for the original judgment.—Hoagland v. State ex rel. Schrieber, 22 Ind. App. 204, 40 N. E. 931, 59 N. E. 336, 72 Am. St. Rep. 298.

A sheriff permitting a defendant committed to jail for nonpayment of a judgment in bastardy proceedings to voluntarily escape is not to be committed to jail for failure to pay the judgment rendered against him in favor of the judgment plaintiff for permitting the escape.—Id.

Where a sheriff permits a defendant, committed to his custody for nonpayment of a final judgment in bastardy proceedings, to go at large, unattended, on his promise to return, there is a voluntary escape, rendering the sheriff liable for the payment of the judgment.—Id.

After the sheriff has permitted defendant in execution to go at large, he cannot, by again receiving him into custody without plaintiff's consent, relieve himself from liability for the payment of the judgment.—Id.

The inability of the defendant to pay the judgment in no way affects the sheriff's liability.—Id.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Prisons, §§ 27-46; 21 CENT. DIG. Execution, § 1280; 43 CENT. DIG. Sheriffs, § 139.

See, also, 32 Cyc. pp. 335-347.

§ 18. Compensation for keeping and maintenance of prisoners, jail fees, and incidental expenses.

Compensation of sheriff or constable for keeping and care of prisoners otherwise than as jail or prison keeper, see SHERIFFS AND CONSTABLES, § 39.

Mandamus to compel warden to issue warrant for supplies furnished, see MANDAMUS, § 102.

[a] (Sup. 1856)

Where a person is convicted for violation of the city charter, and confined in the county jail, used by the city for the confinement of prisoners, the city is liable for the expense of receiving, boarding, and discharging such prisoner.—Board of Com'rs of Tippecanoe County v. Chissom, 7 Ind. 688.

A city is liable for the expense of receiving, boarding, and discharging a prisoner confined in the county jail.—Id.

[b] (Sup. 1860)

A city cannot be charged by the county with two days' board of a prisoner, who is placed in the jail a short time before midnight and discharged a short time after that hour.—City of Indianapolis v. Parker, 31 Ind. 230.

[c] (Sup. 1877)

The respective counties are bound to furnish fuel to keep the prisoners comfortable in jail, and if they do not do so, and the sheriff furnishes it, the county commissioners must reimburse him, though it be not expressly provided for by statute.—Board of Com'rs of Marion County v. Reissner, 58 Ind. 260.

[d] (Sup. 1879)

A sheriff may recover from the county the price paid by him for mops, brooms, coal, and candles, which were necessary for use in the county jail.—Board of Com'rs of Marion County v. Reissner, 66 Ind. 568.

[e] (Sup. 1881)

Under a statute providing that the sheriffs shall charge "for boarding each prisoner lawfully in his charge, per day, 60 cents," they can recover only 20 cents for one-third of a day's board.—Pressley v. Board of Com'rs of Marion County, 80 Ind. 45.

[f] (Sup. 1884)

If a sheriff suffers prisoners to escape from jail, he cannot, as of right, charge the county with expenses incurred in recapturing them.—Board of Com'rs of Martin County v. Pipher, 98 Ind. 124.

[g] A sheriff can claim no compensation for keeping the jail and taking care of the prisoners, in addition to the amount allowed by law for boarding them; this being only a part of his general duty.—(Sup. 1885) Bynum v. Board of Com'rs of Greene County, 100 Ind. 90; Board of Com'rs of Benton County v. Harman, 101 Ind. 551; Alexander v. Board of Com'rs of Monroe County, Id. 599; Sexson v. Board of Com'rs of Greene County, Id. 600.

[h] (Sup. 1885)

As the circuit court has no authority to commit insane persons as such to the county jail, the presumption is that they were committed as prisoners, and the sheriff is entitled to no extra compensation for their care.—Board of Com'rs of Carroll County v. Gresham, 101 Ind. 53.

[i] (Sup. 1892)

Under Rev. St. § 6115, which provides, "There shall be established and kept in their county, by authority of the board of county commissioners, and at the expense of the county, a prison for the safe-keeping of prisoners lawfully committed," where a steam-heating apparatus is placed in a jail, which for its operation requires a skilled engineer, such engineer, though employed by the sheriff, should be paid by the county outside of the sheriff's compensation.—Board of Com'rs of Vigo County v. Weeks, 130 Ind. 162, 29 N. E. 776.

[j] (App. 1892)

Under section 4903 Rev. St. 1881 though there be a regularly elected secretary of a county board of health, still, he being at such a distance from the jail that he could not be reached in time to save the life of a prisoner suddenly taken sick, the jailer may employ a physician at the expense of the county.—Lamar v. Board of Com'rs of Pike County, 4 Ind. App. 191, 30 N. E. 912.

[k] Rev. St. 1881, §§ 5873, 6115, 6118, provide that there shall be established and kept in every county, by authority of the board of county commissioners, and at the expense of the county, a prison for the safe-keeping of prisoners; that it is the duty of the sheriff to keep the jail; and that he may charge "for every person committed to jail, 20 cents; for discharging each prisoner from jail 20 cents." *Held*, that the sheriff is entitled to be paid such fees from the county treasury, though not so specified in the statute, since in many instances they could not be charged against the persons committed, and it has never been the practice to so tax them.—(App. 1892) Hawthorn v. Board of Com'rs of Randolph County, 5 Ind. App. 280, 30 N. E. 16, 31 N. E. 1124; (1893) McKee v. Board of Com'rs of Tippecanoe County, 6 Ind. App. 700, 33 N. E. 251.

[l] (App. 1899)

There is no statute in Indiana under which a county can be held liable to a city located in such county for the board of prisoners incarcerated in a city jail, nor liable to the city for the expense of transporting such prisoners from the city to the county jail.—City of Alexandria v. Board of Com'rs of Madison County, 55 N. E. 31, 23 Ind. App. 110.

The obligation of allowing prisoners to be temporarily confined in a city jail until they can be transported to the county jail is an obligation imposed upon cities by Burns' Rev. St. 1894, § 3541, subd. 44, and the city must bear the expense of caring for such prisoners until they are delivered to the sheriff of the county.—Id.

[m] (App. 1905)

Since the metropolitan police law (Acts 1897, p. 93, c. 59, as amended by Acts 1901, p. 24, c. 18), requiring cities to provide food for persons detained in a station house when the same is deemed necessary by the officer in charge, creates an implied contract on the part of the city to reimburse a sheriff who boards prisoners committed by the city to the county jail to await trial, and makes it the legal duty of the city to pay for such board, no demand is necessary on the part of the sheriff as a condition precedent to suing the city for the value of the board furnished by him.—City of Kokomo v. Harness, 74 N. E. 270, 35 Ind. App. 384.

Under the metropolitan police law (Acts 1897, p. 93, c. 59, as amended by Acts 1901, p. 24, c. 18), requiring the council in certain cities to provide at the expense of the city necessary accommodations for police station houses, and to provide food for persons detained therein when the food was deemed necessary by the officer in charge, where a city operating thereunder had no station house itself, and committed all prisoners arrested for the violation of city ordinances and penal statutes of the state to the county jail and the care and custody of the sheriff, who furnished them with board and other accommodations during the period intervening between their incarceration and trial or discharge upon abandonment of the prosecution, it was liable to such sheriff for the board so furnished.—Id.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Prisons, §§ 47-56; 13

CENT. DIG. Counties, § 205.

See, also, 32 Cyc. pp. 347-357.

PRIVATE CROSSINGS.

Liability of railroad company for killing stock going on track at private crossings, see RAILROADS, § 413.

PRIVATE HOSPITALS.

See HOSPITALS.

PRIVATE INTERNATIONAL LAW.

Gambling contracts and transactions, see GAMING, § 2.

PRIVATE NUISANCE.

See NUISANCE, §§ 1-57.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

PRIVATE ROADS.

Scope-Note.

[INCLUDES roads established by public authority for accommodation of private persons, but open for free passage to the public; nature and scope of power to establish and maintain such roads in general; constitutional and statutory provisions relating to the establishment of such roads, construction, repair, and improvement thereof, and alteration, vacation, and abandonment thereof; local assessments therefor; title to and rights in land occupied, and removal of and liabilities for obstructions, encroachments, etc.; and of such roads, and liabilities for injuries from defects, obstructions, etc., therein.

[EXCLUDES roads established for public benefit (see *Highways*); and rights of way over lands of others (see *Easements*). For complete list of matters excluded, see cross-references, post.]

Analysis.

- § 1. Nature and essentials.
- § 2. Establishment.
- § 3. Alteration.
- § 7. Obstructions and encroachments.
- § 9. — Civil liability.
- § 12. Injuries from defects or obstructions.

Cross-References.

See—

Application of statute of frauds to grants of private rights of way. FRAUDS, STATUTE OF, § 60.

Defects in private crossing as affecting liability for killing stock. RAILROADS, § 413.

Power to establish as included in power of eminent domain. EMINENT DOMAIN, § 19.

Private railroad crossings. RAILROADS, § 300.

Rights of way. EASEMENTS.

Statutory and municipal regulations as to removal of trains across private roads. RAILROADS, § 247.

§ 1. Nature and essentials.

[a] (Sup. 1870)

A neighborhood road is a public highway and not a private road.—Kissinger v. Hanselman, 33 Ind. 80.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Priv. Roads, §§ 1, 2; 25 CENT. DIG. High. § 225.

See, also, 32 Cyc. pp. 367, 368.

§ 2. Establishment.

[a] (Sup. 1857)

Where defendant in an action of trespass relied solely on an order by a county board authorizing the opening of a private way without defining its width, the plaintiff was entitled to judgment on the pleadings.—Barnard v. Harworth, 9 Ind. 103.

Under St. 1839 (Acts 1839, p. 105, § 30), prescribing the minimum width of private roads and requiring the width to be stated in the order, an order of a board of commissioners establishing a private road whose width is not defined is void.—Id.

Commissioners have no power to establish a private road, unless in the mode prescribed by the statute.—Id.

[b] (Sup. 1873)

That notice has been given of a petition for the opening of a private road is a jurisdictional fact that must be proved, before the board of commissioners can act on the petition, if the record shows that due notice was not given, that is conclusive.—Wild v. Deig, 4 Ind. 455, 13 Am. Rep. 390.

One whose name is mentioned in a petition for opening a private road cannot, in an action to recover damages and to restrain the tearing down fences and opening the road through his land, attack the validity of the proceedings to establish it on the ground that the names of all the owners of lands over which the road was to pass were not mentioned in the petition.—Id.

[c] (Sup. 1874)

If a way is petitioned for and damages assessed as for a private way, and the order of the board of commissioners made for a private road, the road is a private road.

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way, the way cannot be sustained on the ground that it is a public highway.—*Stewart v. Hartman*, 46 Ind. 331.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Priv. Roads, §§ 3-21;
25 CENT. DIG. High. §§ 26, 136, 295.

See, also, 30 Cyc. p. 1380, 32 Cyc. pp. 368-383; note, 91 Am. Dec. 585.

§ 3. Alteration.

[a] (*Sup.* 1867)

Under St. March 9, 1861 (Sess. Acts 1861, p. 131), amending section 49 of the "act to provide for the opening, vacating, and change of highways," approved June 17, 1852, which provides for the laying out, changing, or vacating a private road upon the presentation of a proper petition, the application for the change of a private way may be made by the person over whose land the road is located.—*Ryker v. McElroy*, 28 Ind. 179.

The road first located not having been opened, the statute requiring the person asking for a change of location to put the new way in repair did not apply.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Priv. Roads, § 22.

See, also, 32 Cyc. pp. 385, 386.

§ 7. Obstructions and encroachments.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Priv. Roads, §§ 32-37.

See, also, 32 Cyc. pp. 384, 385.

§ 9. — Civil Liability.

[a] (*Sup.* 1883)

In an action for an obstruction of a private way, the gist is the deprivation of the right of way.—*Powell v. Bunker*, 91 Ind. 64.

[b] A complaint in an action for damages for the obstruction of a private way, which alleges that for more than 30 years plaintiff has been in the continuous and uninterrupted enjoyment of the way, is not insufficient for failing to allege where and how the user began.—(*App.* 1904) *Cincinnati, R. & M. R. Co. v. Miller*, 36 Ind. App. 26, 72 N. E. 827, 73 N. E. 1001; (1906) *Same v. Troutman*, 38 Ind. App. 700, 75 N. E. 277; *Same v. Patterson*, 39 Ind. App. 702, 77 N. E. 1199.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Priv. Roads, §§ 33-36.

See, also, 32 Cyc. pp. 384, 385.

§ 12. Injuries from defects or obstructions.

[a] (*Sup.* 1906)

The owner of a private way is liable to any person injured in using it by invitation if the injury is caused by the owner's failure to use ordinary care.—*Baltimore & O. S. R. Co. v. Slaughter*, 167 Ind. 330, 79 N. E. 186, 7 L. R. A. (N. S.) 597, 119 Am. St. Rep. 503.

The word "invitation," as used in referring to a license to enter the premises of another, imports not only an actual bidding, but also an allurement or enticement; and an invitation to use a private way may be implied from the manner of constructing the same and the continued use thereof by others.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Priv. Roads, § 39; 25

CENT. DIG. High. § 479.

See, also, 32 Cyc. p. 385.

PRIVATES.

Designation of parts exposed in indictment for public indecency, see **OBSCENITY**, § 11.

PRIVATE SALE.

Land for delinquent city taxes, see **MUNICIPAL CORPORATIONS**, § 980.

PRIVATE STATUTES.

See—

Judicial notice. **EVIDENCE**, § 30.

Pleading. **STATUTES**, § 280.

PRIVATE WAYS.

Injury from discharge of surface water from adjoining land, see **WATERS AND WATER COURSES**, § 119.

PRIVILEGE.

See—

Carrying weapons. **WEAPONS**, § 11.

Defendants as to venue. **VENUE**, §§ 20-22.

Exclusive franchises or privileges—

FERRIES, § 16.

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To use streets—

MUNICIPAL CORPORATIONS, § 686.

STREET RAILROADS, § 29.

FRANCHISES.

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Service of process. **PROCESS**, §§ 117-119.

Grant and regulation by special or local law. **STATUTES**, § 79.

Grants by municipal corporations. **MUNICIPAL CORPORATIONS**, § 309.

Right to use street for purpose other than highway. **MUNICIPAL CORPORATIONS**, §§ 679-690.

Grants of special privileges or immunities, constitutional prohibition. **CONSTITUTIONAL LAW**, § 205.

License tax on. **LICENSES**, §§ 1-42.

LIENS.

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Self-executing provisions of Constitution conferring privileges. CONSTITUTIONAL LAW, § 33.
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PRIVILEGED COMMUNICATIONS.

See—
 Disclosure by witness. WITNESSES, §§ 187-223.
 LIBEL AND SLANDER, §§ 35-46, 93, 109.

PRIVITY.

See—
 Admissions by privies. EVIDENCE, §§ 229-236.

Between parties as affecting liability for money received. MONEY RECEIVED, § 5
 Collateral attack on judgment by privies. JUDGMENT, § 506.
 CONTRACTS, §§ 185-187.
 Title between claimants. INTERPLEADER, §§ 126-127.
 With parties to usury. USURY, §§ 126-127.
 With party to action, conclusiveness of judgment. JUDGMENT, §§ 665-712.
 Effect of judgment as bar. JUDGMENT, §§ 624-632.

PRIZE.

Contest for prizes as violation of gaming laws. see GAMING, § 7.

PRIZE FIGHTING.

Scope-Note.

[INCLUDES fighting without weapons by agreement, for a prize, reward, state championship, advising or aiding therein, and sending, publishing, accepting, etc., a challenge so to fight; nature and extent of criminal responsibility therefor, and grounds for defense; and prosecution and punishment of such acts as public offenses.]

[EXCLUDES assault and battery involved in prize fighting (see *Assault and Battery*) and killing another in a prize fight (see *Homicide*).]

§ 3. Indictment or information.

[a] (Sup. 1902)

An allegation in an indictment that defendant, "in pursuance of a previous arrangement and appointment * * * so to do, did * * * unlawfully engage as a principal with said William Dickerson in a fight between each other with their fists for and upon a certain (unknown) wager," sufficiently charges the crime of prize fighting under a statute that "whoever engages as principal in any prize fight * * * shall be fined," etc.—*State v. Patton*, 64 N. E. 850, 159 Ind. 248.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Prize F. § 2.

See, also, 32 Cyc. pp. 399, 400.

PROBABLE CAUSE.

See—
 Arrest. FALSE IMPRISONMENT, § 13.
 Prosecution. MALICIOUS PROSECUTION, §§ 15-24, 47, 49, 53, 59.

PROBATE.

See WILLS, §§ 204-433.

PROBATE COURTS.

See COURTS, §§ 198-202.

PROCEDURE.

See cross-reference head of PRACTICE, and references thereunder.

PROCEEDS.

See—
 Collection by bank, rights and liabilities. BANKS AND BANKING, §§ 164-167.
 Exempt property. EXEMPTIONS, §§ 53-58.
 FINES, § 20.
 Goods sold by factor. FACTORS, § 42.
 Right of seller to recover. SALES, § 330.
 Insurance, rights of parties. INSURANCE, §§ 580-594.
 Married woman's separate property. HUSBAND AND WIFE, § 124.
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 Parol trust in proceeds of sale of real property. TRUSTS, §§ 17, 18.
 Penalties for violations of liquor laws, distribution. INTOXICATING LIQUORS, § 195.
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Sale, etc.—(Cont'd).

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 Of pledge. **PLEDGES**, § 59.
 Of real property as assets of estate of deceased vendor. **EXECUTORS AND ADMINISTRATORS**, § 40.
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 On foreclosure of mortgage—
CHATTEL MORTGAGES, § 265.
MORTGAGES, §§ 376, 563-568.

Sale, etc.—(Cont'd).

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 Under judgment, order, or decree of court in general. **JUDICIAL SALES**, § 62.
 School lands granted to state by United States. **PUBLIC LANDS**, § 57.
 Taxes collected—
MUNICIPAL CORPORATIONS, § 984.
TOWNS, § 60.
 Or assessments for highways. **HIGHWAYS**, §§ 130, 140.
 Tax sale, disposition thereof. **TAXATION**, §§ 681-683.
 Trust property in hands of trustee, rights of cestui que trust. **TRUSTS**, § 354.

PROCESS.

Scope-Note.

[INCLUDES writs, mandates, precepts, or notices, issued by a court or judge, clerk, attorney, or other officer, in or incident to proceedings in civil actions in general, and more particularly such instruments by which civil actions are begun, and defendants therein are required to appear and answer or are notified of the bringing of the action; issuance, requisites, and validity of such instruments in general; service thereof, personal or substituted, or by publication, privilege from service, and return; defects in process or return, and objections therefor, and how objections to process or service may be taken; amendment of process or return; quashing or setting aside process or return; and abuse of process in general.]

[EXCLUDES process against and service of process on particular classes of persons (see *Infants*; *Insane Persons*; *Corporations*; and other specific heads); waiver of objections to process or to service thereof, by appearing (see *Appearance*); process for arrest or other special remedies in actions (see *Arrest*; *Attachment*; and other specific heads), or for attendance of jurors (see *Jury*) or witnesses (see *Witnesses*), final process (see *Execution*), and writs and other process for review of proceedings in actions (see *Appeal and Error*; *Certiorari*; *Review*; *Audita Querela*); writs in civil proceedings other than actions (see *Habeas Corpus*; *Mandamus*; *Prohibition*; *Quo Warranto*; *Scire Facias*; and titles of other special proceedings); process in suits in equity (see *Equity*) or admiralty (see *Admiralty*), in probate proceedings (see *Wills*; *Executors and Administrators*), and in proceedings under insolvent acts (see *Insolvency*) and bankrupt acts (see *Bankruptcy*); process in criminal prosecutions (see *Criminal Law*; *Arrest*; *Extradition*; *Searches and Seizures*); process peculiar to particular courts (see *Courts*), or to proceedings before justices of the peace (see *Justices of the Peace*); wrongful use of particular writs or other mandates of courts (see *Attachment*; *Execution*; *Injunction*; and other specific heads); and liability for malicious prosecution (see *Malicious Prosecution*). For complete list of matters excluded, see cross-references, post.]

*Analysis.***I. Nature, Issuance, Requisites, and Validity.**

1. Nature of process in general.
3. Necessity and use in judicial proceedings.
4. — In general.
15. Persons against whom process may issue.
16. — In general.
19. Counties to which process may issue.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

I. Nature, Issuance, Requisites, and Validity—Continued.

- § 21. Time for issuance.
- § 22. Præcipe or direction to issue.
- § 29. Direction to particular officer or county.
- § 31. Direction to or designation of parties.
- § 33. Requirement as to appearance and pleading.
- § 34. Statement as to nature, form, or cause of action.
- § 36. Directions for return.
- § 37. Teste.
- § 38. Date.
- § 41. Seal.
- § 42. Indorsements.
- § 43. Delivery to and receipt by officer.
- § 45. Alias and pluries writs.

II. Service.**(A) PERSONAL SERVICE IN GENERAL.**

- § 48. Nature and necessity in general.
- § 50. Authority or capacity to serve.
- § 51. — In general.
- § 55. — Party or person interested.
- § 56. Persons to be served.
- § 59. — Codefendants.
- § 60. Place for service.
- § 62. — Nonresidents.
- § 63. Time for service.
- § 64. Mode and sufficiency of service.
- § 65. Service procured by fraud.
- § 66. Service of pleading with process.
- § 68. Operation and effect.

(B) SUBSTITUTED SERVICE.

- § 69. Nature and necessity in general.
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§ 1. Nature of process in general.

[a] (Sup. 1846)

A *capias* ad respondendum, with an indorsement that no bail is required, is substantially a summons.—*Linn v. Schmall*, 8 Blackf. 94.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. §§ 1, 2.

See, also, 32 Cyc. pp. 419-422.

§ 3. Necessity and use in judicial proceedings.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. §§ 4-6, 55.

See, also, 32 Cyc. pp. 423-425.

§ 4. — In general.

[a] (Sup. 1867)

In cases requiring ordinary adversary proceedings, the jurisdiction of the person is necessary to the validity of the judgment, and this can only be acquired by the service of process or by an appearance.—*Hawkins v. Hawkins'* Adm'r, 28 Ind. 66.

[b] (Sup. 1872)

A summons need not issue where the matters set up in the answer or cross-complaint are apparent on the face of the original complaint, and the defendants thereto have been served with process in the original action; and, if they have already been defaulted on the complaint, no new default need be taken on the answer or cross-complaint.—*Pattison v. Vaughan*, 40 Ind. 253.

[c] (Sup. 1873)

Process need not issue upon a pleading filed by some of the defendants, setting up that they are sureties of the other defendants, even when such pleading is filed after the default of the latter, but before any judgment is rendered.—*Fentriss v. State ex rel. Watkins*, 44 Ind. 271.

[d] (Sup. 1887)

Where a complaint discloses the character of the claim of a cross-complainant, and fairly informs defendants that a cross-claim was involved and would be adjudicated, no issue of process on the cross-complaint is necessary.—*Bevier v. Kahn*, 12 N. E. 169, 111 Ind. 200.

[e] (App. 1893)

Where the parties are once rightfully in court, its jurisdiction over them continues without further notice as long as any steps can be rightfully taken in the cause, but after the term has closed, and the proceedings have ceased to be in fieri, no legal steps can be taken against any party who has a substantial interest in them except after notice given.—*Durre v. Brown*, 34 N. E. 577, 7 Ind. App. 127.

[f] (App. 1907)

Where the original complaint disclosed the character of cross-complainant's claims, and fairly informed the appellants that those claims would be adjudicated, it was not necessary that summons issue on the cross-complaints, as against parties in court on the original complaint.—*Eisman v. Whalen*, 39 Ind. App. 350, 79 N. E. 514, 1072.

FOR CASES FROM OTHER STATES,

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See, also, 32 Cyc. p. 423.

§ 15. Persons against whom process may issue.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. § 14.

See, also, 32 Cyc. pp. 423, 544-570.

§ 16. — In general.

[a] (Sup. 1866)

Issuing process in vacation, and without order of court, against persons who were not made parties to the original complaint, and before an amendment of the complaint making them parties, is illegal and void. It does not therefore impose on them any obligation to appear to the action, or authorize a default on their failure to do so after the complaint has been amended by making them parties.—*Nutting v. Losance*, 27 Ind. 37.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. § 14.

See, also, 32 Cyc. p. 423.

§ 19. Counties to which process may issue.

[a] (App. 1906)

Where an action against one was properly brought in a certain county, process might be sent for service on a codefendant in another county, if they were properly joined.—*Chicago & W. I. R. Co. v. Marshall*, 75 N. E. 973, 38 Ind. App. 217.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. § 15.

See, also, 32 Cyc. pp. 427, 428, 545.

§ 21. Time for issuance.

[a] (Sup. 1858)

Under the Code (2 Rev. St. p. 35, § 34), a complaint must be filed before a valid sum-

mons can issue.—*Mills v. State ex rel. Barbour*, 10 Ind. 114.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. § 16.

See, also, 32 Cyc. pp. 425, 426.

§ 22. *Præcipe or direction to issue.*

[a] (Sup. 1858)

A summons cannot, under the Code, be issued upon a *præcipe*.—*Mills v. State ex rel. Barbour*, 10 Ind. 114.

[b] (Sup. 1881)

Under Code, § 315, as amended by the act of March 6, 1877, an indorsement upon a complaint, directing the clerk to issue a summons, and fixing the day of the term at which defendants should appear, and signed "A. & B., Attys.," *held* sufficient, where said attorneys were the same who signed and filed the complaint.—*Robinson v. Brown*, 74 Ind. 365.

[c] (Sup. 1882)

A *præcipe* for a summons, containing the direction to the clerk to "fix in the summons, Thursday, April 6, 1882, the same being the sixteenth judicial day of the Jasper circuit court,"—sufficiently fixes the day on which defendant should appear.—*Johnson v. Lynch*, 87 Ind. 326.

[d] (Sup. 1888)

The following indorsement on a complaint filed: "Clerk will docket this cause for trial January 10, 1887, and issue summons returnable that date,"—is sufficient, under Rev. St. 1881, § 516, providing that plaintiff may, by indorsement on the complaint, fix the time for defendant to appear.—*Moore v. Glover*, 115 Ind. 367, 16 N. E. 163.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. § 17.

See, also, 32 Cyc. p. 426.

§ 29. *Direction to particular officer or county.*

[a] (Sup. 1843)

The circumstance that a trespass upon land was committed in one county by persons resident in another does not authorize the *capias ad respondendum*, issued in the former county, to be directed to the sheriff of the latter.—*Ham v. Rogers*, 6 Blackf. 559.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. § 23.

See, also, 32 Cyc. p. 430.

§ 31. *Direction to or designation of parties.*

[a] (Sup. 1871)

Summons is not void because the name of the plaintiff was not inserted therein.—*Martin v. Cole*, 38 Ind. 379.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. § 25.

See, also, 32 Cyc. pp. 434-436.

§ 33. *Requirement as to appearance and pleading.*

[a] (Sup. 1859)

Under 2 Rev. St. p. 454 (Acts 1853, pp. 102, 113), the day of trial should be set, in every summons, not more than 30 days after the date of the summons.—*Michigan Southern & N. I. R. Co. v. Shannon*, 13 Ind. 171.

[b] (Sup. 1864)

Under the statute requiring that the notice to appear before a court of conciliation must specify the time for the appearance, a notice to appear before a court of conciliation on Tuesday the 18th of May does not require an appearance on the 19th of May, where that day is Tuesday; there being no such time as Tuesday May 18th.—*Steinmetz v. Signer*, 23 Ind. 386.

[c] (Sup. 1880)

Where a complaint and its summons both bear the indorsement of a day of the month during a term certain, on which defendant shall appear, this is a sufficient compliance with Act March 6, 1877, without naming the day of the term.—*Dunkle v. Elston*, 71 Ind. 585.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. §§ 12, 13, 27.

See, also, 32 Cyc. pp. 431-434.

§ 34. *Statement as to nature, form, or cause of action.*

[a] (Sup. 1886)

Where a defendant is served with a summons, he cannot escape the consequences of his neglect to appear and defend, on the ground that the recital in the summons did not fully inform him of the nature of the cause of action.—*Freeman v. Paul*, 105 Ind. 451, 5 N. E. 754.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. § 28.

See, also, 32 Cyc. pp. 436-438.

§ 36. *Directions for return.*

[a] (Sup. 1833)

Where by law the terms of court are to be held in February and August, a *capias ad respondendum*, bearing date January 19, 1832, and returnable on the Wednesday after the last Monday in August next, is a nullity under the act regulating suits at law, and providing that all process shall be made returnable to the first day of the next term.—*Shirley v. Hagar*, 3 Blackf. 225.

A *capias ad respondendum* issued in vacation must be returnable to the first day of the next term of the court.—*Id.*

[b] (Sup. 1858)

A process dated December 27th and returnable at the ensuing April term is a nullity; the January term intervening.—*Carey v. Butler*, 11 Ind. 391.

[c] (Sup. 1859)

It is not error that a writ was made returnable on the second day of the term of the court.—Trittip v. Talbott, 13 Ind. 544; Davis v. Pike, Id. 379.

[d] (Sup. 1861)

Under Common Pleas Act 1859, the naming of a wrong day in a right term in the writ is a mere clerical error, working no prejudice; but had the writ been returnable to a wrong term or run past a term, it would have been void.—Rigsbee v. Bowler, 17 Ind. 167.

[e] (Sup. 1873)

Where more than a term intervenes between the teste and return of original process, the writ is a nullity.—Briggs v. Sneghan, 45 Ind. 14.

A judgment by default, rendered after service of summons, which was made returnable to a day beyond the next term of court, is void.—Id.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. §§ 30, 31.

See, also, 32 Cyc. pp. 431, 432.

§ 37. Teste.

[a] (Sup. 1835)

A writ concluding, "Witness A. B., Clerk," etc., is sufficient under the statute, although the teste is not signed by the clerk.—Wibright v. Wise, 4 Blackf. 137.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. § 32.

See, also, 32 Cyc. p. 439.

§ 38. Date.

[a] (Sup. 1853)

A variance in date between a writ of summons issued by the clerk and the copy left with defendant by the sheriff is immaterial; the date not being a material part of the writ.—Kelley v. Mason, 4 Ind. 618.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. § 33.

See, also, 32 Cyc. pp. 439, 440.

§ 41. Seal.

Amendment, see post, § 161.

Validity of judgment when summons is not sealed, see JUDGMENT, § 490.

[a] (Sup. 1853)

Where a copy of the writ of summons is served on defendant, it is not necessary that the seal of the original should be copied.—Kelley v. Mason, 4 Ind. 618.

[b] The omission of the seal on a writ does not render the writ void.—(Sup. 1880) Boyd v. Fitch, 71 Ind. 306; (1881) State v. Davis, 73 Ind. 359.

[c] (Sup. 1880)

Where the seal of the court is omitted from a summons which has been served and returned.

a judgment based thereon is not void, though it may be voidable.—Boyd v. Fitch, 71 Ind. 306.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. § 35.

See, also, 32 Cyc. p. 441; note, 20 L. R. A. 424.

§ 42. Indorsements.

Indorsement of writ as security for costs, see COSTS, § 126.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. §§ 33, 36; 46 CENT. DIG. TRESP. § 76.

See, also, 32 Cyc. pp. 442, 443.

§ 43. Delivery to and receipt by officer.

[a] A summons is not issued until it comes to the hands of the sheriff.—(Sup. 1871) Fordice v. Hardesty, 36 Ind. 23; (1873) Hardesty v. Fordice, 42 Ind. 314.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. § 37.

See, also, 32 Cyc. p. 442.

§ 45. Alias and pluries writs.

Of execution, see EXECUTION, § 99.

[a] (Sup. 1841)

The issuing of an alias writ which is irregular and void does not prevent the party from availing himself of any remedy which he might have had if the writ had not been issued.—Grover v. Sims, 5 Blackf. 498.

[b] (Sup. 1846)

If a writ against A. and B. be returned served on A., and "Not found" as to B., and another writ issue to be served on B., the second writ should show that it is in the same suit with the first.—Dunn v. Hall, 8 Blackf. 32.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. §§ 42-45.

See, also, 32 Cyc. pp. 444-447.

II. SERVICE.

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Laws relating to as impairing obligation of contracts, see CONSTITUTIONAL LAW, § 129.

Liability of sheriff or constable for failure to serve or delay or defect in service, see SHERIFFS AND CONSTABLES, § 101.

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In actions by or against particular classes of persons.

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GARNISHMENT, § 101.

SCIRE FACIAS, § 9.

(A) PERSONAL SERVICE IN GENERAL.

In actions for divorce, see DIVORCE, § 77.

Return, see post, § 134.

§ 48. Nature and necessity in general.

[a] (Sup. 1859)

The reading of the summons may be waived by the defendant, and the service in such case will be good.—Casteel v. Hiday, 13 Ind. 536.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. §§ 40, 47, 55.

See, also, 32 Cyc. p. 447.

§ 50. Authority or capacity to serve.

Authority to serve subpoena, see WITNESSES, § 13.

Effect of service by unauthorized person, see post, § 68.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. §§ 57-66.

See, also, 32 Cyc. pp. 451-455.

§ 51. — In general.

Deputizing infant to serve writ, see INFANTS, § 7.

[a] (Sup. 1876)

2 Rev. St. 1876, p. 18, § 2, provides that the sheriff shall execute all process directed to

him by legal authority, either in person by deputy. Page 46, § 34, directs that the summons shall be issued by the clerk and delivered to the sheriff. Page 154, § 292, requires the issuance of a process issued by the court to be served by the sheriff, by his clerk or deputy thereof, and, if by any other person, affidavit. *Held*, that a summons directed to the sheriff cannot be served by any other than the sheriff or his deputy, as such § 292 was intended to provide for the proof of service, and not the person by whom service may be made.—*Kyle v. Kyle*, 5 Ind. 387.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. §§ 57, 58.

See, also, 32 Cyc. p. 451.

§ 55. — Party or person interested.

[a] (Sup. 1869)

In a suit against a sheriff and another, an injunction to restrain the former from real estate upon an execution in favor of the codefendant, the summons was placed in the hands of the sheriff who acknowledged the service on himself, and then served it on the codefendant. *Held*, that the service on the defendant was not void.—*Clegg v. Patterson*, 13 Ind. 135.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. § 66.

See, also, 32 Cyc. pp. 454, 455.

§ 56. Persons to be served.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. §§ 49, 67, 68.

See, also, 32 Cyc. p. 448.

§ 59. — Codefendants.

[a] (Sup. 1825)

Under St. 1823, p. 290, where a writ was issued against three persons the writ was served on two only, and returned non est inventus against the other, such return, with a suggestion on the record, authorized plaintiff in such case to proceed against those on whom the writ was served.—*Colman v. Graeter*, 1 Blackf. 49.

[b] (Sup. 1841)

If, in a suit against A. and B., the writ was returned served on A. and not found against B., and an alias writ in the cause, against B. and directed to the sheriff of another county, be held void, the plaintiff may suggest on the record the return of "not found" as to B. on the first writ, and proceed against A. alone.—*Grover v. Sims*, 5 Blackf. 49.

[c] (Sup. 1853)

Where the writ in an action against several defendants for trespass was returned "not found" as to a portion of the defendants, and the other courses were, under Rev. St. 1843, open to the plaintiff. He might continue the cause against the defendants were brought into court, and suggest the return of "not found" upon the

and proceed to trial against those served.—*Conwell v. Smith*, 4 Ind. 359.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. §§ 49, 68.

See, also, 32 Cyc. p. 448.

§ 60. Place for service.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. §§ 69, 70.

See, also, 32 Cyc. p. 455.

§ 62. — Nonresidents.

[a] (Sup. 1892)

Under Rev. St. 1881, § 312, which provides that, where a defendant has no permanent residence in the state, process in commencement of an action may be served in any county in the state where he may be found, a demurrer to a plea in abatement that defendant was a nonresident was properly sustained, where it appears that defendant was personally served within the state.—*Reed v. Browning*, 130 Ind. 575, 30 N. E. 704.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. § 70.

See, also, 32 Cyc. p. 455.

§ 63. Time for service.

Computation of time, see TIME, §§ 8, 9.

[a] (Sup. 1857)

Where the process was served on September 21st and the first day of the term of court following was the first day of October ensuing, the service was in time.—*Martin v. Howell*, 8 Ind. 501.

[b] (Sup. 1860)

At common law, a writ to be executed on the person could not run beyond a term; and under our statutes the forms prescribed for such writs require service before, and a return at the next term.—*Will v. Whitney*, 15 Ind. 194.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. §§ 71-75.

See, also, 32 Cyc. pp. 456, 457; note, 40 L. R. A. 217.

§ 64. Mode and sufficiency of service.

[a] (Sup. 1906)

Service of process by copy is not constructive, but actual, service, and is conclusive between the parties.—*Meyer v. Wilson*, 76 N. E. 748, 166 Ind. 651.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. §§ 55, 56, 76-82.

See, also, 32 Cyc. pp. 457-459; note, 44 L. R. A. 435; note, 25 Am. Dec. 171.

§ 65. Service procured by fraud.

[a] (Sup. 1884)

A request to enter another state and defend an attachment suit there pending is not a fraud,

though thereby jurisdiction be obtained over the nonresident, and judgment be rendered against him.—*Duringer v. Moschino*, 93 Ind. 495.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. § 51.

See, also, 32 Cyc. pp. 448, 449, 556.

§ 66. Service of pleading with process.

[a] (Sup. 1818)

Under Act 1814, authorizing the bringing of an action by petition and summons and requiring that the summons shall have a copy of the petition prefixed, a summons unaccompanied by a copy of the petition, and not referring to such copy, should be abated on defendant's plea.—*Finley v. Richards*, 1 Blackf. 487.

Act 1814, authorizing the bringing of an action by petition and summons, requires the summons to have a copy of the petition prefixed. A summons returnable to the April term of the circuit court, was returned executed, and thereafter plaintiff obtained leave to amend and also an order for an alias summons, which was afterwards issued returnable to the August term of court. Defendants filed a plea in abatement to the alias summons on the ground that it was not accompanied by a copy of the petition, and did not refer to any such copy. *Held* that, if the original summons was considered as inoperative from the April to the August term, defendants were not bound to attend court at the latter term by virtue of its authority, and, not being bound to attend by virtue of the alias summons, were not bound to answer the petition at that term, and judgment against them was erroneous.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. § 53.

See, also, 32 Cyc. p. 449.

§ 68. Operation and effect.

[a] (Sup. 1876)

Where service of summons is made by an unauthorized person, no jurisdiction of the person so served is thereby acquired by the court.—*Kyle v. Kyle*, 55 Ind. 387.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. § 52.

See, also, 32 Cyc. p. 511.

(B) SUBSTITUTED SERVICE.

Return, see post, § 135.

§ 69. Nature and necessity in general.

[a] (Sup. 1861)

When the copy of a summons, regularly issued by the proper clerk in a suit against a person resident in the state, is left by the officer charged with the service of such summons at the then abode of such person, the person so notified is regarded, not as construc-

tively, but as actually, summoned to appear.—*Sturgis v. Fay*, 16 Ind. 429, 79 Am. Dec. 440.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. PROC. § 83.

See, also, 32 Cyc. p. 461.

§ 72. Persons on whom substituted service may be made.

[a] (Sup. 1861)

If the defendant has become a nonresident, service cannot be made by leaving at his usual place of abode.—*Sturgis v. Fay*, 16 Ind. 429, 79 Am. Dec. 440.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. § 86.

See, also, 32 Cyc. pp. 461, 549-556, 562-567.

§ 76. Mode and sufficiency of service.

Mode and sufficiency of service in general, see ante, § 64.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. §§ 89-97.

See, also, 32 Cyc. pp. 462-467.

§ 78. — Leaving copy at residence or other place.

[a] (Sup. 1850)

Where the officer's return was that he had served the writ on A. by leaving a copy at his last place of residence, and, on motion to set it aside, it appeared that A. had not been in the county for six months prior to said service; that he left for the south as a peddler, taking goods with him; that letters had been received from him from North Carolina, but that his family remained on the property of A.; that he had been a resident for six or seven years; and that it was not known that he had or intended to change his residence,—it was held that the service was good.—*Pendleton v. Vanausdal*, 2 Ind. 54.

[b] (Sup. 1850)

Under the express provisions of Rev. St. p. 674, § 23, service of a writ on a resident defendant may be made by leaving it at his residence.—*Conwell v. Atwood*, 2 Ind. 289.

[c] (Sup. 1853)

Rev. St. 1843, c. 40, § 23, authorized the service of a summons by leaving a copy at the defendant's usual place of residence.—*Kelley v. Mason*, 4 Ind. 618.

[d] (Sup. 1854)

Where there were two or more defendants residing at the same place, a copy must be left for each, in a case in which Rev. St. 1843 authorizes a summons to be served by leaving a copy at the defendant's usual place of residence.—*Hutchens v. Latimer*, 5 Ind. 67.

[e] (Sup. 1861)

The term "usual or last place of residence" in the statute, providing that summons shall be served either personally on defendant, or by

leaving a copy thereof at his usual or last place of residence, means the residence into which the person, still a resident of the state, has moved, in the state, last before the service of process.—*Sturgis v. Fay*, 16 Ind. 429, 79 Am. Dec. 440.

[f] (Sup. 1865)

In a suit upon a judgment against A. B. rendered by a justice of the peace in the state of Ohio, the transcript contained the following return to the summons: "Served by leaving a copy at place of residence, with A. B." Held, that the service was insufficient at common law.—*Snyder v. Snyder*, 25 Ind. 399.

[g] (Sup. 1873)

When service of a summons is made by leaving a copy at defendant's last or usual place of residence, it is not necessary that the seal should be copied.—*Hughes v. Osborn*, 42 Ind. 450.

[h] (Sup. 1880)

"Personally served," as used in Act March 6, 1877, has reference to personal service as distinguished from publication; and, in this sense, service by copy left at the residence is personal service as well as service by reading to the party.—*Dunkle v. Elston*, 71 Ind. 585.

[i] (App. 1898)

The service of a summons upon a defendant by leaving a copy thereof at his last and usual place of business is not a compliance with the statute, requiring that a summons be served either personally on the defendant or by leaving a copy thereof at his usual or last place of residence.—*Stout v. Harlem*, 50 N. E. 492, 20 Ind. App. 200, 48 N. E. 235.

A personal judgment against a defendant, upon whom the summons was served by leaving a copy at his "last and usual place of business," when the statute requires it to be left at his "usual or last place of residence," is void, when it appears that the defendant's residence and place of business are in the same city, and about a mile apart, and that defendant was absent from the city when the officer left the summons.—Id.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. § 90.

See, also, 32 Cyc. p. 402.

§ 80. — Service on attorney or agent.

[a] (Sup. 1890)

Under Rev. St. 1881, § 309, which provides that, when a person has an office or agency in any county, any action growing out of the business of such office or agency may be brought in such county, and that process served upon the agent employed there shall be sufficient service upon the principal, a service upon defendants' agent employed in a store, in an action growing out of the business in the store, is sufficient service, though defendants are nonresidents.—*Rauber v. Whitney*, 125 Ind. 216, 25 N.

E. 186; Behn v. Same, 125 Ind. 599, 25 N. E. 187.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. § 92.

See, also, 32 Cyc. pp. 466, 467.

(C) PUBLICATION OR OTHER NOTICE.

Amendment of defects, see post, § 165.

As item of costs, see COSTS, § 176.

First publication as commencement of action within statute of limitations, see LIMITATION OF ACTIONS, § 119.

In attachment proceedings, see ATTACHMENT, § 209.

In proceedings for sale of land to enforce assessments for public improvements, see MUNICIPAL CORPORATIONS, § 543.

Notice of petition for removal of administrator, see EXECUTORS AND ADMINISTRATORS, § 35.

Proof, see post, § 138.

Publication in actions for divorce, see DIVORCE, § 79.

Publication of notice of sale of land for taxes, see TAXATION, § 660.

Right to defend after judgment on service by publication, or other constructive service, see JUDGMENT, § 142.

Vacating order for publication and service thereunder, see post, § 159.

§ 86. Actions and proceedings in which publication is authorized.

[a] (Sup. 1885)

An attaching creditor is entitled to sue in equity to set aside an alleged fraudulent conveyance of corporate stock in a proceeding based on service by publication to subject such stock to the payment of his judgment; such proceeding being in rem.—Quarl v. Abbett, 1 N. E. 476, 102 Ind. 233, 52 Am. Rep. 662.

[b] (App. 1891)

An action by the state against the sheriff to recover money deposited with him by a prisoner in lieu of bail is purely in rem, so far as it affects the prisoner, and hence service by publication on the ground of nonresidence will bind him as effectively as if the service were personal.—State ex rel. Michener v. Scanlon, 2 Ind. App. 320, 28 N. E. 426; Id., 28 N. E. 430.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. § 100.

See, also, 32 Cyc. pp. 467-469.

§ 87. Persons on whom service by publication may be made.

[a] (Sup. 1859)

Defendants cannot be summoned by publication unless shown to be nonresidents.—Johnson v. Patterson, 12 Ind. 471.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. § 101.

See, also, 32 Cyc. pp. 470, 471.

§ 88. Grounds and conditions precedent.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. §§ 102-104.

See, also, 32 Cyc. p. 472.

§ 89. — In general.

[a] (App. 1898)

Under Burns' Rev. St. 1894, § 320 (Rev. St. 1881, § 318), stating the various grounds for giving notice of the pendency of an action by publication in the disjunctive, it is only necessary that one of the grounds be set forth.—Redman v. Burgess, 50 N. E. 825, 20 Ind. App. 371.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. § 102.

See, also, 32 Cyc. p. 472.

§ 94. Application for order for publication.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. §§ 106-120.

See, also, 32 Cyc. pp. 473-480.

§ 96. — Affidavits.

Defect in as ground for new trial, see NEW TRIAL, § 16.

[a] (Sup. 1858)

An affidavit of the nonresidency of a party is not bad for not stating the cause of action, or for containing the qualifying words "as the deponent verily believes."—Trew v. Gaskill, 10 Ind. 265.

[b] (Sup. 1877)

Under 2 Rev. St. 1876, p. 49, authorizing service by publication, when it appears by affidavit that a cause of action exists against defendant, and that he is a necessary party to an action in relation to real estate, an affidavit merely reciting that the affiant is informed and believes that the defendant is not a resident of the state is insufficient to authorize a notice by publication in a pending action.—Fontaine v. Houston, 58 Ind. 316.

[c] (Sup. 1878)

Under 2 Rev. St. 1876, p. 49, § 38, an affidavit for publication showing a cause of action and the nonresidence of defendant is sufficient.—Davidson v. State ex rel. Vanmeter, 62 Ind. 276.

[d] (Sup. 1884)

Under 2 Rev. St. 1876, p. 49, § 38, providing for service by publication where it appears by affidavit that a cause of action exists against any defendant, or that he is a necessary party to an action relating to real estate, an affidavit stating that the defendants were nonresidents of the state, that a cause of action existed against them, that they were necessary parties to the action, and that the action was in relation to real estate, is sufficient.—Hamilton v. Barricklow, 96 Ind. 398.

[e] (Sup. 1884)

The affidavit for notice by publication to a nonresident defendant should state that a cause of action exists against him, or that he is a necessary party in relation to real estate.—*Dowell v. Lahr*, 97 Ind. 146.

[f] (Sup. 1885)

An affidavit which states that there is a cause of action in plaintiff against defendants, shows that it is connected with a contract, and alleges that defendants are nonresidents, is sufficient to support an order for publication, without a full statement of the facts constituting the cause of action.—*Field v. Malone*, 102 Ind. 251, 1 N. E. 507.

[g] (Sup. 1891)

The sufficiency of an affidavit for notice of suit by publication is not subject to attack in a collateral action.—*Goodell v. Starr*, 127 Ind. 198, 26 N. E. 793.

[h] (Sup. 1893)

Elliott's Supp. § 1, in relation to notice by publication, permits it when defendant is a nonresident, and the action arises, inter alia, from a duty imposed by law in relation to real estate in the state, or is to try or quiet title to or possession of real estate. *Held*, that an affidavit for publication in an action to quiet title and declare a tax lien is insufficient which simply states that the "cause is in relation to real estate situate" in Indiana.—*Pitts v. Jackson*, 135 Ind. 211, 35 N. E. 10.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. §§ 108-120.

See, also, 32 Cyc. pp. 473-480, 557.

§ 99. Filing or record.**[a] (Sup. 1890)**

An order for service by publication having been made by the court, but not entered, a nunc pro tunc entry may be made at any time before final judgment.—*Horn v. Indianapolis Nat. Bank*, 125 Ind. 381, 25 N. E. 558, 21 Am. St. Rep. 231, 9 L. R. A. 676.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. § 125.

See, also, 32 Cyc. pp. 473, 474.

§ 102. Mode and sufficiency of publication.**FOR CASES FROM OTHER STATES,**

SEE 40 CENT. DIG. PROC. §§ 129-135.

See, also, 32 Cyc. pp. 483-489.

§ 103. — In general.**[a] (Sup. 1870)**

In a published notice of the pendency of a proceeding, a mistake as to the date on which the term of court was to be held was unimportant in view of the fact that the time of holding the court was fixed by law.—*Morgan v. Woods*, 33 Ind. 23.

[b] (Sup. 1893)

Notice by publication to "—— Clark" of the pendency of proceedings is not binding on "Helen I. Clark."—*Clark v. Hillis*, 134 Ind. 421, 34 N. E. 13.

[c] (Sup. 1893)

Service by publication addressed to "—— M.," further described as "wife of J. M.," who was then dead, does not make the person attempted to be described a party to the action.—*Thompson v. McCorkle*, 136 Ind. 484, 34 N. E. 813, 36 N. E. 211, 43 Am. St. Rep. 334.

[d] (Sup. 1894)

Rev. St. 1894, § 319, validating the summons and service if there is enough about either to inform the person who may be served of the pendency of an action against him, the name of the plaintiff, the court, and the time for appearance, applies to service by publication; and where a married woman having property rights in the state has absented herself therefrom more than 35 years, and remarried without the knowledge of her kin and home acquaintances, she cannot complain of a publication against her under the surname of her first husband.—*Jones v. Kohler*, 137 Ind. 523, 37 N. E. 399.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. §§ 129, 131.

See, also, 32 Cyc. p. 483.

§ 104. — Notice and other matters to be published.**[a] (Sup. 1855)**

The notice required to be given an absent defendant by publication need not specify the day on which the term of court is to commence; the time of holding the term being fixed by law, of which all suitors are bound to take notice.—*Green v. Green*, 7 Ind. 113.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. § 130.

See, also, 32 Cyc. pp. 484-486.

§ 105. — Newspaper or other periodical in which publication to be made.**[a] (Sup. 1896)**

Within the meaning of Rev. St. 1894, §§ 320, 1299 (Rev. St. 1881, §§ 318, 1279), providing for the service of process by publication in "a newspaper of general circulation," a periodical ephemeral in form, issued daily except Sundays, devoted to the general dissemination of legal news, and containing other matter of general interest to the public, is such a paper.—*Lynn v. Allen*, 44 N. E. 646, 145 Ind. 584, 33 L. R. A. 779, 55 Am. St. Rep. 223.

[b] (App. 1906)

A newspaper, in the popular acceptance of the word, is a publication issued at regular stated intervals containing, among other things, the current news.—*Ruth v. Ruth*, 39 Ind. App. 200, 79 N. E. 523.

Notices of sale published in an obscure newspaper not circulated in the interested locality, and with the intention to avoid notice to those interested, are voidable, though the letter of the statute has been observed.—Id.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. § 132.

See, also, 32 Cyc. pp. 487, 488.

§ 106. — Time and number of publications.

[a] (Sup. 1890)

Under Rev. St. 1881, § 318, amended by Act 1885 (Elliott's Supp. § 1), and section 516, amended by Act 1883 (Elliott's Supp. § 16), as to service of process by publication, which provide that notice shall be published 3 weeks successively, and that publication shall be made 3 weeks, 30 days before the day fixed for defendant to appear, it is sufficient if the publication is in 3 successive issues of the newspaper, and 3 full weeks elapse before the 30 days begin to run.—*Security Co. v. Arbuckle*, 123 Ind. 518, 24 N. E. 329.

[b] (Sup. 1890)

Notice of suit by publication is sufficient, if it is inserted in three successive issues of a weekly newspaper, the first insertion being 51 days before the first day of the term at which the defendant is required to appear.—*Horn v. Indianapolis Nat. Bank*, 125 Ind. 381, 25 N. E. 558, 21 Am. St. Rep. 231, 9 L. R. A. 676.

[c] (Sup. 1907)

Section 4, c. 48, p. 61, Acts 1905 (section 896, Burns' Ann. St. Supp. 1905), provides that proof of service by publication shall show "publication for three successive weeks in a weekly newspaper of general circulation, * * * the last publication to be five days before the day set for the hearing." *Held*, that the phrase "publication for three successive weeks" means three successive publications in a weekly newspaper on its weekly days of issue, and that a publication for a full period of 21 days is not required.—*Southern Indiana Ry. Co. v. Indianapolis & L. Ry. Co.*, 168 Ind. 360, 81 N. E. 65, 13 L. R. A. (N. S.) 197.

An alleged defect in a service by publication, because not published for a sufficient length of time, only affords ground for a delay of the hearing, and it was not error for the court to overrule a motion to set aside the notice and quash the publication on that ground.—Id.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. § 133.

See, also, 32 Cyc. pp. 486, 487.

§ 111. Operation and effect.

[a] (Sup. 1838)

Notice by publication dispenses with a citation.—*Crabb v. Atwood*, 10 Ind. 331.

[b] (Sup. 1893)

A notice by publication to "Clark" of the pendency of proceedings not being binding on "Helen I. Clark," she may attack such proceedings collaterally.—*Clark v. Hillis*, 134 Ind. 421, 34 N. E. 13.

[c] (Sup. 1894)

When a publication of notice of nonresidence is made, the presumption must prevail that the interested party becomes acquainted with the notice; at least such party will be held to have seen it, and to be estopped to deny it.—*Jones v. Kohler*, 37 N. E. 399, 137 Ind. 528, 45 Am. St. Rep. 215.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. §§ 138, 139.

(D) PRIVILEGES AND EXEMPTIONS.

§ 117. Attendance at court.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. §§ 146-151.

See, also, 32 Cyc. pp. 490, 491.

§ 118. — In general.

[a] (Sup. 1889)

A nonresident, who comes into the state for the sole purpose of attending and testifying in an action in which he is defendant, is exempt from the service of summons in a suit of the plaintiff in that action. Rev. St. 1881, § 312, providing that in cases of nonresidents an action may be commenced and summons served in any county where they may be found, does not alter this rule.—*Wilson v. Donaldson*, 117 Ind. 356, 20 N. E. 250, 10 Am. St. Rep. 48, 3 L. R. A. 266.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. § 146.

See, also, 32 Cyc. pp. 491, 492.

§ 119. — Parties.

[a] (App. 1908)

It is a rule of public policy, recognized at common law, aside from statute, that suitors as well as witnesses should be able to attend judicial proceedings outside their own jurisdiction which require their presence without being held to answer there an adverse proceeding against them.—*Minnich v. Packard*, 42 Ind. App. 371, 85 N. E. 787.

Where a resident of New York came into Indiana to testify as a witness in his own behalf in a cause wherein he was a party, he was privileged from the service of a summons while necessarily in Indiana for the purpose of attending and returning from the trial.—Id.

Burns' Ann. St. 1901, § 315, permitting nonresidents to be sued and summons served in any county where they may be found, does not

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apply to a citizen of another state who comes into Indiana to testify in a cause wherein he is a party.—*Id.*

FOR CASES FROM OTHER STATES,
SEE 40 CENT. DIG. PROC. §§ 148, 149.
See, also, 32 Cyc. pp. 492-494.

(E) RETURN AND PROOF OF SERVICE.

Defects as ground for collateral attack on judgment, see JUDGMENT, § 491.
Directions for return in process, see ante, § 36.
Falsity as affecting foreign judgment, see JUDGMENT, § 820.
Falsity as ground for equitable relief against judgment, see JUDGMENT, § 420.
In justices' courts, see JUSTICES OF THE PEACE, § 82.
Liability of sheriff or constable for making false return, see SHERIFFS AND CONSTABLES, § 124.
Of service on corporation, see CORPORATIONS, § 507.
Of service on railroad company, see RAILROADS, § 24.
Quashing or vacating, see post, § 158.

In particular actions or proceedings.

See—
ARREST, § 38.
ATTACHMENT, §§ 319-328.
Call for special session of county board. COUNTIES, § 52.
DIVORCE, § 80.
EXECUTION, §§ 333-347, 444.
GARNISHMENT, § 96.
NE EXEAT, § 13.
REPLEVIN, § 53.
SCIRE FACIAS, § 9.

§ 127. Nature and necessity in general.

[a] (Sup. 1880)

Under Code (2 Rev. St. 1876, p. 154) § 202, providing that proof of service of any notice required to be served on any party shall be, among other things, the written admission of the defendant and that the admission must state the time and place of service, an agreed statement of facts in writing which by stipulation a party has entered into and on which a cause involving a notice, the proof of which was in question, was tried, providing among other things that the notice was left at the residence of the party to whom the notice was intended to be given on a certain date, in the hands of his wife during his temporary absence from home, is a sufficient written admission of the party to show proof of the service of the notice.—*McCoy v. Lockwood*, 71 Ind. 319.

FOR CASES FROM OTHER STATES,
SEE 40 CENT. DIG. PROC. §§ 155, 157.
See, also, 32 Cyc. pp. 496-498.

§ 128. Statutory provisions.

[a] (Sup. 1880)

Under Code (2 Rev. St. 1876, p. 154) providing that proof of the service of notice required to be served on any party, among other things, the written admission of the "defendant," and that the admission must state the time and place of the service, "defendant" means party.—*McCoy v. Lockwood*, 71 Ind. 319.

FOR CASES FROM OTHER STATES,
SEE 40 CENT. DIG. PROC. § 156.

§ 131. Time for making.

[a] (Sup. 1851)

Process returnable at a day fixed by the court, and deemed to be returnable at that day by enactment of the Revised Statutes, 1843, although a different day may be fixed in the process.—*Davidson v. Alvord*, 3 Ind. 319.

FOR CASES FROM OTHER STATES,
SEE 40 CENT. DIG. PROC. § 159.
See, also, 32 Cyc. p. 497.

§ 132. Form and requisites of return certificate.

FOR CASES FROM OTHER STATES,
SEE 40 CENT. DIG. PROC. §§ 164-171.
See, also, 32 Cyc. pp. 498-500, 557.

§ 133. — In general.

[a] (Sup. 1908)

A sheriff's return on a summons is not valid unless the summons is shown when the summons was received by the sheriff, since the action is not commenced until the summons is delivered to him.—*Marshall v. Hooper*, 171 Ind. 238, 86 N. E. 339.

FOR CASES FROM OTHER STATES,
SEE 40 CENT. DIG. PROC. § 164.
See, also, 32 Cyc. pp. 498-500.

§ 134. — Personal service.

[a] (Sup. 1852)

The sheriff's return showed that on the day the summons was served, the defendants had been "served," and that others were "not found," etc. *Held*, that the service was shown with reasonable certainty.—*Colerick v. Hooper*, 3 Ind. 316, 56 A. 505.

[b] (Sup. 1877)

Plaintiff, the wife of G. W., sued to recover possession of land sold under a mortgage, and described herself as "Lois W.," but had been described in the summons and complaint in the foreclosure suit as "the wife of G. W.," and in the sheriff's return thereof as "Ann W." *Held*, that the return showed service on her as a defendant in the foreclosure suit; 2 Rev. St. 1876, p. 49, § 100, requiring immaterial a discrepancy as to the Christian name of a person identified.—*Jones v. Patterson*, 59 Ind. 237.

[c] (Sup. 1878)

Where a summons is blank as to the name of the defendant, and the sheriff's return names no one on whom service was had, the return is a nullity, and gives the court no jurisdiction.—*Brooks v. Allen*, 62 Ind. 401.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. §§ 164-169, 176.
See, also, 32 Cyc. pp. 501, 502.

§ 135. — Substituted or constructive service.

[a] (Sup. 1854)

A sheriff's return stated that he had served a summons by leaving a copy at the defendant's "last place of residence." *Held*, that under Rev. St. 1843, such a return showed a sufficient service.—*Bryant v. State ex rel. Quigley*, 5 Ind. 245.

[b] (Sup. 1873)

When the statute allows a summons to be served on the defendant by "leaving a copy thereof at his last place of residence," etc., a return of service "by copy left at the residence" of the defendant is sufficient.—*Pigg v. Pigg*, 43 Ind. 117.

[c] (Sup. 1884)

A sheriff's return stating that a certain defendant was not found in his bailiwick, and followed by a certificate stating that a certain person named as served was at the time the agent and clerk of the defendant in charge of her store at a certain place, and that such defendant was a nonresident of the state, was insufficient to show any valid or legal summons on the defendant, or on such person as the agent or clerk of defendant; it appearing that the agent referred to was a defendant in the suit and the service of the summons as to him referred to in the certificate was the service on him as such defendant and not as clerk or agent.—*Wright v. Mack*, 95 Ind. 332; *Mathews v. Mack*, 95 Ind. 431.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. §§ 170-174.
See, also, 32 Cyc. pp. 508-506.

§ 136. — Process not served.

[a] (Sup. 1820)

In an action *ex contractu* against two, the sheriff's return of "not found" as to one does not authorize the plaintiff, under St. 1817, p. 25, to proceed to judgment against the other alone; a return of "no inhabitant of the county" being necessary, in such a case, by that statute.—*Morris v. Knight*, 1 Blackf. 106.

[b] (Sup. 1843)

In *assumpsit*, against A., B., C., and D., the sheriff returned the writ served as to A. and B., and "not found" as to C. and D., but stated in his return that he did not go to the house of D. by order of plaintiff's attorney. *Held*, that there was no legal return of "not

found" as to D.—*Lodge v. State Bank*, 6 Blackf. 557.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. § 175.
See, also, 32 Cyc. pp. 506, 507.

§ 137. Form and requisites of affidavit of service.

[a] (Sup. 1875)

When a summons has been personally served out of the state, it must be shown by affidavit that the person served is the identical person named in the action or proceeding. It is not sufficient to show by affidavit that the person served acknowledged himself to be such identical person.—*Cole v. Allen*, 51 Ind. 122.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. §§ 177-180.
See, also, 32 Cyc. pp. 507-509.

§ 138. Proof of service by publication.

[a] (Sup. 1892)

An affidavit of publication stated that "the notice was duly published * * * for three weeks consecutively, the first of which publications was on the 11th day of September, 1890, and the last on the 25th day of September, 1890." *Held*, that the affidavit showed three publications, the first and third publications being on the dates named, respectively, and the second on an intervening date.—*Curry v. State*, 131 Ind. 439, 31 N. E. 86; *Gilchrist v. Same*, 131 Ind. 600, 31 N. E. 86.

[b] (App. 1908)

Under Burns' Ann. St. 1908, § 504 (Burns' Ann. St. 1901, § 489), providing that proof of service of any process issued by the court or of any notice required to be served on any party shall be as follows: " * * * Third: In case of publication, a printed copy with the affidavit of the printer, his foreman or clerk or of any competent witness"—a paper purporting to be an affidavit of publication of notice of an action was insufficient where no name was subscribed to the jurat.—*Deputy v. Dollarhide*, 42 Ind. App. 554, 86 N. E. 344.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. §§ 181-186.
See, also, 32 Cyc. pp. 509-511.

§ 140. Operation and effect in general.

[a] (Sup. 1858)

A return of service of summons showing service on October 16th, returnable to the circuit court, which commenced its session October 27th, shows a service at least 10 days prior to the first day of the term.—*Adams v. Heinsheimer*, 11 Ind. 279; *Same v. Weybright*, Id. 300.

[b] (Sup. 1858)

A return, "Served by reading," implies "to the defendant."—*Holsinger v. Dunham*, 11 Ind. 346; *Chandler v. Miller*, Id. 382.

[c] (Sup. 1874)

The return of an officer on mesne or final process can be evidence of the facts stated therein only when such facts recited are official acts done in the ordinary and usual course of proceedings. Matters of opinion or excuse for failure to perform a duty cannot be made evidence by stating them in the return.—*Splahn v. Gillespie*, 48 Ind. 397.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. §§ 187, 188.

See, also, 32 Cyc. pp. 511-518.

§ 141. Conclusiveness of return or certificate in general.

[a] An officer's return of the service of process is conclusive upon the parties to the suit in which the process is issued.—(Sup. 1877) *Johnson v. Patterson*, 59 Ind. 237; (1882) *Johnston Harvester Co. v. Bartley*, 81 Ind. 406; (1882) *Cavanaugh v. Smith*, 84 Ind. 380.

[b] (Sup. 1881)

The sheriff's return to a summons in an action in which judgment was entered cannot be contradicted on motion for a nunc pro tunc amendment of the summons.—*State v. Davis*, 73 Ind. 359.

[c] (Sup. 1881)

In a suit to restrain the enforcement of a judgment, an averment in the complaint that no summons was served avails nothing against the statement in the record and in the officer's return that process was served.—*Hume v. Conduitt*, 76 Ind. 598.

[d] (Sup. 1884)

An officer cannot contradict his return.—*State ex rel. Clark v. Cisney*, 95 Ind. 265.

[e] (App. 1909)

Jurisdiction of the court is conclusively established by the sheriff's return showing service of summons upon a defendant, though there was in fact no service.—*Groff v. Warner*, 89 N. E. 609.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. §§ 189-192; 12 CENT. DIG. CORP. § 1997.

See, also, 32 Cyc. pp. 514-518, 559; note, 124 Am. St. Rep. 756.

§ 142. Collateral attack.

[a] (Super. 1872)

Where it is shown by return that a summons has been served in accordance with the provisions of the statute, the party served cannot, in a collateral proceeding, show by parol that he had no notice of the action in which the summons issued.—*Gillespie v. Splahn*, Wils. 228.

[b] (Sup. 1874)

Where the return of a sheriff to a summons shows that it was served by leaving a copy at the last usual place of residence of the defend-

ant, it will be sufficient to show personal service, and it cannot be impeached in a collateral proceeding.—*Splahn v. Gillespie*, 48 Ind. 397.

[c] (Sup. 1884)

In a suit to set aside a default, the sheriff's return of summons in the former action, showing service of summons, cannot be questioned.—*Nichols v. Nichols*, 96 Ind. 433.

[d] (App. 1905)

A sheriff's return regular on its face, showing service of summons by leaving a true and certified copy at defendant's last and legal place of residence, is, in the absence of fraud, conclusive against collateral attack.—*Tyler v. Davis*, 75 N. E. 3, 37 Ind. App. 557.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. § 193.

See, also, 32 Cyc. p. 518.

§ 143. Grounds for impeaching or contradicting.

[a] (Sup. 1906)

Where process was not in fact served by the officer, and a false return was procured by the fraudulent acts of plaintiff, or by a conspiracy between him and the officer, the return was not conclusive.—*Meyer v. Wilson*, 76 N. E. 748, 166 Ind. 651.

FOR CASES FROM OTHER STATES,

See 32 Cyc. pp. 514-518.

§ 144. Evidence as to service.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. §§ 194-205.

See, also, 32 Cyc. pp. 513, 514.

§ 145. — Presumptions and burden of proof.

Service of call for special session of county board, see COUNTIES, § 52.

[a] (Sup. 1881)

Where a return of service of summons, in an action against a railroad for killing stock, recites that it was served by certified copy on a conductor of a freight train, it will be presumed, in the absence of proof to the contrary, that it was served in the county whence it issued upon the conductor of a freight train passing through said county.—*Ohio & M. R. Co. v. Quier*, 16 Ind. 440; *Same v. Clement*, Id. 473.

[b] (Sup. 1892)

Where persons served with process reside within the county of the officer serving it, or, like conductors of railways, are constantly passing through it, and the return is silent as to place of service, it will be presumed that the officer acted within the limits of his jurisdiction.—*Baltimore & O. R. Co. v. Brant*, 132 Ind. 37, 31 N. E. 464.

[c] (App. 1903)

In the absence of a showing to the contrary, it is presumed that summons was served

on the defendant named in the complaint.—*Union Traction Co. v. Barnett*, 67 N. E. 205, 31 Ind. App. 467.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. §§ 194-199.

See, also, 32 Cyc. p. 513.

§ 146. — Admissibility in general.

[a] (Sup. 1839)

Evidence is admissible to prove to the court that at the time of the service of a writ it was not sealed, and did not contain the name of the county in which it was issued.—*Pope v. Anthony*, 5 Blackf. 212.

[b] (Sup. 1885)

It is competent to permit evidence that an affidavit of posting of notice was sworn to.—*Williams v. Stevenson*, 103 Ind. 243, 2 N. E. 728.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. § 200.

See, also, 32 Cyc. pp. 513, 514.

§ 148. — Evidence to impeach or contradict return, certificate, or affidavit of service.

[a] (Sup. 1881)

Evidence cannot be received to contradict a sheriff's return on a summons.—*Birch v. Frantz*, 77 Ind. 199.

[b] (Sup. 1888)

When a constable has, without objection, given evidence in apparent contradiction to his return on a process, he may be questioned further for the purpose of explaining such contradiction.—*State ex rel. Maggard v. Caldwell*, 115 Ind. 6, 17 N. E. 185.

[c] (Sup. 1895)

Where, in an action against a corporation for wrongful death, the return of service recited that the process was served on a wharf master, who received and discharged freight for the defendant and transacted business in its name, such return was not impeached by general statements and conclusions set forth in affidavits that the person served was not an agent of the corporation.—*Memphis & C. Packet Co. v. Pikey*, 40 N. E. 527, 142 Ind. 304.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. § 201.

See, also, 32 Cyc. pp. 514-518.

§ 149. — Weight and sufficiency.

[a] (Sup. 1874)

Between third parties, the return of an officer is prima facie evidence only of matters stated in the return.—*Splahn v. Gillespie*, 48 Ind. 397.

[b] (Sup. 1892)

The return of a sheriff indorsed on a summons is evidence of a high grade, abundantly

sufficient of itself to sustain a finding of proper service, as against evidence tending to show no service.—*Murrer v. Security Co.*, 30 N. E. 879, 131 Ind. 35.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. §§ 188, 202-205.

See, also, 32 Cyc. pp. 516, 517.

III. DEFECTS, OBJECTIONS, AND AMENDMENT.

Grounds for abatement, see **ABATEMENT AND REVIVAL**, § 30.

Grounds for collateral attack on judgment, see **JUDGMENT**, § 490.

Grounds for continuance, see **CONTINUANCE**, § 11.

Grounds for dismissal of action or nonsuit, see **DISMISSAL AND NONSUIT**, §§ 50, 57.

Grounds for new trial, see **NEW TRIAL**, § 16.

Grounds for opening or vacating judgment, see **JUDGMENT**, § 350.

In condemnation proceedings, see **EMINENT DOMAIN**, § 184.

In execution proceedings, see **EXECUTION**, §§ 97, 338.

In justices' courts, see **JUSTICES OF THE PEACE**, § 83.

Liability of sheriff or constable for failure to serve or delay or defect in service, see **SHERIFFS AND CONSTABLES**, § 101.

Litigation on motion to amend of right to have a default and judgment set aside, see **JUDGMENT**, § 135.

Time for objection to service of process on railroad company, see **RAILROADS**, § 24.

Waiver of service on infant by guardian ad litem, see **INFANTS**, § 84.

§ 151. Invalidity or irregularity of process and service in general.

[a] (Sup. 1841)

If suit is improperly commenced by ca. res. instead of a summons, the defendant has a right, for that reason, to be discharged from custody, but not to have the suit dismissed.—*Rittenour v. McCausland*, 5 Blackf. 540.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. § 206.

See, also, 32 Cyc. pp. 518, 519.

§ 152. Defects and irregularities in writ or other process or notice.

[a] (Sup. 1850)

A process not issued in strict conformity with the law, the defects in which appear upon the face of the process or by reference to extrinsic facts, is irregular, whether such defects render the process void or only voidable.—*Doe ex dem. Cooper v. Harter*, 2 Ind. 252.

[b] (Sup. 1861)

Where process is returnable to the next term of court, it is not vitiated by naming an

erroneous day for the sitting of the court.—*Denny v. Graeter*, 17 Ind. 197.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. § 206.

See, also, 32 Cyc. pp. 519-522.

§ 155. Necessity and mode of objection in general.

[a] (*Sup.* 1822)

In a suit, by notice and motion, under the statute (St. 1807, p. 450; St. 1813, p. 106) requiring a sheriff to pay over money collected on an execution, it is irregular to move to quash the notice for an insufficient description of the cause of action; the defendant should demur.—*Dawson v. Shaver*, 1 Blackf. 204.

[b] (*Sup.* 1859)

Where the complaint does not show that the summons was prematurely issued, a demurrer based upon that defect is bad.—*Hust v. Conn*, 12 Ind. 257.

[c] (*Sup.* 1881)

Where service of process appears to be regular on the face of the return of the sheriff, the insufficiency thereof can only be raised by an answer stating extrinsic facts.—*Ætna Ins. Co. v. Black*, 80 Ind. 513.

[d] (*Sup.* 1887)

Where a writ is served on a party by a wrong name, and he fails to appear and plead the misnomer, he is concluded; and in all future proceedings may be connected with the judgment by proper averment.—*Vogel v. Brown Tp.*, 14 N. E. 77, 112 Ind. 299, 2 Am. St. Rep. 187.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. § 210; 1 CENT.

DIG. ABATE. & R. §§ 171, 174.

See, also, 32 Cyc. pp. 524-526.

§ 156. Time for objection.

[a] (*Sup.* 1818)

Where a motion to quash a summons and petition on the ground that plaintiff's name was not signed to the petition, and that the summons did not pursue the statute, in that it failed to state, after requiring defendant to answer, that otherwise final judgment would be entered up against him by default, was not made until three terms had passed, and defendant in the meantime had obtained orders for taking depositions at two several terms, it was too late to take advantage of such informalities either by plea or motion.—*Miller v. Green*, 1 Blackf. 469.

[b] (*Sup.* 1883)

A cause being called on the first day of the term, the parties agreed that they had appointed the next day for trial; and, on the plaintiff's motion, the defendant was ruled to plead on the next day, he reserving the right to plead in abatement. *Held*, that these circumstances did not preclude the defendant

from afterwards moving on the day the rule was granted to quash the writ.—*Shirley v. Hagar*, 3 Blackf. 225.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. § 211.

See, also, 32 Cyc. pp. 527-530.

§ 157. Quashing or vacating writ or other process or notice.

Right to quash summons for want of signature of complaint as against motion to amend complaint, see PLEADING, § 271.

[a] (*Sup.* 1818)

Where the summons does not pursue the statute, in that it omits the words "or otherwise final judgment will be entered up against him by default," and the plaintiff's name is omitted from the foot of the petition, such informalities, when urged in a motion to quash or otherwise, are entitled to no more indulgence than a dilatory plea.—*Miller v. Green*, 1 Blackf. 469.

[b] (*Sup.* 1850)

The fact that a resident defendant, temporarily absent in another state, on whom a writ was served by leaving it at his place of residence, as authorized by Rev. St. p. 674, § 23, was not actually notified of the suit until the first day of the term at which the summons was returnable, constituted no reason for setting aside the writ.—*Conwell v. Atwood*, 2 Ind. 289.

[c] (*Sup.* 1859)

A summons issued before complaint filed may be set aside.—*Hust v. Conn*, 12 Ind. 257.

[d] (*Sup.* 1880)

A summons will not, according to Code, § 37, be set aside merely because it was made returnable in vacation.—*Ross v. Glass*, 70 Ind. 391.

[e] (*Sup.* 1883)

The failure of a party or his attorney to sign a complaint is not available on motion to quash the summons.—*Sims v. Dame*, 113 Ind. 127, 15 N. E. 217.

[f] (*Sup.* 1891)

Under Rev. St. 1881, § 658, providing that no judgment shall be reversed in the Supreme Court for any defect which by law might be amended in the court below, the overruling of a motion to quash a summons, for the reason that the Christian names of the plaintiffs were not given in full in the summons, though they were set out in the complaint, is not reversible error.—*Mansfield v. Shipp*, 128 Ind. 55, 27 N. E. 427.

[g] (*App.* 1897)

Rev. St. 1894, § 524 (Rev. St. 1881, § 516), provides that an action will stand for trial at the first term, where the summons has been served 10 days before the first day of the term, but that plaintiff may cause it to stand

for trial at a pending term, if, when he asks for summons, he, by indorsement on the complaint, shall have fixed the day during such pending term or next term on which the defendant shall appear, and such day shall be stated in the summons when issued. A complaint filed bore the indorsement that the clerk should "set this cause of action down for answer and trial" on a certain day fixed. *Held* that, even if the indorsement on the summons was defective, yet as the clerk, in issuing the summons, accepted it as sufficient, and named the day fixed therein as that on which the defendants should appear, it was not error to overrule a motion to set aside the summons and service, whether the cause should have been continued or not.—*Axtell v. Workman*, 46 N. E. 472, 17 Ind. App. 152.

[b] (App. 1910)

It is competent for a plaintiff to orally direct the issuing of the summons, and if the summons commands an appearance at a time not authorized by law, it would be a good summons for the next term, and there would be no ground for quashing it, but a reason for continuance only.—*Town of Knox v. Golding*, 91 N. E. 857.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. §§ 212-217.

See, also, 32 Cyc. pp. 519-522.

§ 158. Quashing or vacating service or return or proof thereof in general.

[a] (Sup. 1854)

By Rev. St. 1843, the service of a summons must be set aside, where the name of the plaintiff's attorney was not indorsed on the summons, unless the irregularity is waived.—*Hutchens v. Latimer*, 5 Ind. 67.

[b] (App. 1894)

Where the summons is served upon the proper officer of a corporation, but the sheriff's return does not show such fact, the return should be set aside; but a refusal so to do is not reversible error, under Rev. St. 1894, § 670 (Rev. St. 1881, § 658), providing that no judgment shall be reversed for any defect in the returns which might have been legally amended in the court below, when it appears that the merits have been fairly determined.—*Supreme Council of Catholic Benevolent Legion v. Boyle*, 10 Ind. App. 301, 37 N. E. 1105.

[c] (App. 1909)

In an action against a foreign corporation, a motion to quash the return to the summons, reciting service on one K., its agent, on ground that it was not had on an authorized agent, was properly overruled, since, if K. was not its agent, that was a question of fact for the court on a proper plea.—*Workingmen's Mut. Protective Ass'n of Benton Harbor, Mich., v. Swanson*, 43 Ind. App. 379, 87 N. E. 668.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. §§ 218-220.

See, also, 32 Cyc. pp. 522-524.

§ 159. Vacating order for publication and service thereunder.

[a] (App. 1892)

Notice by publication will not be set aside though the complaint be defective, where the affidavit on which such notice is based is sufficient.—*Mehrhoff v. Dffenbacher*, 4 Ind. App. 447, 31 N. E. 41.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. §§ 221, 222.

See, also, 32 Cyc. p. 524.

§ 161. Amendment of defects.

Amendment of judgment as to process, see JUDGMENT, § 311.

Effect of amendment on admissibility of depositions, see DEPOSITIONS, § 98.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. §§ 176, 224-249.

See, also, 32 Cyc. pp. 531-541.

§ 163. — Writ or other process or notice.

[a] (Sup. 1840)

If the plaintiff file a præcipe in his right name, and the clerk misspell it in the writ, the writ may be amended by the præcipe.—*Beck v. Williams*, 5 Blackf. 374.

[b] (Sup. 1842)

The clerk having omitted to state in a capias ad respondendum the nature of the action or the amount claimed, it was *held* that the mistake might be amended by the præcipe.—*State ex rel. Bird v. Hood*, 6 Blackf. 260.

[c] (Sup. 1849)

A writ in favor of "W. and H.," the præcipe and declaration containing their full names, may be amended by inserting their full names.—*Nimmon v. Worthington*, 1 Ind. 376, Smith, 226.

A writ describing the plaintiffs as "W. and H.," they being described in the præcipe and declaration as "E. W. and J. H.," may be amended, on motion, without terms.—*Id.*

[d] (Sup. 1854)

Where an amendment was made to a declaration, and thereby a variance was produced between the declaration and the writ, an amendment to the writ ought also to have been granted.—*State v. Bryant*, 5 Ind. 192.

[e] (Sup. 1856)

Where there is a variance between the process and the complaint, an amendment may be allowed, so that they may be made to accord with each other.—*Riley v. Murray*, 8 Ind. 354.

[f] If process was amendable for any defect below, it will be regarded as amended on appeal.—(Sup. 1857) *Kaufman v. Sampson*, 9 Ind.

520, affirmed *Samé v. Forchheimer* (1858) 10 Ind. 419.

Summons served 10 days before the first day of the term, which was on the 1st day of October, commanding defendants to appear on the second day of the term to be held on the first Monday of October, was amendable on motion.—Id.

[g] (Sup. 1880)

Under Code, § 37, providing that no summons or the service thereof shall be set aside or be adjudged insufficient where there is sufficient substance about either to inform the party on whom it may be served that there is an action instituted against him, where summons is defective merely as to the judicial day on which the defendants are to appear and answer, but serves the purpose of bringing the parties on whom it is served into court, it is amendable to make it conform to the indorsement on the complaint.—*Dunkle v. Elston*, 71 Ind. 585.

[h] (Sup. 1881)

The omission of a seal on a writ is an amendable defect.—*State v. Davis*, 73 Ind. 359.

[i] (Sup. 1882)

A complaint by mistake called defendant "Jacob S.," instead of "Joseph S."; but the summons, though following the complaint, was served on "Joseph S." The complaint was amended. *Held*, that the summons could be amended to conform thereto.—*Shackman v. Little*, 87 Ind. 181.

[j] (Sup. 1883)

A summons naming the defendant a "rail-road" company, when it was in fact a "rail-way" company, may be amended after default and judgment.—*Chicago & I. Air Line Ry. Co. v. Johnston*, 89 Ind. 88.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. §§ 224-238.

See, also, 32 Cyc. pp. 531-534.

§ 164. — Return of proof of service in general.

Amendment by sheriff after expiration of term of office, see *SHERIFFS AND CONSTABLES*, § 83.

Return on execution, see *EXECUTION*, § 444.

Right to trial by jury in proceedings to amend return, see *JURY*, § 19.

[a] (Sup. 1860)

An officer should be permitted, on leave asked of the court, to so amend his return to a writ as to show the actual manner of service.—*Jackson v. Ohio & M. R. Co.*, 15 Ind. 192.

[b] (Sup. 1881)

A sheriff has a right, with the leave of court, to amend his return so as to state the facts.—*Walker v. Shelbyville & R. Turnpike Co.*, 80 Ind. 452.

[c] (Sup. 1883)

A motion to permit an amendment of a sheriff's return requires no formal proceedings,

such as an issue, trial, etc., but leave may be granted informally in a proper case.—*Wilcox v. Moudy*, 89 Ind. 232.

[d] (App. 1892)

An amendment to the return of a summons speaks from the date of the return.—*Heaton v. Peterson*, 6 Ind. App. 1, 31 N. E. 1133.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. §§ 176, 239-248; 12 CENT. DIG. CORP. § 2000.

See, also, 32 Cyc. pp. 537-539; note, 13 Am. Dec. 173.

§ 165. — Proceedings for service by publication and proof of service.

[a] (Sup. 1882)

Proof of notice by publication may be amended so as to show the true date of the publication.—*Barkley v. Tapp*, 87 Ind. 25.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. § 249.

See, also, 32 Cyc. p. 536.

§ 166. Waiver of defects and objections. Waiver by appearance, see *APPEARANCE*, § 24.

[a] (Sup. 1826)

Any objection which might have been urged to a process is waived by pleading to the merits.—*Hays v. McKee*, 2 Blackf. 11.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. §§ 210, 250-255.

See, also, 32 Cyc. p. 530.

§ 167. Cure of defects by subsequent proceedings.

[a] (Sup. 1907)

Where a return of process shows that there was no service whatever upon a person authorized by the statute to accept service, the matter is not cured by *Burns' Ann. St.* 1901, § 319, providing that no summons or service thereon shall be set aside, where there is sufficient substance about either to inform the party on whom it may be served that there is an action instituted against him, the plaintiff, court, and time when he is required to appear.—*Southern Indiana Ry. Co. v. Indianapolis & L. Ry. Co.*, 168 Ind. 360, 81 N. E. 65, 13 L. R. A. (N. S.) 197.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROC. § 256; 12 CENT.

DIG. CORP. § 2000.

IV. ABUSE OF PROCESS.

As contempt of court, see *CONTEMPT*, § 11.

False imprisonment, see *FALSE IMPRISONMENT*.

Liability of sheriff or constable for wrongful levy or other taking of property, see *SHERIFFS AND CONSTABLES*, §§ 110-113.

Malicious prosecution, see **MALICIOUS PROSECUTION**.

Wrongful arrest, see **ARREST**, § 57.

Wrongful attachment, see **ATTACHMENT**, §§ 355-365.

Wrongful execution, see **EXECUTION**, §§ 454-472.

Wrongful injunction, see **INJUNCTION**, § 257.

Wrongful searches and seizures, see **SEARCHES AND SEIZURES**, §§ 7, 8.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Proc. §§ 257-259.

See, also, 32 Cyc. pp. 541-544; note, 14 Am. Dec. 365; note, 28 Am. Rep. 262; note, 86 Am. St. Rep. 397.

PROCLAMATION.

See—

Commencement of war. **WAR**, § 6.

Judicial notice of official orders and proclamations. **EVIDENCE**, § 46.

Ordering or calling election. **ELECTIONS**, §§ 39-41.

PRO CONFESSO.

Decree in equity, see **EQUITY**, §§ 417-419.

PRODUCTION.

See—

Bill or note in action thereon. **BILLS AND NOTES**, § 488.

Bond, note, or other obligation secured, in action to foreclose mortgage. **MORTGAGES**, § 464.

Documents before trial. **DISCOVERY**, §§ 80-107.

By parties at trial. **EVIDENCE**, §§ 366, 368.

By witnesses at trial. **WITNESSES**, § 16.

Privilege of witness. **WITNESSES**, § 298.

Money on making tender. **TENDER**, § 13.

PROFANITY.

See **BLASPHEMY**.

PROFERT.

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Letters testamenatry or of administration, in pleading. **EXECUTORS AND ADMINISTRATORS**, § 445.

Pleading. **PLEADING**, §§ 246, 305.

In action on bill or note. **BILLS AND NOTES**, § 488.

PROFESSION.

Words tending to injure in profession as constituting libel or slander, see **LIBEL AND SLANDER**, § 9.

PROFILE.

See—

Evidence of location of railroad. **RAILROADS**, § 53.

Filing by railroad company as giving priority in right of way. **RAILROADS**, § 70.

PROFITS.

See—

Accounting for, by purchaser of property at partition sale. **PARTITION**, § 109.

Accrual after foreclosure and before expiration of time of redemption. **MORTGAGES**, § 372.

Agreements to divide profits as within statute of frauds. **FRAUDS, STATUTE OF**, § 84.

Allowance and charges for rents and profits on partition. **PARTITION**, § 86.

Or deduction of rents and profits on redemption of mortgaged property. **MORTGAGES**, § 602.

Assets of estate of decedent. **EXECUTORS AND ADMINISTRATORS**, §§ 41, 131.

Assignment of future profits or earnings. **ASSIGNMENTS**, § 11.

Banks. **BANKS AND BANKING**, § 41.

Decedent's estate, rights of heirs and distributees. **DESCENT AND DISTRIBUTION**, § 79.

Division on assignment of dower. **DOWER**, § 93.

Individual profits or benefits of partner from firm business. **PARTNERSHIP**, § 97.

Land sold at execution sale, rights of purchaser. **EXECUTION**, § 281.

Loss, element of damages. **DAMAGES**, § 40.

Evidence. **DAMAGES**, § 176.

Married woman's separate property. **HUSBAND AND WIFE**, § 125.

Mesne profits, recovery in ejectment. **EJECTMENT**, §§ 127, 128, 132, 134, 143.

Mortgaged land, rights and liabilities of parties. **MORTGAGES**, § 199.

Rights of purchaser at foreclosure sale. **MORTGAGES**, §§ 547-549.

Mutual rights, duties, and liabilities of co-tenants as to rents and profits. **TENANCY IN COMMON**, § 28.

Receiver for rents and profits after sale on foreclosure. **MORTGAGES**, §§ 473, 550.

Rights and liabilities of purchaser of land at tax sale. **TAXATION**, § 739.

Sharing profits as element of partnership. **PARTNERSHIP**, §§ 4-12, 30.

Trust property. **TRUSTS**, § 183.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

PROHIBITION.

Scope-Note.

[INCLUDES writs of prohibition forbidding prosecution of particular proceedings before inferior courts or other tribunals, judges, boards, officers, or corporations, as being without or in excess of their jurisdiction; nature and scope of the remedy in general; grounds of such writs and defenses thereto; to and against whom and to forbid what proceedings they are allowed; jurisdiction to grant and proceedings to obtain the writ; issuance of alternative or absolute writs, requisites and validity thereof, service thereof, return to alternative writs, and proceedings thereon; judgments or orders and enforcement thereof; review of proceedings; costs in such proceedings; and disobedience to such writs.

[EXCLUDES preventive relief by injunction (see *Injunction*). For complete list of matters excluded, see cross-references, post.]

Analysis.

I. Nature and Grounds.

- § 1. Nature and scope of remedy.
- § 3. Existence and adequacy of other remedies.
- § 6. Acts and proceedings of public officers and boards.
- § 8. Grounds for relief.
- § 9. — In general.
- § 13. Prohibition ineffectual or not beneficial.

II. Jurisdiction, Proceedings, and Relief.

[No paragraphs or references in this Digest. But see 40 Cent. Dig. Prohib. §§ 64-84.]

Cross-References.

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LOTTERIES, §§ 3, 6.

Police power of municipalities to enact prohibitory ordinances. MUNICIPAL CORPORATIONS, § 622.

Prohibitory acts and ordinances as regulation of commerce. COMMERCE, § 53.

Prohibitory, etc.—(Cont'd).

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Of lottery tickets. LOTTERIES, § 8.

Traffic in intoxicating liquors. INTOXICATING LIQUORS.

I. NATURE AND GROUNDS.

§ 1. Nature and scope of remedy.

[a] (Sup. 1859)

The writ of publication can only be used "to command the judge and parties to a suit in an inferior court to cease the prosecution thereof, upon a suggestion that the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court"—Board of Com'rs of Jasper County v. Spitler, 13 Ind. 235.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Prohib. § 1.

See, also, 32 Cyc. pp. 593, 590.

§ 3. Existence and adequacy of other remedies.

[a] (Sup. 1859)

Prohibition will not be issued to prevent county commissioners from entering an order es-

tablishing the boundaries of a new county, under the act of March, 1857, appeal being the proper remedy.—Board of Com'rs of Jasper County v. Spitler, 13 Ind. 235.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Prohib. §§ 4-19.

See, also, 32 Cyc. pp. 613-621.

§ 6. Acts and proceedings of public officers and boards.

[a] (Sup. 1878)

Prohibition is not the proper remedy to prevent the execution of a contract by a town for the construction of a sidewalk along the property of petitioner, since injunction will lie.—Corporation of Bluffton v. Silver, 63 Ind. 262.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Prohib. §§ 31-33.

See, also, 32 Cyc. pp. 601, 602.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

§ 8. Grounds for relief.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Prohib. §§ 35-56.

See, also, 32 Cyc. pp. 602-612.

§ 9. — In general.

[a] (Sup. 1859)

For the causes for which a writ of prohibition may be allowed the courts must look to the common law.—Board of Com'rs of Jasper County v. Spitler, 13 Ind. 235.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Prohib. § 35.

See, also, 32 Cyc. pp. 602, 603.

§ 13. Prohibition ineffectual or not beneficial.

[a] (Sup. 1878)

Prohibition will not issue to prevent the execution of a contract made by a town for the construction of a sidewalk along the property of petitioner. If it issues at all it should issue to prevent the making of the contract.—Corporation of Bluffton v. Silver, 63 Ind. 262.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Prohib. § 62.

See, also, 32 Cyc. p. 603.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Prohib. §§ 64-84.

See, also, 32 Cyc. pp. 623-632.

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Over street, privileges of and restrictions on abutting owners, see MUNICIPAL CORPORATIONS, § 667.

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By master to remedy defect, effect as to assumption of risk. MASTER AND SERVANT, § 221.

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Fraudulent representations. FRAUD, § 12.

New promise after termination of disability of coverture as supported by moral obligation of promise during existence of disability. HUSBAND AND WIFE, § 89.

As suspending limitations, or reviving debt barred. LIMITATION OF ACTIONS, §§ 139-149.

By bankrupt after discharge. BANKRUPTCY, § 434.

By surety after discharge. PRINCIPAL AND SURETY, § 130.

To pay bill or note after discharge for failure or insufficiency of presentment, demand, notice or protest. BILLS AND NOTES, § 423.

Usurious contract as consideration. USURY, § 67.

To answer for debt, default, or miscarriage of another. FRAUDS, STATUTE OF, §§ 14-30.

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BREACH OF MARRIAGE PROMISE.

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Taking additional proofs on appeal. CRIMINAL LAW, § 1139.

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PROPERTY.

Scope-Note.

[INCLUDES the nature and subjects of rights of property in general; distinctions between different kinds of property; evidence of title; and matters relating to acquisition, ownership, possession, and transfer of property generally.

[EXCLUDES constitutional guaranties of rights of property (see *Constitutional Law*); capacities, rights, and liabilities of particular classes of persons (see *Aliens; Bastards; Infants; Insane Persons; Corporations*; and other specific heads); and particular subjects and incidents of rights of property, estates, and interests in property, modes of transfer, and actions and proceedings involving or affecting rights of property (see specific heads). For complete list of matters excluded, see cross-references, post.]

Analysis.

1. Nature of right of property.
3. Distinction between real and personal property.
4. — In general.
5. — Conversion or change of form.
6. What law governs.
7. Ownership and incidents thereof.
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Slander of property. **LIBEL AND SLANDER**,
 130-139.
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TRESPASS, §§ 76-89.

§ 1. Nature of right of property.

[a] (*Sup.* 1857)

Property, as applied to lands, includes every species of title, inchoate or complete, and is supposed to embrace those rights which lie in contract, executory as well as executed.—*Figg v. Snook*, 9 Ind. 202.

[b] (*App.* 1910)

A "right" is a claim or title to an interest in anything whatsoever that is enforceable by law.—*Bailey v. Miller*, 91 N. E. 24.

FOR CASES FROM OTHER STATES,
 SEE 40 CENT. DIG. PROPTY. § 1.
 See, also, 32 Cyc. pp. 647-650.

§ 3. Distinction between real and personal property.

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FOR CASES FROM OTHER STATES,
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 See, also, 32 Cyc. pp. 661-675; note, 82 C.
 C. A. 602.

§ 4. — In general.

[a] (*Sup.* 1861)

A title deed is a personal chattel; but it is so connected with and essential to the ownership of real estate that it descends with it to the heir.—*Wilson v. Rybolt*, 17 Ind. 391, 79 Am. Dec. 486.

[b] (*Sup.* 1882)

A house, if treated as personal property, may be held as such.—*Price v. Malott*, 85 Ind. 266.

A dwelling house is presumed to be realty until shown to be personalty, though the owner of the house does not necessarily make it real estate by placing it on the land of a third person.—*Id.*

FOR CASES FROM OTHER STATES,
 SEE 40 CENT. DIG. PROPTY. §§ 4-6; 27
 CENT. DIG. IMPROV. § 2.
 See, also, 32 Cyc. p. 661.

§ 5. — Conversion or change of form.

[a] (*Sup.* 1884)

Where gravel and sand were severed from the soil, they became personal property, for the carrying away and conversion of which damages might be assessed as in cases of other kinds of personal property.—*Pittsburgh, Ft. W. & C. Ry. Co. v. Swinney*, 97 Ind. 586.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. PROPTY. §§ 7, 8.
 See, also, 32 Cyc. pp. 672-674.

§ 6. What law governs.

[a] (*Sup.* 1899)

The laws of a sister state, which give or deny the power to contract, have extraterritorial force or effect where the particular contract involved relates to the ownership or incumbrance of lands situated in another state or jurisdiction.—*Nathan v. I.* N. E. 987, 152 Ind. 232, 43 L. R. A. 8.

FOR CASES FROM OTHER STATES,
 SEE 40 CENT. DIG. PROPTY. § 3.
 See, also, 32 Cyc. pp. 674-676.

§ 7. Ownership and incidents thereof.

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Ownership as affecting right to exemption, see **EXEMPTIONS**, §§ 59, 61; **HOMESTEAD**.

Ownership as element of arson, see **ARSON**, 9, 22.

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Ownership as element of larceny, see **LARCENY**, §§ 7, 32, 60.

Ownership of bill or note, see **BILLS AND NOTES**, §§ 467, 480, 481, 496, 497, 503, 523-525.

Ownership of building burglarized, see **BURGLARY**, § 22.

Ownership of improvements, see **IMPROVEMENTS**, § 3.

Ownership of land as affecting right to mortgage lien for improvements, see **MORTGAGES**, **LIENS**, §§ 56-59.

Ownership of lands under navigable water, see **NAVIGABLE WATERS**, §§ 36, 37.

Ownership of property in, or stolen from, and burglarized, see **BURGLARY**, § 23.

Ownership of property insured, promissory notes, covenants, or conditions subject to, see **INSURANCE**, § 328.

Ownership of property insured, representing warranties, or conditions in policy or contract therefor, see **INSURANCE**, § 282.

Ownership of property obtained by false pretenses, allegations in indictment, see **PRETENSES**, § 32.

Ownership of property or instrumentality causing injury, allegations in pleadings, see NEGLIGENCE, § 109.

Pleading, see PLEADING, § 33.

Res judicata as to title, see JUDGMENT, §§ 540-740.

Variance between allegations and proof as to ownership, see INDICTMENT AND INFORMATION, § 182.

[a] (Sup. 1909)

Where private property is by the consent of the owner invested with a public interest or privilege for the public, the owner can no longer deal with it as his private property only, but must hold it subject to the rights of the public.—*State ex rel. Goodwine v. Cadwallader*, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319.

[b] (App. 1909)

The meaning of the word "hold" as applied to real estate is somewhat different from the mode of acquisition. It has to do with the duration or tenure of the estate.—*Lehman v. State ex rel. Miller*, 88 N. E. 365.

FOR CASES FROM OTHER STATES.

SEE 40 CENT. DIG. Prop. § 9.

See, also, 32 Cyc. pp. 676, 677.

§ 9. Evidence as to title.

Best and secondary evidence of, see EVIDENCE, § 158.

In action for injuries from defect in street, see MUNICIPAL CORPORATIONS, § 819.

In action to restrain collection of assessment for public improvements, see MUNICIPAL CORPORATIONS, § 538.

Judgment as evidence of title or link in chain, see JUDGMENT, §§ 712.

Probated will, see WILLS, § 433.

Self-serving declarations, see EVIDENCE, § 273.

Tax deed as evidence, see TAXATION, § 789.

To bill or note, see BILLS AND NOTES, §§ 496, 497, 508, 509, 523-525.

To lost goods, see FINDING LOST GOODS, § 3.

To property claimed as assets of decedent's estate, see EXECUTORS AND ADMINISTRATORS, § 59.

To property claimed in ejectment, see EJECTMENT, §§ 86, 90, 95.

To property claimed in replevin, see REPLEVIN, §§ 70-72.

To property levied on, see EXECUTION, § 194.

To property sold at tax sale, see TAXATION, § 789.

To property subject of suit to quiet title, see QUIETING TITLE, § 44.

To railroad, see RAILROADS, §§ 269-272.

To vessel, see SHIPPING, § 19.

[a] (Sup. 1841)

Evidence for defendant in ejectment that plaintiff held another title to the same land, but on the validity of which he did not rely, is irrelevant and inadmissible to divest or impair the title which he acquired by purchase

at a sheriff's sale under a regular execution issued on the judgment of a court of competent jurisdiction.—*Tillotson v. Doe ex dem. Gregory*, 5 Blackf. 590.

[b] (Sup. 1841)

The possession of land raises a presumption of ownership, in the absence of anything to show the contrary.—*Robinoe v. Doe ex dem. Colwell*, 6 Blackf. 85.

[c] (Sup. 1855)

Possession of personal property is prima facie evidence of ownership.—*Smith v. Downing*, 6 Ind. 374.

[d] (Sup. 1861)

In a suit against alleged owners of a steamboat for money and goods supplied on the master's order, the listing of the boat by the assessor for taxation is rightly given in evidence to prove ownership.—*Holcroft v. Halbert*, 16 Ind. 256; *Same v. Wright*, 17 Ind. 13; *Same v. Halbert*, Id. 18; *Same v. Sherley*, Id. 28.

[e] (Sup. 1886)

Where title by deed is relied on, a chain of title must be traced back to the ultimate source of title, or to the grantor in possession under a claim of title at the time he executed the deed.—*City of Lafayette v. Wortman*, 8 N. E. 277, 107 Ind. 404.

[f] (App. 1898)

Ownership of personalty can be presumed from possession, and a claim of ownership under circumstances indicating it, and, when once shown to exist, is presumed to continue until the contrary is proven.—*McAfee v. Montgomery*, 51 N. E. 957, 21 Ind. App. 196.

[g] (App. 1905)

A warranty deed of real estate from one in possession gives the grantee prima facie a good title.—*Western Union Telegraph Co. v. Krueger*, 36 Ind. App. 348, 74 N. E. 25.

[h] (App. 1906)

Evidence held to sustain a finding that defendant owned certain land.—*Littler v. Robinson*, 38 Ind. App. 104, 77 N. E. 1145.

[i] (App. 1908)

Ownership of personalty may be established by acts of ownership as well as by direct testimony; possession being prima facie proof of ownership.—*City of La Porte v. Henry*, 41 Ind. App. 197, 83 N. E. 655.

Where ownership of personalty is undisputed, slight evidence will establish it.—*Id.*

[j] (App. 1908)

Assessment lists of personal property are admissible as evidence to prove the ownership of such property by the person assessed at the time of the assessment.—*Indiana Union Traction Co. v. Benadum*, 42 Ind. App. 121, 83 N. E. 261.

[k] (App. 1910)

Possession of land is sufficient evidence of ownership to make the question of title one for the jury.—Pittsburg, C., C. & St. L. Ry. Co. v. Wilson, 91 N. E. 723.

[l] (App. 1910)

Though there is a presumption that one shown to be the owner of a note continues to own it, this may be overthrown by evidentiary circumstances rendering it probable that the fact is otherwise.—Conner v. Martin, 92 N. E. 3.

FOR CASES FROM OTHER STATES,

SEE 20 CENT. DIG. EVID. §§ 78, 87, 106, 109, 111, 144–154, 196, 214, 239, 316, 449, 474½, 759, 788, 822–882, 1033, 1066, 1078, 1095, 1108–1120, 1136, 1178, 1219, 1220, 1276, 1277, 2171, 2192, 2457.

See, also, 32 Cyc. pp. 678–680.

§ 11. Right of alienation.

[a] (Sup. 1858)

Generally the owner of property has a right to dispose of it to whom he pleases; but the right must be exercised without fraud.—Dearmond v. Dearmond, 10 Ind. 191.

[b] (Sup. 1880)

In the absence of a statute, the owner has entire control of his personal property. He can sell and transfer it by parol, and may by parol transfer it upon such lawful terms, and to such uses and trusts, as he may desire.—Hon v. Hon, 70 Ind. 135.

FOR CASES FROM OTHER STATES,

See 32 Cyc. p. 680.

PROPOSALS.

See—

Bids at sale for taxes. TAXATION, § 676.

At sale on execution. EXECUTION, §§ 229–239.

At sale on partition. PARTITION, § 104.

For contracts with counties. COUNTIES, §§ 115, 120.

For contracts with municipal corporations. MUNICIPAL CORPORATIONS, §§ 332, 334–336.

For contracts with school districts or officers. SCHOOLS AND SCHOOL DISTRICTS, § 80.

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Necessity for purpose of review, see APPEAL AND ERROR, § 846.

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Duty of mine operator to furnish, for use of miners, see MASTER AND SERVANT, § 118.

PROSECUTING ATTORNEYS.

See DISTRICT AND PROSECUTING ATTORNEYS.

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PROSTITUTION.

Scope-Note.

[INCLUDES common lewdness of a female in offering or permitting sexual intercourse with men indiscriminately, for gain or other purpose, and soliciting or inducing a female to become a prostitute or inmate of a house of prostitution, placing or keeping a female in such a house; and living with or accepting earnings of a prostitute; nature and extent of criminal responsibility therefor, and grounds of defense; and prosecution and punishment of such acts as public offenses.

[EXCLUDES offenses of open and notorious lewdness or lascivious conduct (see *Lewdness*); abduction (see *Abduction*); and keeping, frequenting, etc., house of prostitution (see *Disorderly House*). For complete list of matters excluded, see cross-references, post.]

Analysis.

- § 1. Nature and elements of offenses.
- § 3. Indictment or information.

Cross-References.

See—

Abduction of female infant for purpose of. AB-
DUCTION.

Affecting right of inheritance. DESCENT AND
DISTRIBUTION, § 63.

Change of sleeping apartment in house of, as
breach of warranty in insurance policy. IN-
SURANCE, § 322.

DISORDERLY HOUSE.
LEWDNESS.

Power of city to apprehend prostitutes outside
of city limits. MUNICIPAL CORPORATIONS,
§ 594.

Words imputing as constituting libel or slander.
LIBEL AND SLANDER, § 7.

§ 1. Nature and elements of offenses.

[a] (Sup. 1877)

The ordinance of Greensburgh of 1868 (sec-
tion 2), against associating with a prostitute
“in any public place, street, alley, common, or
within said city,” must be construed to read,
“alley or common within,” etc. A prosecution
cannot be maintained thereunder for associating
with a prostitute in a private place in the city.
—Zorger v. City of Greensburgh, 60 Ind. 1.

[b] (Sup. 1885)

A single act of voluntary sexual inter-
course between an unmarried woman and a
male person does not make the woman a pros-
titute, within Rev. St. 1881, § 2002, prohibit-
ing association with prostitutes or frequenting
gambling houses with prostitutes.—Fahnestock
v. State, 102 Ind. 156, 1 N. E. 372.

[c] (Sup. 1909)

Under Burns' Ann. St. 1908, § 2356, mak-
ing it unlawful to entice a female to enter “any
house of prostitution, assignation, saloon or
wine room where intoxicating liquors are sold,
or any other place for vicious or immoral pur-
poses,” an affidavit is insufficient which charges
accused with enticing a female “to enter into a
certain house situated at No. 202 East Broad-
way street” in a city, county, and state named,

“for the purpose of having sexual intercourse
with her,” as “any other place” means place of
like character with those previously enumerat-
ed.—Wiggins v. State, 172 Ind. 78, 87 N. E.
718.

Under Burns' Ann. St. 1908, § 2356, the
vicious intent is an element of the crime in ev-
ery case, whether the entry is into one of the
places expressly mentioned or one of the “other”
places referred to in the act.—Id.

FOR CASES FROM OTHER STATES,

SEE 40 CENT. DIG. Prost. §§ 1, 2; 17
CENT. DIG. Disorderly H. § 7.

See, also, 32 Cyc. pp. 731-733.

§ 3. Indictment or information.

[a] (Sup. 1879)

An affidavit and information under Laws
1877, p. 80, § 5, defining a female prostitute
must charge the commission of acts constituting
the offense therein prohibited.—Delano v. State,
66 Ind. 348.

[b] (App. 1896)

Under Burns' Rev. St. 1894, § 2089 (Rev.
St. 1881, § 2002), making it a criminal offense
for a man to associate “with females known or
reputed as prostitutes,” an indictment which

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charges a defendant with associating with one female known and reputed as a prostitute is sufficient.—*Jessup v. State*, 14 Ind. App. 257, 42 N. E. 950.

[c] (App. 1901)

Under Burns' Rev. St. 1894, § 2090, declaring any female frequenting houses of ill fame, or associating with unchaste women, or committing fornication for hire, a prostitute, and authorizing punishment, an indictment charging a female, among other acts, with committing fornication for hire, defines an offense, though it does not set out the particular acts constituting the offense.—*Stanton v. State*, 60 N. E. 999, 27 Ind. App. 105.

FOR CASES FROM OTHER STATES,
SEE 40 CENT. DIG. Prost. § 3.
See, also, 32 Cyc. pp. 734-736.

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PUBLIC LANDS.

Scope-Note.

[INCLUDES lands forming part of the public domain; regulations relating grants thereof, and acquisition by private owners of title thereto or rights therefrom; and grants or statutory provisions.]

[EXCLUDES commons (see *Common Lands*); mines and minerals in public lands (see *Mines and Minerals*); and lands under navigable waters (see *Navigable Waters*). For complete list of matters excluded, see cross-references, post.]

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§ 142. In general.

IV. Colonial and Proprietary Grants.

[No paragraphs or references in this Digest. But see 41 Cent. Dig. Pub. Lands, §§ 601-623.]

V. Spanish, Mexican, French, and Russian Grants.

[No paragraphs or references in this Digest. But see 41 Cent. Dig. Pub. Lands, §§ 624-725.]

VI. Titles Derived from Indians.

[No paragraphs or references in this Digest. But see 41 Cent. Dig. Pub. Lands, §§ 726-730.]

*Cross-References.**See—*

Competency of transcripts or certified copies of records and proceedings in land office. EVIDENCE, § 342.

Devise of interest in public lands. WILLS, § 8.

Execution on interests in public lands. EXECUTION, § 23.

Improvement by township trustees. TOWNS, § 46.

Lands under water. NAVIGABLE WATERS, §§ 36, 37.

Liability of public lands or rights and interests therein to taxation. TAXATION, §§ 175-177. Mandamus to control official acts in reference to proceedings relating to public lands. MANDAMUS, § 85.

Mineral lands. MINES AND MINERALS, § 36.

Right of administrator to land certificate to which decedent was entitled. EXECUTORS AND ADMINISTRATORS, § 39.

Sufficiency of title to support ejectment. EJECTMENT, § 11.

I. GOVERNMENT OWNERSHIP.**§ 20. Improvements.**

[a] (Sup. 1841)

A sale of land by the United States will pass the property in a fence, placed thereon by mistake, to the purchaser, since by its annexation to the soil the fence became the property of the United States.—*Seymour v. Watson*, 5 Blackf. 555, 36 Am. Dec. 556.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Pub. Lands, § 27.

See, also, 32 Cyc. pp. 786, 787.

II. SURVEY AND DISPOSAL OF LANDS OF UNITED STATES.

Boundaries, see BOUNDARIES.

Mineral lands, see MINES AND MINERALS, § 36.

To individual Indians, see INDIANS, § 14.

(A) SURVEYS.

Description of land in complaint in ejectment by reference to, see EJECTMENT, § 64.

Description of land in deed by reference to, see DEEDS, § 38.

For selection and certification of swamp lands to state, see post, § 60.

§ 24. Method and sufficiency.

[a] (Sup. 1832)

Under Act Cong. April 24, 1820, where a quarter section containing an excess over 160 acres is to be divided, the excess must fall on the exterior half.—*Grover v. Paddock*, 84 Ind. 244.

[b] (Sup. 1895)

A government survey which actually runs its section lines every two miles across swamp lands, and makes the corners on each line at the end of every mile, is a legal survey.—*Tolleston*

This Digest is compiled on the Key-Number System. For explanation, see page iii.

Club of Chicago v. State, 141 Ind. 107, 38 N. E. 214, 40 N. E. 690.

[c] (Sup. 1896)

Where the field notes of a survey of a fractional township partly covered by a lake show the external boundary lines thereof to have been run and the section corners marked thereon, and all the interior lines to the lake shore, and the corners marked in the field, except the south line of one section of which but a part was run, but which could be ascertained by running the line due west across the lake to the external boundary, and the east and west section lines as run were less than a mile apart, the survey was sufficient under Rev. St. U. S. §§ 2395, 2396, and included the land covered by the lake.—Kean v. Roby, 145 Ind. 221, 42 N. E. 1011.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Pub. Lands, §§ 31, 32.

See, also, 32 Cyc. pp. 799, 800.

§ 28. Resurveys.

[a] (Sup. 1896)

The affirmance by the interior department of a resurvey is not binding on the courts, when it appears that by patent under a prior legal survey title to the lands passed from the government.—Kean v. Roby, 145 Ind. 221, 42 N. E. 1011.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Pub. Lands, § 40.

See, also, 32 Cyc. pp. 805, 806.

(B) ENTRIES, SALES, AND POSSESSORY RIGHTS.

Adverse possession of land, see ADVERSE POSSESSION, § 7.

Assignment of rights, see post, § 135.

Cancellation of entries, see post, § 102.

§ 29. Lands subject to entry.

[a] (Sup. 1838)

Lands of the United States, which, prior to the 29th of May, 1830, had been proclaimed for sale by the president, but which remained unsold, were subject to the pre-emption right conferred by the act of that date.—Smith v. Mosier, 5 Blackf. 51.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Pub. Lands, §§ 41-47.

See, also, 32 Cyc. p. 807.

§ 32. Rights acquired by entry in general.

[a] (Sup. 1849)

If the register of a land office has duly admitted the location of land, and granted a certificate thereof, a subsequent sale of the same land is void, although to a bona fide purchaser without notice.—Moyer v. McCullough, 1 Ind. 339, Smith, 211.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Pub. Lands, §§ 54-56.

See, also, 32 Cyc. pp. 817-819; note, 70 L. R. A. 799.

§ 34. Pre-emption.

[a] (Sup. 1838)

On the death of a person entitled to a land certificate under the act of congress of 1828, the certificate issues to his heirs.—Shanks v. Lucas, 4 Blackf. 476.

[b] (Sup. 1839)

A person to be entitled to a pre-emption right under the act of congress of 1830 must have cultivated the land in 1829, and have been in possession of it at the time the act passed.—Stewart v. Haynes, 5 Blackf. 163.

[c] (Sup. 1860)

In the year 1845 A. settled with his family upon a quarter section of land in the Miami Reservation, and died May 31, 1847, after the act of congress of August 3, 1846, became a law, without proving his claim to pre-emption, or purchasing the land. After his death, his administrator, under the acts of congress in such cases made and provided, pre-empted and entered the land in the names of the heirs of A. A's wife and children, at the time of such pre-emption and purchase, still resided on the land. All the improvements were made thereon by A. and his family, in his lifetime. Held, that though the widow might, under the laws of congress, have pre-empted and purchased the land, yet as it did not plainly appear from the evidence with whose money it was purchased, the inference was that it was with the money of those in whose name it was entered, viz.: the heirs of A., who were also allowed by law to make the entry. As the widow was not an heir, she had no interest in the land.—Grant v. Cromwell, 15 Ind. 315.

[d] (Sup. 1864)

An agent of the United States set off to a tribe of Indians, in accordance with a treaty with them, a tract of land occupied in part by a pre-emptioner, who was recognized as such by the government. Held, that the pre-emptioner had the superior title.—Sumner v. Coleman, 23 Ind. 91.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Pub. Lands, §§ 65-71.

See, also, 32 Cyc. pp. 827-830; notes, 23 Am. Dec. 492, 87 Am. Dec. 132.

§ 40. Abandonment or relinquishment of claim.

[a] (Sup. 1837)

A person having a pre-emption right to a certain tract of land of the United States, which right was to expire on a certain day, sowed grain on the land, which he knew would, on that day, be unripe, and then permitted the time to expire without making the purchase. Held, that a stranger, who afterwards purchased the land of the United States, was entitled to the growing crop.—Razor v. Qualls, 4 Blackf. 286, 30 Am. Dec. 658.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Pub. Lands, §§ 100-102.

See, also, 32 Cyc. pp. 856-858.

§ 41. Evidence.**[a] (Sup. 1832)**

A land certificate, without a patent, conveys no legal title to the land.—*Mosier v. Smith*, 3 Blackf. 132.

[b] (Sup. 1857)

Land office certificates of final payment are evidence of legal title. Laws 1833, p. 112; Rev. St. 1843, c. 29, §§ 1, 8, 9.—*Doe ex dem. Stauffer v. Stephenson*, 9 Ind. 144.

[c] (Sup. 1871)

The deposition of the register of a land office is inadmissible as evidence to prove that certain lands are vacant public lands of the United States and have not been entered by any one.—*Lacey v. Marnan*, 37 Ind. 168.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Pub. Lands, §§ 103–105.

See, also, 32 Cyc. pp. 807, 841.

(C) DONATIONS AND BOUNTY LANDS.

Judicial notice of, see EVIDENCE, § 48.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Pub. Lands, §§ 106–132.

See, also, 32 Cyc. pp. 862–866.

(D) RESERVATIONS TO UNITED STATES.**FOR CASES FROM OTHER STATES,**

SEE 41 CENT. DIG. Pub. Lands, §§ 133–137.

See, also, 32 Cyc. pp. 858–862.

(E) SCHOOL AND UNIVERSITY LANDS.

Application to school purposes of school lands, and proceeds thereof, see SCHOOLS AND SCHOOL DISTRICTS, § 15.

§ 51. Effect of reservation and grant to state in general.**[a] (Sup. 1840)**

The grant of sections numbered 16 by act of congress of 1816, for the use of schools, was not to the state in which the land lies, but to the inhabitants of the respective townships.—*State v. Newton*, 5 Blackf. 455.

[b] (Sup. 1850)

Act Cong. March 26, 1804, entitled "An act making provision for the disposal of the public lands in the Indiana territory and for other purposes," conferred no rights on the trustees of the Vincennes University to the township of land reserved by that act for the use of a seminary of learning, and which was subsequently located in Gibson county. They were not then in existence as a corporation.—*State v. Trustees of Vincennes University*, 2 Ind. 293. Judgment reversed *Vincennes University v. Indiana* (U. S. 1852) 14 How. 268, 14 L. Ed. 416.

[c] The fact that at the time of the grant by congress (April 19, 1816), of a sixteenth section in each township "to the inhabitants thereof for the use of schools," there were no inhabitants in most of the townships, does not affect the validity of the grant. Until there are inhabitants the fee is in abeyance.—(Sup. 1854) *State v. Springfield Tp. in Franklin County*, 6 Ind. 83; (1861) *Same v. White Water Tp. of Franklin County*, 17 Ind. 349.

[d] (Sup. 1886)

After the state has accepted a grant of school lands made by the general government, it cannot be withdrawn.—*Daggett v. Bonewitz*, 107 Ind. 276, 7 N. E. 900.

The grant of school lands to the state of Indiana by the act of congress of April, 1816, vested an immediate seisin in the grantee.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Pub. Lands, §§ 138, 146.

See, also, 32 Cyc. pp. 870–872.

§ 53. Indemnity and lien lands.**[a] (Sup. 1885)**

Lands substituted for school lands proved unavailable must be selected by the secretary of the treasury as required by 4 Stat. 179, or title thereto will not pass.—*Peck v. Louisville, N. A. & C. Ry. Co.*, 101 Ind. 366.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Pub. Lands, §§ 143–145.

See, also, 32 Cyc. pp. 872–875.

§ 54. Sale and conveyance by state.

Interest acquired by purchaser as subject to execution, see EXECUTION, § 23.

Mandamus to compel execution of deed to purchaser, see MANDAMUS, § 85.

[a] (Sup. 1860)

Act Cong. March 26, 1804, entitled "An act making provision for the disposal of public lands in the Indiana Territory," reserved a township of land for the use of a seminary of learning, which was subsequently located in Gibson county. *Held*, that the act of the territorial legislature of 1806 granting the use of said lands to the Vincennes University was inoperative; no power to make the grant being conferred on the Legislature by congress.—*State v. Trustees of Vincennes University*, 2 Ind. 293. Judgment reversed *Vincennes University v. Indiana* (U. S. 1852) 14 How. 268, 14 L. Ed. 416.

[b] The act of congress of May, 1828, authorizing the sale of the sixteenth section, which had been granted to the several congressional townships of the state for the use of schools by the act of congress of April, 1816, is to be taken in *pari materia* with all the successive acts of congress, passed at different sessions, reserving and granting sixteenth sections in various states for the same purpose. Relating to the same

subject, they are to be construed together as one act; the whole forming one body of law, from which the purpose of the grant is to be deduced.—(Sup. 1854) *State v. Springfield Tp.*, in Franklin County, 6 Ind. 83; (1861) *Same v. White Water Tp. of Franklin County*, 17 Ind. 349.

[c] (Sup. 1857)

In an action for the recovery of lands, where it was alleged that the defendant was wrongfully in possession of lands under a conveyance from one acting as a school commissioner, it appeared that by Act Jan. 13, 1844, the legislature had enacted that the sale made by such person, acting as school commissioner, should be declared legal, and that the purchaser should be entitled to all the benefits of the purchase, as if the person named had at that time actually been school commissioner. *Held*, that the effect of the act was to make the sale valid by curing all defects, whether arising from the acts of such school commissioner or his official tenure.—*State ex rel. Parish Grove Tp. v. Sickler*, 9 Ind. 67.

[d] (Sup. 1860)

Where the inhabitants of a township received and expended the proceeds of school lands, and the purchaser made valuable improvements, the court presumed that the inhabitants were cognizant of the improvements, and held them bound by the sale.—*State ex rel. Parish Grove Tp. v. Stanley*, 14 Ind. 409.

[e] (Sup. 1872)

A purchaser of land sold as school land cannot enjoin the auditor of the county from selling the land under his mortgage to secure the purchase money, on the ground that the title to the land was not in the inhabitants of the county. If the inhabitants had no title, the plaintiff has none; and a sale of the land under the mortgage cannot injure him. He has just such title as the inhabitants of the township had, and he mortgaged back just such title as he received. So *held* where there had been no covenants of title, no fraud, no eviction, and where there was no prayer in the foreclosure suit for any personal judgment for deficiency.—*Cartright v. Briggs*, 41 Ind. 184.

[f] (Sup. 1887)

Under the state law, after the lapse of 30 years, the presumption is that a sale of school lands was regularly made.—*McPheeters v. Wright*, 110 Ind. 519, 10 N. E. 634.

The provisions of section 4351, Rev. St. 1881, which authorizes a private sale of school lands after an offer at public auction, do not apply to a case where it does not appear that the lands had ever been offered for sale at public auction.—*Id.*

[g] (Sup. 1889)

Under Rev. St. 1881, § 4346, requiring one-fourth of the purchase price of school land, sold by the county authorities, to be paid, with the interest on the residue for one year, in advance,

and the residue in ten years, with interest in advance, deferred payments to be regarded as part of the school fund, and reported as such to the superintendent of public instruction, the county is liable for the interest on the whole purchase money, though the purchaser defaults in the payment of the deferred installments, and the land is forfeited to the school fund.—*Board of Com'rs of St. Joseph County v. State ex rel. Michener*, 120 Ind. 442, 22 N. E. 339.

[h] (Sup. 1890)

Rev. St. 1881, § 4347, provides that, where the purchaser of school lands fails to make payment on his contract, his rights shall be forfeited, and the land shall revert to the state and be resold, and the residue of the proceeds, after deducting the amount due, with interest and penalties, shall be paid to him or his legal representatives. *Held*, that the forfeiture of the contract does not vest the title absolutely in the state, but merely authorizes it to make the sale.—*McPheeters v. Wright*, 124 Ind. 560, 24 N. E. 734, 9 L. R. A. 176.

[i] (Sup. 1891)

Rev. St. 1881, § 4648, expressly authorizes an action to be brought by the county auditor in the name of the state for the use of the Indiana University to recover for waste committed on state land held for the use of the university, after forfeiture of a conveyance by the state to a purchaser.—*State ex rel. Schumacher v. Gramelspacher*, 26 N. E. 81, 126 Ind. 398.

[j] (Sup. 1906)

Where there is evidence that cross-defendant in a suit to foreclose a lien for unpaid purchase money had paid for the lands purchased at school fund sale, a decree in his favor is proper.—*State ex rel. Longfellow v. Wimer*, 166 Ind. 530, 77 N. E. 1078.

The county auditor may foreclose the lien for the balance due to the school fund on a sale of school lands and sell them to enforce payment.—*Id.*

In an action to quiet title to school lands, a county auditor and board of commissioners were neither necessary nor proper defendants, and a judgment against them could not bind the state.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Pub. Lands, §§ 152-164, 166-169.

See, also, 32 Cyc. pp. 876-896.

§ 55. Leases by state.

Disposition of rents, see post, § 57.

[a] (Sup. 1835)

A purchaser of school land from the school commissioners cannot maintain an action against a lessee of the land for a breach of the contract of lease from the superintendent of school land, where the lease was not such as was authorized by law.—*Garwood v. Cox*, 4 Blackf. 93.

In an action by a purchaser of school land to recover the same from an alleged lessee, it was necessary for the declaration to state that the lease remained uncanceled, and that the trustees of the township had authorized the sale by the commissioner, and it was also necessary to show that the situation of the land was such as to authorize the sale.—Id.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Pub. Lands, §§ 170-174.

See, also, 32 Cyc. pp. 896-901.

§ 57. Disposition of proceeds.

[a] A repeal by the legislature of the act establishing the congressional townships could not alter the effect of the act of congress granting a sixteenth section in each of said townships to the inhabitants thereof, for the use of schools, or give the state any better right than she had before to divert such fund. Said grant is an executed contract, and irrevocable by the legislature.—(Sup. 1854) *State v. Springfield Tp.*, in *Franklin County*, 6 Ind. 83; (1861) *Same v. Whitewater Tp. of Franklin County*, 17 Ind. 349.

By the sale of the several sixteenth sections under the act of congress of 1828, the proceeds of the sale in each township became a trust fund, to be applied to the use of the schools in that township, and not elsewhere.—Id.

[b] (Sup. 1873)

School Law, § 44, as amended by Act March 7, 1873, imposes upon the township trustees the duty of reporting to the county auditor annually by the fourth Monday in March in accordance with the requirements of such section, and of paying into the county treasury all the moneys in their hands derived from rent of unsold school lands belonging to the sixteenth section.—*Davis v. State ex rel. Board of Com'rs of Bartholomew County*, 44 Ind. 38, judgment affirmed in *Davis v. Indiana* (1876) 94 U. S. 792, 24 L. Ed. 320.

Under Act March 7, 1873, § 7, an action may be sustained in the name of the state on the relation of the board of county commissioners to recover rents received by a township trustee for the lease of unsold school lands belonging to the sixteenth section, and not paid by such trustee into the county treasury.—Id.

Money derived from the rent of unsold school lands belonging to the sixteenth section should be paid into the county treasury, and be distributed by the county auditor. A township trustee has nothing to do with its distribution, except to so much of it as may be apportioned to such parts of his township as are within the congressional township.—Id.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Pub. Lands, §§ 176-179.

See, also, 32 Cyc. pp. 900, 901.

(F) SWAMP AND OVERFLOWED LANDS.

Judicial notice of laws relating to, see EVIDENCE, § 32.

§ 58. Construction and operation of grant to state in general.

[a] (Sup. 1878)

The title of the ceded swamp lands vests in the state by virtue of the act of congress, without issuance of any patent.—*Edmondson v. Corn*, 62 Ind. 17.

[b] (Sup. 1884)

A patent purporting to convey land to a state, subject to the disposal of its Legislature, as swamp and overflowed lands, in conformity with the swamp land act (Act Cong. Sept. 20, 1850), was evidence that the title to the land vested absolutely in the state as of the date of such enactment.—*Hamilton v. Shoaff*, 99 Ind. 63.

[c] (Sup. 1885)

After title to land had vested in the state of Indiana by virtue of the act of congress of September 28, 1850, relative to swamp lands, a patent by the United States to an individual to land, in that state, covered by the above act, was of no effect.—*Matthews v. Goodrich*, 102 Ind. 537, 1 N. E. 175.

Rev. St. U. S. 1850, § 2479 (1 Gav. & H. Rev. St. p. 737), provided that the whole of swamp and overflowed lands in the state made unfit thereby for cultivation, which remained unsold at the time of the passage of the act, were thereby granted to the state, and required the Secretary of the Interior as soon as practicable to make out an accurate list and plat of the lands described and transmit the same to the Governor of the state, and cause a patent to be issued to the state therefor, and that by such patent a fee simple to the lands should be vested in the state, subject to the disposal of the Legislature. Held that, lists having been made by the Secretary of Interior and patents for lands having been issued to the state, though not in accordance with such act, the act itself operated as a grant in present to the state.—Id.

[d] (Sup. 1886)

In construing acts granting swamp lands to a state, nothing is to be inferred against the state.—*State v. Portsmouth Sav. Bank*, 106 Ind. 435, 7 N. E. 379.

The swamp land act of 1850 operated as a present grant to the state of Indiana of its swamp lands on being identified, and the selection by the state, of Beaver Lake lands, confirmed by the act of 1873, perfected the title thereto, which relates back to the date of the original act of 1850.—Id.

[e] (Sup. 1895)

Act Cong. Sept. 28, 1850, known as the "Swamp Land Act," was a present grant to the several states of the swamp lands therein situated, and when the selections were confirmed un-

der Act March 3, 1857, title referred back to the date of the grant, September 28, 1850.—*Tolleston Club of Chicago v. State*, 38 N. E. 214, 40 N. E. 690, 141 Ind. 197.

Title to swamp land acquired by the state under a patent from the United States is not affected by a subsequent act of congress granting a company the right to drain such land and authorizing its survey and sale.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Pub. Lands, §§ 180-183, 187-191.

See, also, 32 Cyc. p. 901.

§ 59. Lands included in grant.

[a] (Sup. 1886)

The state of Indiana, having the title, is not estopped to assert it as to the even-numbered lots in Beaver lake, by accepting and approving a deed to the odd-numbered lots in settlement of a claim; nor by assessing and collecting taxes on the even-numbered lots; nor by allowing improvements to be made, the title being equally open to the notice of all parties.—*State v. Portsmouth Sav. Bank*, 106 Ind. 435, 7 N. E. 379.

FOR CASES FROM OTHER STATES.

SEE 41 CENT. DIG. Pub. Lands, §§ 184, 185.

See, also, 32 Cyc. pp. 904-910.

§ 60. Survey, selection, and certification to state.

Survey and selection as condition precedent to sale, see post, § 61.

[a] (Sup. 1895)

Where the commissioner of the general land office of the United States directed a local land register to make a list of land and transmit a copy thereof to the general land office, and it appears that such list was completed on April 15, 1851, and that it was on file in the general land office in 1893, it will be presumed that the register transmitted it to such office before March 3, 1857, the date of the act confirming the state's selection of swamp lands theretofore made and reported to the commissioner.—*Tolleston Club of Chicago v. State*, 141 Ind. 197, 38 N. E. 214, 40 N. E. 690.

[b] (Sup. 1898)

The resurvey of 1875, of the lands formerly covered by water, and which were conveyed to the state of Indiana by the United States under the swamp land act of 1850, by the descriptions of the survey of 1834, was invalid; and sales in pursuance thereof gave no title as against grantees under the survey of 1834.—*Mason v. Calumet Canal & Improvement Co.*, 50 N. E. 85, 150 Ind. 699, affirmed *Kean v. Same* (1903) 23 S. Ct. 651, 190 U. S. 452, 47 L. Ed. 1134.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Pub. Lands, §§ 186, 187.

See, also, 32 Cyc. pp. 903, 904.

§ 61. Sale and conveyance by state to private entry before the land has been at public sale.

[a] (Sup. 1856)

The act to regulate the sale of swamp lands passed in 1852, does not authorize a private entry before the land has been at public sale.—*Carver v. Chute*, 8 Ind.

Swamp Land Act 1853, § 2, was intended to settle the construction of sections 1 and 2 of the statute of 1852 regulating the sale of swamp lands, relative to the number of sections to be included in subdivisions sold at public sale.—*Id.*

[b] (Sup. 1862)

Under 1 Rev. St. 1852, p. 472, § 1, a certificate of entry of swamp lands is evidence of legal title.—*Reed v. Hamilton*, 18 Ind. 47.

[c] (Sup. 1864)

In an action brought to quiet title, the plaintiff alleged that the land in question, in Jackson county, was given to the state of Indiana by the act of congress of September 28, 1850; that afterwards, by the act of the legislature of February 14, 1851, and other supplemental thereto, the plaintiff on a day in November, 1852, applied to the commissioner of the United States land office at Jeffersonville to purchase said land, and received from him a certificate of purchase, and presented the same to the receiver of said land office, and paid to the receiver the purchase price therefor, which he received in payment in full for said lands, and gave to the plaintiff a duplicate certificate of purchase and receipt; that the register the same day transmitted to the auditor of state said certificate and receipt, and transmitted the purchase money to the state treasurer; that November 2, 1852, the auditor issued to the plaintiff a certificate that said receiver had deposited with the state treasurer said purchase money; that December 1, 1852, the governor of the state conveyed to the plaintiff by patent or deed the said land to the plaintiff, and that the sale to the plaintiff was in all things made in conformity with the law of the state and the United States.—*Held*, that the complaint showed a good title.—*Murphy v. Ewing*, 23 Ind. 297.

[d] (Sup. 1875)

It is not necessary or proper that a certificate of purchase issued by the state of swamp lands should be recorded in the county where the land is situated. Such patents are required to be recorded by the secretary of state in his office, and, when so recorded, are notice.—*Mason v. Cooksey*, 51 Ind. 519.

[e] (Sup. 1878)

The certificate of the county treasurer acknowledging the receipt of the purchase money for swamp lands sold by the county auditor is evidence of the legal title to the land.—*Rev. St. 1876*, p. 953, § 11.—*Edmondson v. State*, 62 Ind. 17.

[f] (Sup. 1882)

The failure to record a deed of swamp lands in the office of the secretary of state, as required by law, is not a bar to the title.

by Act June 14, 1852, renders the deed void as against a subsequent purchaser from the state in good faith and without notice.—*Nitche v. Earle*, 88 Ind. 375.

[c] (Sup. 1835)

The governor, without express authority of the legislature, has no power, by any form of conveyance, to transfer to the United States government the control of land previously made the property of the state by virtue of the swamp-land act.—*Matthews v. Goodrich*, 102 Ind. 557, 1 N. E. 175.

There has been no act of the legislature of Indiana or act of congress which can be construed as contemplating a release of the state's title to any of the lands, to which title from the government had previously accrued to the state by virtue of the swamp-land act, without compensation for the lands released.—*Id.*

1 Gav. & H. Rev. St. p. 599, § 11, regulating the sale of swamp land, and providing that the county treasurer's certificate of entry is evidence of legal title to the land mentioned therein in the person in whose name it is issued, makes such certificate evidence of legal title to the land in such person.—*Id.*

[h] (Sup. 1886)

Under the Indiana acts for the disposal of swamp lands, none of such lands could be sold until surveyed and selected and described as swamp lands.—*State v. Portsmouth Sav. Bank*, 106 Ind. 435, 7 N. E. 379.

Public officers have no authority to dispose of the state's land, except such as is conferred on them by positive statute.—*Id.*

The state officers of Indiana, having no authority to sell the bed of Beaver lake directly, the same being unsurveyed and unplatted, could not do it indirectly by selling the border lands which were surveyed and platted.—*Id.*

[i] (App. 1907)

Acts 1852, under Rev. St. 1852, p. 471, authorizing the sale of swamp land, and the morass was swamp land, the officers in selling it could not sell that part outside of the morass and make a gift of the morass.—*Tolleston Club of Chicago v. Lindgren*, 39 Ind. App. 448, 77 N. E. 818.

Acts 1852, under Rev. St. 1852, p. 471, authorizing certain officers to sell state swamp lands, should be strictly construed.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Pub. Lands, §§ 192–213.

See, also, 32 Cyc. pp. 912–931; note, 63 L. R. A. 264.

(G) GRANTS TO STATES FOR INTERNAL IMPROVEMENTS.

Secondary evidence of selection of, see EVIDENCE, § 158.

§ 63. Lands included in grant.

[a] (Sup. 1848)

The only legal evidence of the selection of lands given to the state by Act Cong. March 2, 1827, is a certified copy thereof from the office of the Secretary of the Treasury at Washington, unless it be made to appear that the original is no longer to be found there.—*Doe ex dem. Stauffer v. Stephenson*, 1 Ind. 115, Smith, 20.

A certificate of the auditor of the state that certain land is included in the tract donated to the state by a particular act of Congress, if evidence of the fact at all, is only prima facie evidence and must yield to a certificate from the Land Office of the United States.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Pub. Lands, § 215.

See, also, 32 Cyc. pp. 933, 934.

§ 64. Grants in aid of particular improvements.

[a] (Sup. 1853)

A canal land certificate, which shows on its face there is part yet due, is not evidence of legal title, under Rev. St. 1843.—*Dickerson v. Nelson*, 4 Ind. 160.

[b] (Sup. 1853)

In section 8, c. 29, Rev. St. 1843, the phrase "land office certificate of purchase" refers to United States lands, and "land office receipts of final payment" refers to the system of canal lands, etc., in this state.—*Dickerson v. Nelson*, 4 Ind. 280.

[c] (Sup. 1857)

The act of congress of February 27, 1841, confirming the selections of land made by this state in 1839 to aid in the construction of the Wabash & Erie Canal to Terre Haute, did not embrace or affect pre-emption rights acquired by conforming to the requisitions of the statute of 1838; and the proof of such pre-emption and payment in 1841 was a sufficient compliance with the pre-emption laws as revived and extended.—*Doe ex dem. Stauffer v. Stephenson*, 9 Ind. 144.

[d] (Sup. 1860)

In a suit by the trustees of the Wabash & Erie Canal for a trespass upon certain lands alleged to belong to them, the only evidence of title introduced was a list of lands selected by the state for the completion of the canal, embracing the lands trespassed upon. It was held that this evidence was prima facie sufficient to establish title in the trustees.—*Evans v. Board of Trustees of Wabash & E. Canal*, 15 Ind. 319; *Hawkins v. Same*, *Id.* 326.

[e] (Sup. 1874)

A. purchased canal lands of the trustees of the Wabash & Erie Canal in 1854, and received a certificate of purchase therefor. Afterwards, in 1856, he assigned and delivered the certificate to B., who, in 1857, obtained a patent, or deed, for the land. After the death of A., in 1862, his heirs conveyed said real estate to C. *Held*,

that C. could not recover the real estate from one who acquired title through B., though the deed of B. was not placed on record within the time-limited by law, or until after the deed from the heirs of A. to C. had been recorded.—Wright v. Shepherd, 47 Ind. 176.

[f] (Sup. 1875)

The lands granted by the United States to the state of Indiana for the completion of the Wabash & Erie Canal cannot be sold or conveyed, unless the contract of sale or conveyance is concurred in and signed by the trustees on the part of the state.—Burnet v. Trustees of Wabash & E. Canal, 50 Ind. 251.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Pub. Lands, §§ 222-225.

See, also, 32 Cyc. p. 932.

§ 66. Sale and conveyance by state.

[a] (App. 1905)

Act. Feb. 2, 1832, p. 122, providing for the election of a commissioner of the Michigan road lands, and authorizing him to sell in half-quarter sections so much of the road as would produce a sum sufficient to refund to the state the amount advanced, etc., provided that in any cases where any half section shall be divided by said road, running through the same, the commissioner shall have power, if he considers it for the interest of the state, to sell the part lying on one side of the road in one parcel, and attach and sell with the half-quarter that which lies on the opposite side of the road in the same section, implies discretionary power to sell the entire half-quarter section divided by said road running through the same.—Western Union Telegraph Co. v. Krueger, 36 Ind. App. 348, 74 N. E. 25.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Pub. Lands, §§ 219, 220.

See, also, 32 Cyc. pp. 935-937.

(H) GRANTS IN AID OF RAILROADS.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Pub. Lands, §§ 226-283.

See, also, 32 Cyc. pp. 937-1000.

(I) PROCEEDINGS IN LAND OFFICE.

Competency of transcripts or certified copies of records and proceedings as evidence, see EVIDENCE, § 342.

§ 102. Cancellation of entries, receipts, certificates, and warrants.

[a] (Sup. 1857)

In ejectment, where the defendant claimed under a certificate of purchase under the pre-emption laws issued to his ancestor, the fact that the word "canceled" was written upon the

certificate of purchase is not sufficient to establish the fact of cancellation.—Doe ex. dem. Stauffer v. Stephenson, 9 Ind. 144.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Pub. Lands, §§ 294-297.

See, also, 32 Cyc. pp. 1012-1017; note, 75 Am. St. Rep. 880.

§ 105. Conclusiveness and effect of decisions.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Pub. Lands, §§ 301-306.

See, also, 32 Cyc. pp. 1020-1026; notes, 22 C. C. A. 38, 28 C. C. A. 344, 57 C. C. A. 207; note, 20 Am. Dec. 273.

§ 106. — In general.

[a] (Sup. 1843)

The state courts cannot revise the decisions of the register and receiver of a United States land office for mere error of opinion respecting a pre-emption right.—Stewart v. Haynes, 6 Blackf. 354.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Pub. Lands, §§ 104, 301, 302.

See, also, 32 Cyc. pp. 1020-1025.

(J) PATENTS.

Recording letters patent, see RECORDS, § 6.
To individual Indians, see INDIANS, § 14.

§ 114. Construction and operation in general.

[a] (Sup. 1860)

A tax sale of a title which has been entered and paid for, but the patent for which has not issued, passes the fee under Rev. St. 1824, and the patent when issued will inure to the benefit of the collector's grantee.—Doe ex. dem. Dunn v. Hearick, 14 Ind. 242.

[b] (Sup. 1878)

Under Rev. St. U. S. § 450 [U. S. Comp. St. 1901, p. 256], authorizing the president to sign a patent by a secretary, such patent is admissible in evidence without proof of its execution.—Steeple v. Downing, 60 Ind. 478.

The production by the grantee's heirs of a conveyance of land by the United States, pursuant to the treaty of August 29, 1821, ceding unlocated sections to certain Indians, approved by the president, is presumptive evidence that it had been properly delivered to the grantee, and no new delivery was necessary.—Id.

A conveyance, by a beneficiary of the Potawatamie treaty (7 Stat. 218), of a tract of land afterwards conveyed to him by the United States by patent, pursuant thereto, vested the title in the grantee, though the grantee died before issuance of the patent, and before the president's approval of the conveyance; such approv-

al relating back to the execution of the conveyance.—Id.

[c] (Sup. 1881)

A purchase of a given subdivision of public lands, which happens to have for one of its boundaries a marsh or pond, does not give the purchaser a part or all of another defined subdivision, in order to reach the center of such pond.—*Edwards v. Ogle*, 76 Ind. 302.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Pub. Lands, §§ 314-322.

See, also, 32 Cyc. pp. 1033-1039.

§ 115. Conclusiveness.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Pub. Lands, §§ 323-328.

See, also, 32 Cyc. p. 1038; notes, 2 Am. Dec. 568, 12 Am. Dec. 564.

§ 116. — In general.

[a] (Sup. 1849)

Where a Canadian volunteer certificate for public land, under the act of congress of 1821, was legally located, the register of the land office was without authority to dispose of the land; and such location would prevail over a patent subsequently issued by mistake to the purchaser of the same land.—*Moyer v. McCullough*, 1 Ind. 339, Smith, 211.

[b] (Sup. 1853)

Under an Indian treaty the United States agreed to grant to an Indian a tract of land which should be conveyed to him by patent. The land was to be selected under the direction of the president. The agent appointed by the president to select the land reported that he had selected the tract, and the president approved the report, but no patent was ever issued. Before the selection, a third person had located on the land selected, made improvements thereon, and continued to occupy it, and obtained a patent therefor under a pre-emption right. *Held*, that the treaty did not operate as a grant in present, but only as a contract for a future conveyance by patent, and therefore the title of the land in the third person was complete.—*Verden v. Coleman*, 4 Ind. 457, writ of error dismissed (U. S. 1855) 18 How. 86, 15 L. Ed. 272; *Id.*, 10 Ind. 552, appeal dismissed (U. S. 1859) 22 How. 192, 16 L. Ed. 336 and writ of error dismissed (U. S. 1861) 1 Black, 472, 17 L. Ed. 161.

[c] (Sup. 1885)

The fact that a patent was issued to the state by the United States in 1858 for certain land in dispute as swamp and overflowed land, under the swamp land act of Congress of 1850, was conclusive evidence that this particular land was selected by the state as swamp land, and that the selection was approved by the proper authority, and establishes title to the particular land commencing at the date of the passage of

the act.—*Matthews v. Goodrich*, 1 N. E. 175, 102 Ind. 557.

If for any particular lands granted by the swamp land act of 1850 the state received compensation instead of the lands, such fact would prevent the state's grantee from questioning a title derived from the United States to such particular lands; but, where it affirmatively appeared that as late as 1858 the state received from the United States a patent for this particular land in controversy, such fact was conclusive that the United States did not give, and that the state did not accept money or other land or any consideration instead of the particular land. Therefore the state's grantee was not estopped to deny the title of a subsequent patentee from the United States.—Id.

[d] (Sup. 1886)

Where land has been previously disposed of, a patent issued by the federal officers is invalid.—*Daggett v. Bonewitz*, 107 Ind. 276, 7 N. E. 900.

[e] (Sup. 1889)

Where the title to real estate passed from the United States to an individual by mesne conveyance prior to the issuing of a patent for the lands to the state, the state took no title.—*Stoner v. Rice*, 22 N. E. 968, 121 Ind. 51, 6 L. R. A. 387.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Pub. Lands, §§ 323, 325-328.

See, also, 32 Cyc. p. 1038.

(K) REMEDIES IN CASES OF FRAUD, MISTAKE, OR TRUST.

§ 124. Relief to claimant of land.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Pub. Lands, §§ 341-346.

See, also, 32 Cyc. pp. 1050-1066.

§ 127. — On ground of mistake.

[a] (Sup. 1849)

Where a patent to land is issued by mistake, the party having the prior equitable title to the land may maintain a bill in chancery and obtain the legal title from the patentee or his voluntary grantee.—*Moyer v. McCullough*, 1 Ind. 339, Smith, 211.

The state courts have jurisdiction of a bill for relief against the mistake of a register of a land office in selling public land which had been previously located by another person, and a certificate given to him.—Id.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Pub. Lands, § 343.

See, also, 32 Cyc. pp. 1050, 1051.

§ 128. — Establishment of trust.**[a] (Sup. 1849)**

The issuing of a patent is a ministerial act. If it issue by mistake and without authority, the party having the previous equitable title to the land may, by bill in chancery, obtain from the patentee or his voluntary grantee the legal title.—*Moyer v. McCullough*, 1 Ind. 339, Smith, 211.

[b] (Sup. 1856)

C. being about to proceed upon a journey to enter lands, his mother placed money in his hands, directing him to purchase therewith a tract of land for her sons A. and B. With this and money of his own C. entered several tracts, taking the titles in his own name. At the time of the entry of the land A. and B. were minors. *Held*, that a trust resulted in favor of A. and B.—*Fausler v. Jones*, 7 Ind. 277.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Pub. Lands, § 344.

See, also, 32 Cyc. pp. 1060-1065.

(L) RELIEF OF BONA FIDE SETTLERS AND CLAIMANTS.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Pub. Lands, §§ 347-350.

See, also, 32 Cyc. pp. 817-824.

(M) CONVEYANCES, CONTRACTS, AND EXEMPTIONS.**§ 135. Assignments and transfers of rights in general.**

Assignment of land certificate by administrator of holder, see **EXECUTORS AND ADMINISTRATORS**, § 129.

[a] (Sup. 1838)

The pre-emption law of the United States, in force in February, 1833, did not authorize the transfer of a pre-emption right before a patent had issued for the land.—*Carr v. Allison*, 5 Blackf. 63.

[b] (Sup. 1844)

A. purchased at the land office a tract of land, and took a duplicate receipt for the purchase money, and then sold and assigned the certificate of purchase to B., retaining the duplicate receipt. Afterwards A., being in possession of the land, sold the same to C., and gave him a bond conditioned for a conveyance at a future time. *Held*, that A.'s retaining the duplicate receipt did not affect B.'s priority of claim to the land; there being no proof of fraudulent collusion on his part.—*Godfroy v. Cushman*, 7 Blackf. 253.

[c] (Sup. 1848)

A conveyance of land, held under a pre-emption claim, and before the issue of a patent, being void under the pre-emption act of

congress, providing that "all assignments and transfers of the right of pre-emption, given by this act, prior to the issuing of patents, shall be null and void," a covenant of warranty in such conveyance is also void.—*Doe ex dem. Stevens v. Hays*, 1 Ind. 247, Smith, 177, 48 Am. Dec. 359.

[d] (Sup. 1849)

Since the act of congress, March 3, 1821, Canadian volunteer certificates are assignable.—*Moyer v. McCullough*, 1 Ind. 339, Smith, 211.

The act of congress authorizing assignees of Canadian volunteer certificates to receive patents applies to assignments made before the passage of the act.—*Id.*

[e] (Sup. 1863)

In a matter embracing neither fraud nor covenant, the purchaser of a land office certificate of location acts at his own risk, and voluntarily foregoes any remedy, if the title should fail. The rule caveat emptor applies.—*Johnson v. Houghton*, 19 Ind. 359.

[f] (Sup. 1874)

Where one who had purchased canal lands of the trustees of the Wabash & Erie Canal assigned and delivered his certificate of purchase to another, *held*, that such assignor had thereafter no interest or title in the lands purchased that would descend to his heirs, and a conveyance made by such heirs would pass no title.—*Wright v. Shepherd*, 47 Ind. 176.

[g] (Sup. 1880)

Where a pre-emptor of government land who has not received his patent relinquishes to a railroad company a right of way across the land, title subsequently acquired by such pre-emptor by virtue of the issuance of a patent to him inured to the benefit of the railroad company as far as the land relinquished was concerned.—*Indianapolis, P. & C. Ry. Co. v. Rayl*, 69 Ind. 424.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Pub. Lands, §§ 351-362.

See, also, 32 Cyc. pp. 1066-1074; note, 31 Am. St. Rep. 192.

§ 136. Mortgages.**[a] (Sup. 1842)**

The holder of a certificate for canal land on which a part of the purchase money has been paid has sufficient interest therein to be subject to mortgage.—*Miller v. Tipton*, 6 Blackf. 238.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Pub. Lands, §§ 364-366.

See, also, 32 Cyc. pp. 1075, 1076; note, 52 Am. St. Rep. 249.

§ 137. Sale of improvements.**[a] (Sup. 1835)**

If a person make improvements on public land, and sell the possession, stating to the

purchaser at the time that he has not title to the land, which is in the United States, the purchaser cannot afterwards recover back the money paid for the price.—*Vest v. Weir*, 1 Blackf. 135.

[b] (*Sup. 1838*)

An agreement to pay a certain sum in consideration of an improvement previously made on United States land, and of the other party's promise not to enter the land, is not supported by a sufficient consideration.—*Carr v. Allison*, 5 Blackf. 63.

[c] (*Sup. 1845*)

The promise of a purchaser of United States land to pay a person for an improvement, which the latter had made on the land before the purchase, is valid under the statute of 1834 in Indiana.—*Givens v. Burget*, 7 Blackf. 577.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Pub. Lands, § 367.

See, also, 32 Cyc. pp. 1071, 1072.

§ 138. *Bona fide purchasers.*

[a] (*Sup. 1838*)

A land office certificate under the statute of 1833 is evidence of legal title only in the hands of a bona fide holder.—*Smith v. Mosier*, 5 Blackf. 51.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Pub. Lands, § 368.

See, also, 32 Cyc. pp. 1074, 1075; note, 67 C. C. A. 13.

§ 139. *Validity of contracts.*

[a] (*Sup. 1838*)

An agreement to pay a certain sum in consideration of an improvement previously made on government land, and of the promise of the other party not to enter the land, is void as against public policy.—*Carr v. Allison*, 5 Blackf. 63.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Pub. Lands, §§ 369–376.

See, also, 32 Cyc. pp. 1077–1080.

§ 140. *Exemption of lands from liability for debts.*

As title subject to execution, see EXECUTION, § 23.

[a] (*Sup. 1863*)

A judgment is no lien on land which the debtor holds by a bond, or school land certificate issued by a county auditor under the school law, conditioned for the execution of a title on payment of the purchase money, though he had taken possession and paid the money before the rendition of the judgment.—*Jeffries v. Sherburn*, 21 Ind. 112.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Pub. Lands, §§ 377–382.

See, also, 32 Cyc. pp. 1082–1085.

III. DISPOSAL OF LANDS OF THE STATES.

Lands granted to state by United States, see ante, §§ 54, 55, 61, 66.

Title of purchaser at execution sale of certificate of canal lands, see EXECUTION, § 264.

§ 142. *In general.*

[a] (*Sup. 1822*)

If the execution of a deed by the commissioners of the Illinois grant (Acts Va. 1783, 1786) be conformable to the laws of Virginia, it is sufficient.—*Henthorn v. Doe ex dem. Shepherd*, 1 Blackf. 157.

Whether or not the patent authorized by the statute of Virginia of 1783 for the benefit of an Illinois regiment was ever executed, the Virginia statute of 1796, expressly recognizing the proceedings of the commissioners, to whom the patent was to be made, is sufficient evidence of the previous transfer of title by that state to the commissioners in conformity with her laws.—*Id.*

[b] (*Sup. 1858*)

Act Feb. 5, 1831, § 5 (Gen. Laws, p. 83), relative to the purchase of lands from the state, provides that upon full payment of the purchase price the agent shall execute a deed to the purchaser. Act May 27, 1852 (1 Rev. St. p. 150) § 17, requires that the state auditor shall do all acts necessary to be performed in the relation of the business heretofore performed by the agent of the town of Indianapolis. A complaint for mandamus to compel the state auditor to issue a conveyance to plaintiff showed the sale of a lot at \$25, the minimum price, the failure to pay it by the purchaser as the installments became due, the forfeiture and reversion of the land to the state, plaintiff's entry under said act of 1831, a tender of the amount at which the lot was originally appraised, a demand of the deed from the auditor, and the latter's refusal. *Held*, upon demurrer to the complaint, that the writ should issue.—*Smith v. Talbott*, 11 Ind. 144.

[c] (*Sup. 1871*)

The state in 1862 sold and bid in land which was mortgaged to the sinking fund for default in payment. Subsequently the mortgagor sold and conveyed the property to another, and the purchaser remained in possession. Later the auditor of the state conveyed the land to another, who gave notice to the purchaser from the mortgagor to surrender the premises, and, on the latter's failure to do so, procured from the auditor a warrant directing the sheriff to put the purchaser from the state in possession, and the purchaser from the mortgagor thereupon applied for an injunction, alleging that he had made valuable improvements on the land, and, at the time the sale was made by the auditor, was in adverse possession. *Held*, that the right of the purchaser from the mortgagor to be favored in the purchase continued only for a period of six months after

the land was sold and bid in by the state, and the auditor's decision among such applicants to purchase was final.—*Vannoy v. Blessing*, 36 Ind. 349.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. PUB. LANDS, §§ 383-388, 410.

See, also, 32 Cyc. pp. 1086-1099.

IV. COLONIAL AND PROPRIETARY GRANTS.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. PUB. LANDS, §§ 601-623.

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V. SPANISH, MEXICAN, FRENCH, AND RUSSIAN GRANTS.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. PUB. LANDS, §§ 624-725.

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VI. TITLES DERIVED FROM INDIANS.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. PUB. LANDS, §§ 726-730.

See, also, 32 Cyc. pp. 813, 814.

PUBLIC LAWS.

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Municipal officers. MUNICIPAL CORPORATIONS, §§ 137-142.

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QUIETING TITLE.

Scope-Note.

[INCLUDES actions for determination of conflicting claims to real property or removal of clouds on title thereto, whether under the jurisdiction of courts of equity or under statutory provisions; statutory actions to determine adverse claims to money or personal property; nature and scope of the remedy in general; grounds of such actions and defenses thereto; by and against whom and as to what property, rights, and claims they may be maintained; procedure therein; incidental relief; judgments or decrees, and enforcement thereof; review of proceedings; and costs in such actions.

[EXCLUDES actions of trespass to try title (see *Trespass to Try Title*); effect of statutes of limitation, lapse of time, laches, etc. (see *Limitation of Actions; Equity*); and new trials as of right in statutory actions for determination of adverse claims (see *New Trial*). For complete list of matters excluded, see cross-references, post.]

Analysis.

I. Right of Action and Defenses.

- § 1. Nature and scope of remedy.
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- § 8. Prevention of threatened cloud on title.
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II. Proceedings and Relief.

- § 27. Form of remedy.
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*Cross-References.**See—*

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I. RIGHT OF ACTION AND DEFENSES.Claim for, as counterclaim in ejectment, see
EJECTMENT, §§ 28, 72.Collateral attack on probate of will in action to
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HUSBAND AND WIFE, § 210.Right of grantee of land exempt from judgment
lien to maintain action to quiet title as against
claim of judgment creditor, see EXEMPTIONS,
§ 137.Title of trustee in bankruptcy, see BANKRUPT-
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To land conveyed in fraud of creditors, see
FRAUDULENT CONVEYANCES, § 248.

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§ 1. Nature and scope of remedy.

[a] (Sup. 1900)

That damages were claimed for the use of
the land and on account of the cutting of tim-
ber therefrom did not render the action any
less one to quiet title, since the damages were
merely incidental to the principal right.—*Sher-*
rin v. Flinn, 58 N. E. 549, 155 Ind. 422.

[b] (App. 1908)

A complaint construed, and held to be a
suit to quiet title and to redeem, which was
governed by equitable principles.—*Ætna Life*
Ins. Co. v. Stryker, 42 Ind. App. 57, 83 N. E.
647.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quiet. T. §§ 1, 2.

See, also, 32 Cyc. pp. 1305, 1306; note, 67
Am. Dec. 110.**§ 6. Adverse claim of title.**

Allegations of complaint, see post, § 34.

Statutory remedy to determine, see post, § 21.

[a] (Sup. 1864)

A complaint which alleges that plaintiff
gave a deed to secure the loan of money for a
year, that a part of the sum secured was usuri-
ous interest, and that after the debt became
due defendant claimed the absolute ownership
of the land and denied plaintiff's right to re-
deem, is sufficient to entitle plaintiff to have
his title to the equity of redemption quieted.—
Zimmerman v. Marchland, 23 Ind. 474.

[b] (Sup. 1866)

A title in fee simple means a title
whole of the thing absolutely, and any
of title to the same thing by another is
sarily adverse to him who owns the wh
—*Dumont v. Dufore*, 27 Ind. 263.

[c] (Sup. 1888)

In an action to have a deed dec
mortgage, a cross-complaint to quiet
defendants, which shows that they pu
in good faith, paid full value, and rec
warranty deed, and that plaintiff is in
sion, alleging that the deed, absolute
face, was a mortgage, and invalid as s
cause executed to secure the debt of h
band, is good.—*Rogers v. Beach*, 115 Ind.
17 N. E. 609.

[d] (Sup. 1890)

So long as plaintiff made no claim
tain real estate, and permitted defendan
held the legal title, to occupy it undis
defendant had no right of action, and
not until plaintiff asserted title and in
proceedings to recover the land that it
necessary for defendant to ask that h
be quieted.—*Detwiler v. Schultheis*, 23
709, 122 Ind. 155.

[e] (Sup. 1893)

A complaint to quiet title by the p
er at mortgage sale alleged that the la
been a part of a decedent's estate, to
defendants were heirs; that, while defe
were yet infants, other heirs, as suc
veyed the land to M., the mortgagor.
portion of the estate, as heir; that after
in a suit to which all of the heirs, in
defendants and M., were made parties,
tate, except the land in suit, was part
but M. received no portion thereof; th
value of the land was no more than M.
of the estate. Held, that the complaint
a good cause of action, though defendan
not join in the conveyance to M., and
not made parties to the mortgage forec
by which M.'s title passed to plaintiff,
presumed the rights of all parties were
mined in the partition suit.—*Brown v.*
135 Ind. 4, 34 N. E. 312.

[f] (Sup. 1897)

A complaint in an action to qui
which alleges that the defendants, the
commissioners, claim a lien upon the l
the plaintiff by virtue of an attempt to
the land with a lien for a ditch asse

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is bad as such, as it does not state an adverse claim of title by the commissioners, but, its object being to cancel and stay the enforcement of an apparent lien, it presents an appeal to the equitable powers of the court.—*Board of Com'rs of Cass County v. Plotner*, 48 N. E. 635, 149 Ind. 116.

[K] (Sup. 1899)

A claim of title under a lease from the grantor of plaintiff's ancestor is adverse, so as to authorize the determination of its validity by an action to quiet title.—*Island Coal Co. v. Combs*, 53 N. E. 452, 152 Ind. 379

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quiet. T. § 4.

See, also, 32 Cyc. pp. 1342, 1343.

§ 7. Cloud on title.

Complaint, see post, § 34.

[a] (Sup. 1873)

When the claim set up by one to an interest in land appears to be valid on the face of the record, and the defect can only be made to appear by extrinsic evidence, particularly if that evidence depends on oral testimony, it presents a case invoking the aid of a court of equity to remove it as a cloud on the title.—*Sanxay v. Hunger*, 42 Ind. 44.

[b] (Super. 1874)

A. purchased certain real estate without knowledge or notice of a prior sale made to B. under an executory contract of the same property, and brought a suit to quiet title, alleging that such executory contract had been forfeited by B. failing to pay the purchase money, and that it was abandoned and rescinded. *Held*, that as the executory contract was not void on its face, it constituted a cloud on plaintiff's title for which a suit might be maintained.—*Germania Bldg., etc., Ass'n v. Marot, Wils.* 541.

[c] (Sup. 1886)

The owner of property whose title is clouded by the recording of an instrument may maintain a suit to have the record canceled, although the instrument was not entitled to go on the record.—*Walter v. Hartwig*, 106 Ind. 123, 6 N. E. 5.

[d] (Sup. 1890)

An execution creditor bought at sheriff's sale, for one dollar, land worth \$6,000, which the execution debtor had previously sold. The owner of the land allowed it to be sold upon representations of the creditor's attorney that no sheriff's deed would be taken out, and that the sale was merely a formal one, made to secure rights against other property of the debtor. Afterwards the execution creditor obtained a sheriff's deed, and threatened to sue in ejectment. *Held* to justify a decree quieting the landowner's title after the period of redemption had expired, the acts of the execution creditor constituting a fraud.—*Detwiler v. Schultheis*, 122 Ind. 155, 23 N. E. 709.

[e] (Sup. 1892)

In an action to quiet title to certain land, defendant filed a cross-complaint to foreclose the lien of a drainage assessment on such land. It appeared that a mortgage on the land had been foreclosed, and the land sold to plaintiff's grantor, some two months prior to the time of the filing of the petition in the drainage proceedings, and that in the petition the land was described as belonging to the mortgagor. *Held*, that the drainage assessment was a cloud on plaintiff's title, which should be removed.—*Killian v. Andrews*, 130 Ind. 579, 30 N. E. 700.

[f] (App. 1905)

A suit will lie to quiet the title of an owner of land as against a claim under a contract purporting to grant the oil and gas under its surface, with a right of entry, where such claim is unfounded, because of the original insufficiency of the contract, or because of the termination of the rights and interests created thereby, in some manner recognizable as sufficient to work such a determination of such rights.—*Monaghan v. Mount*, 36 Ind. App. 188, 74 N. E. 579.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quiet. T. §§ 14-33.

See, also, 32 Cyc. pp. 1314-1325; note, 15 L. R. A. 784; note, 45 Am. St. Rep. 373.

§ 8. Prevention of threatened cloud on title.

[a] (Sup. 1885)

An action in equity will lie to prevent a cloud being cast on title to real estate, as well as to remove a cloud already created.—*Thomas v. Simmons*, 103 Ind. 538, 2 N. E. 203, 3 N. E. 381.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quiet. T. §§ 34, 35.

See, also, 32 Cyc. pp. 1325-1328.

§ 9. Title of plaintiff.

Answer, see post, § 37.

Issues, proof and variance, see post, § 43.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quiet. T. §§ 36-43.

See, also, 32 Cyc. pp. 1328-1335.

§ 10. — In general.

[a] (Sup. 1855)

One who has recovered judgment at law, and levied his execution on the only real estate of defendant, is entitled to a bill in chancery to remove a cloud on the title of such real estate.—*Ledyard v. Chapin*, 6 Ind. 320.

[b] (Sup. 1871)

Where the object of a suit is to reform a contract, and to set aside and cancel a sheriff's deed taken by the defendant in violation of the terms of the agreement, but which conveys whatever interest plaintiff had in the property and to quiet plaintiff's title as against the deed, it is not necessary for plaintiff to

show a title to the land conveyed to have been in him, to entitle him to the relief he demands.—*Monroe v. Skelton*, 36 Ind. 302.

[c] (Sup. 1881)

Where recovery of possession of land is barred by limitations, the title of the party so barred cannot be quieted.—*Smith v. Bryan*, 74 Ind. 515.

[d] (Sup. 1882)

The owner of an equitable title may sue to have his title quieted.—*Stout v. Duncan*, 87 Ind. 383.

[e] (Sup. 1883)

Lands conveyed by a judgment debtor to defraud his creditors were subsequently sold at execution sale, and during the period of redemption were mortgaged by the holder of the legal title to one having no notice of the prior fraudulent conveyance. *Held*, that the purchaser at the execution sale, on obtaining a sheriff's deed for the lands, could maintain against the mortgagee an action to quiet title.—*Sanders v. Muegge*, 91 Ind. 214.

[f] (Sup. 1884)

The fact that persons of whom a corporation was composed or the public of which they were part had an interest in certain lands by reason of the use thereof as a place of burial, which the landowner was estopped to question, such corporation being known as a cemetery association, did not confer such an interest on the corporation, and hence it was not entitled to sue to quiet title.—*Redwood Cemetery Ass'n v. Bandy*, 93 Ind. 240.

[g] (Sup. 1889)

Where the plaintiff in a suit to quiet title owns the fee subject to a lien in a third person, the defendants cannot employ such lien to defeat the owner, as the lien is a claim that may be enforced, but it does not constitute a title to the land.—*Manifold v. Jones*, 20 N. E. 124, 117 Ind. 212.

[h] (Sup. 1899)

A finding that a certain person was the owner in fee of the lands in controversy, and conveyed them to plaintiffs' ancestor, whose only heirs at law plaintiffs are, shows a title in plaintiffs sufficient to support an action to quiet title against one claiming under the grantor of plaintiffs' ancestor, under *Burns' Rev. St. 1894*, § 1082 (*Horner's Rev. St. 1897*, § 1070), authorizing the owner of lands to maintain an action to quiet the title thereto.—*Island Coal Co. v. Combs*, 53 N. E. 452, 152 Ind. 379.

[i] (App. 1902)

A mortgagee, after conveying the mortgaged estate with a warranty of title, may maintain a suit in equity to relieve the estate from a cloud affecting the rights under the mortgage, thus protecting the title conveyed and warranted.—*City of Indianapolis v. Board of*

Church Extension of United Presbyterian Church, 62 N. E. 715, 28 Ind. App. 319.

[j] (App. 1905)

In an action to quiet title to realty, plaintiff must recover on the strength of his own title, regardless of defendant's.—*Krotz v. A. R. Beck Lumber Co.*, 73 N. E. 273, 34 Ind. App. 577.

[k] (Sup. 1906)

In a suit to quiet title, defendant relied on a deed as giving him title, but conceded that the deed as written did not cover the land in controversy, and he did not present a case entitling him to a reformation of the deed so as to include such land. His grantor, before the commencement of the action, conveyed his interest in the land in controversy to plaintiff. *Held*, that whatever infirmity might have existed in respect to plaintiff's title to the land involved was cured by such conveyance.—*Adams v. Betz*, 167 Ind. 161, 78 N. E. 649.

[l] (App. 1906)

That plaintiff, in an action to quiet title, procured his title by fraud on his grantors, will not avail a defendant, a stranger to the transaction, whose conduct was not influenced thereby, and who makes no claim under or through the persons defrauded.—*Pence v. Long*, 77 N. E. 901, 38 Ind. App. 63.

[m] (App. 1909)

A life tenant cannot have her title quieted as to her right to convey a fee, though, should she exercise such power, her grantee or the remainderman might in a proper case; title to a power which may never be exercised not being within the provisions of the statute.—*Foudray v. Foudray*, 89 N. E. 499.

FOR CASES FROM OTHER STATES.

SEE 41 CENT. DIG. Quiet. T. §§ 36-42.

See, also, 32 Cyc. pp. 1328, 1329.

§ 12. Possession of plaintiff.

[a] (Sup. 1878)

Under the express provision of 2 Rev. St. 1876, p. 254, § 611, an action to determine or quiet title may be maintained by a plaintiff in or out of possession, whether the defendant is in possession or not.—*Caress v. Foster*, 62 Ind. 145.

[b] (Sup. 1892)

A father who had intended to convey certain land to his daughter as an advancement conveyed the same land to his son on the son's agreement to convey to the daughter other land of which he was the owner. The daughter left the consummation of the agreement to her husband, who, instead of having the conveyance made to her, took it to himself. *Held*, in an action by the wife to quiet her title after the death of her husband, that the question whether she had adverse possession of the land was immaterial where the evidence showed that the husband fully recognized the right of the wife

up to the time of his death.—*Warner v. Warner*, 31 N. E. 466, 132 Ind. 213.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quiet. T. §§ 8-12, 44, 45.

See, also, 32 Cyc. pp. 1335-1341; note, 39 C. C. A. 522.

§ 14. Conditions precedent.

Complaint, see post, § 34.

[a] (Sup. 1876)

The purchaser of the equity of redemption of real estate which is incumbered by mortgage liens of different priorities, if he be in possession under such purchase, may maintain an action to quiet his title, against the holder of the junior mortgage, without alleging that he has paid off the senior.—*Holten v. Board of Com'rs of Lake County*, 55 Ind. 194.

[b] (Sup. 1889)

Where in an action to quiet title to, and obtain possession of, land incumbered by a school fund mortgage, defendant in his answer confessed the allegations made in the complaint, and sought to avoid them by showing that the title therein had been divested by a sale made under the mortgage, plaintiff's right to a recovery was not barred on the ground that he had not paid or offered to pay the amount due on the mortgage.—*Haynes v. Cox*, 20 N. E. 758, 118 Ind. 184.

[c] (Sup. 1897)

Though assessment of any rear parcel of the first 150 feet back from a street may be enjoined till the front parcel or parcels have been exhausted, title to none of them can be quieted against the lien of the assessment till it is paid.—*Town of Woodruff Place v. Raschig*, 46 N. E. 990, 147 Ind. 517.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quiet. T. § 46.

See, also, 32 Cyc. pp. 1328-1343.

§ 15. Defenses.

[a] (Sup. 1876)

In an action to quiet the title of the plaintiff to real estate, the title or claim of the defendant, if any he has, being better known to himself than to a person claiming adversely to him, is a matter of defense which he must assert in such suit, if he would protect it.—*Marot v. Germania Bldg. & S. A. No. 2, of Indianapolis*, 54 Ind. 37.

[b] (Sup. 1889)

Where an action to quiet title is brought by the grantee of a devisee, the defendants to defeat plaintiff because the estate of the devisee was conditional must show that they were the heirs and still owned the reversion, as the devisee had the right to convey subject to the condition, and the estate could be defeated only at the election of the parties entitled to enter.—*Manifold v. Jones*, 20 N. E. 124, 117 Ind. 212.

[c] (Sup. 1890)

In a suit to quiet title to a city lot as against a purchaser thereof at a sale for a special assessment, an answer setting out in detail the various steps taken by the city council in ordering the improvement, the letting of the contract therefor to defendant, the doing of the work, the failure of plaintiff to pay the assessment, the sale of the lot and issuance of a deed therefor, and alleging that plaintiff had full notice of the proceedings, and allowed the improvement to be made without objection, states a good defense.—*Trustees of the United Brethren in Christ Church v. Rausch*, 122 Ind. 167, 23 N. E. 717.

[d] (Sup. 1900)

Burns' Rev. St. 1894, § 8624 (*Horner's Rev. St. 1897, § 6473*), provides that a tax deed shall be prima facie evidence of the regularity of the sale, and prima facie evidence of a good and valid title in fee simple in the grantee. *Held*, in an action to quiet title, that a tax deed was prima facie a complete defense, and that it was error to find in favor of plaintiff, where defendant claimed by virtue of a tax deed, and plaintiff did not attempt to prove that the tax sale was irregular, or that the deed was invalid.—*Doren v. Lupton*, 56 N. E. 849, 154 Ind. 396.

[e] (App. 1908)

Where, in a suit to quiet title, a defense seeks to avoid the effect of a decree of adoption, the defense is of an equitable nature.—*Jones v. Leeds*, 41 Ind. App. 164, 83 N. E. 526.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quiet. T. § 47.

See, also, 32 Cyc. pp. 1343-1346.

§ 16. Persons entitled to relief.

Parties plaintiff, see post, § 30.

Right to contest validity of deed, see **DEEDS**, § 77.

[a] (Sup. 1886)

An allegation in a petition for the cancellation of a deed and the quieting of title that the grantor died intestate, and that the plaintiffs are the heirs and only heirs of the decedent, sufficiently shows that the plaintiffs had such an interest in the property as entitled them to maintain the action.—*Physio-Medical College v. Wilkinson*, 9 N. E. 167, 108 Ind. 314.

[b] (Sup. 1889)

Under Rev. St. 1881, § 251, which provides that every action must be prosecuted in the name of the real party in interest, and section 1073, which provides that any person having the right to recover land, or to quiet title thereto in the name of any other person, may do so in his own name, the grantee of land cannot bring suit to quiet title in the name of his grantor, though the latter was out of possession when he conveyed.—*Peck v. Sims*, 120 Ind. 345, 22 N. E. 313.

[c] (Sup. 1897)

Under Rev. St. 1894, § 251 (Rev. St. 1881, § 251), requiring every action to be prosecuted in the name of the real party in interest, a grantor by warranty deed cannot maintain suit in his own name, to quiet title, against third persons claiming an interest in the land paramount to that conveyed to the grantee.—*Chapman v. Jones*, 47 N. E. 1065, 49 N. E. 347, 149 Ind. 434.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quiet. T. §§ 64, 65.

See, also, 32 Cyc. pp. 1346, 1347; note, 45 Am. St. Rep. 373.

§ 18. Statutory remedies for determination of adverse claims.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quiet. T. §§ 48-58.

See, also, 32 Cyc. pp. 1300-1313.

§ 19. — Nature and scope.

[a] (Sup. 1878)

Under the express provisions of 2 Rev. St. 1876, p. 254, § 611, an action may be brought to quiet title by a person either in or out of possession having an interest in remainder or reversion against any person claiming title to or interest in real property adverse to him though the defendant may not be in possession thereof.—*Schori v. Stephens*, 62 Ind. 441.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quiet T. § 48.

See, also, 32 Cyc. pp. 1300, 1310.

§ 21. — Adverse claim.

[a] (Sup. 1883)

Where an execution sale is void, one acquiring title from the execution debtor after the sale can maintain a suit to quiet title on a complaint generally asserting title in himself and that defendant claims some interest in the lands adverse to him.—*Stumph v. Reger*, 92 Ind. 286.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quiet. T. §§ 51-53.

See, also, 32 Cyc. p. 1314.

II. PROCEEDINGS AND RELIEF.

Death of party before judgment, see JUDGMENT, § 12.

Necessity for pleading matter in abatement, see ABATEMENT AND REVIVAL, § 40.

Right to trial by jury, see JURY, §§ 13, 14.

Right to trial by jury in suit for partition and to quiet title, see JURY, § 13.

Severance of action, see ACTION, § 60.

Statutory new trial as of right, see NEW TRIAL, § 178.

Tax lien as counterclaim in suit to quiet title, see SET-OFF AND COUNTERCLAIM, § 34.

§ 27. Form of remedy.

[a] Under 2 Rev. St. 1876, p. 254, § same rules of practice apply to actions title as to actions to recover possession estate.—(Sup. 1880) *Green v. Glynn*, 336; (1889) *Johnson v. Pontious*, 20 N. 118 Ind. 270.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quiet. T. § 61.

§ 29. Limitations and laches.

Application of general statutes of limitation see LIMITATION OF ACTIONS, §§ 37, 38. Depriving title to land conveyed in creditors, see FRAUDULENT CONVEYANCE, 248.

[a] (Sup. 1891)

An action to quiet title is barred by 15 years.—*Stonehill v. Swartz*, 28 N. E. 100, 118 Ind. 310.

[b] (Sup. 1892)

An action to quiet title to land is barred by Rev. St. 1881, § 294, and must be brought within 15 years.—*Irey v. Markey*, 300, 132 Ind. 546.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quiet. T. § 61.

See, also, 32 Cyc. pp. 1344, 1345.

§ 30. Parties.

Allegations as to party in complaint, see § 34.

Persons entitled to relief, see ante, § 34.

[a] (Sup. 1878)

In an action to quiet title, one of the defendants having died, his heirs are not necessary parties, though not necessary, parties defendant.—*Foster v. Foster*, 62 Ind. 145.

[b] (Sup. 1878)

In an action to quiet title, a third party claiming an equitable title to the land may, on a proper showing, be made a defendant.—*Hampson v. Fall*, 64 Ind. 286.

[c] (Sup. 1884)

In an action to quiet title, a husband and wife may join as plaintiffs, if the land is claimed solely by the wife, and evidence of ownership will not vitiate a finding in favor of the plaintiffs jointly.—*Indiana, B. & W. v. Brittingham*, 98 Ind. 294.

[d] (Sup. 1891)

Where defendant, in an action to quiet title, seeks by counterclaim to quiet title against plaintiff, defendant's grantor is not a necessary party.—*Warbritton v. Nett*, 129 Ind. 346, 27 N. E. 730, 28 N. E. 730.

[e] (Sup. 1893)

In an action to quiet title to land, if the land has been purchased by plaintiff from a judgment debtor and alleged to be exempt from execution, it is not necessary to set it aside.

sheriff who levied on the property as being subject to the judgment is not a necessary party.—*King v. Easton*, 135 Ind. 353, 35 N. E. 181.

[f] (Sup. 1893)

Rev. St. 1881, § 2491, gives a surviving wife one-third of all the real estate of which her husband may have been seised in fee simple at any time during the marriage, and in the conveyance of which she may not have joined. Elliott's Supp. § 2143, provides that, in actions to quiet title, all persons who have, or claim to have, or appear of record to have, any interest in or lien on the land, shall be made defendants. *Held* that, where a married man conveyed land by deed in which his wife did not join, and the land was afterwards sold for taxes, such wife was a necessary party to an action by the purchaser at the tax sale to quiet the title.—*Thompson v. McCorkle*, 136 Ind. 484, 34 N. E. 813, 36 N. E. 211, 43 Am. St. Rep. 334.

[g] (Sup. 1894)

A holder of a tax deed is not a necessary party to an action between two claimants of the property to quiet title in one of them as against the other.—*Shedd v. Disney*, 139 Ind. 240, 38 N. E. 594.

[h] (App. 1901)

Where a lease had been assigned by the original lessees by assignments on the back of the lease, duly signed and acknowledged, and no relief was sought against such original lessees in a suit to quiet title against the assignee, it is no ground of objection to evidence of a mistake in the description of the leased land, offered as an equitable defense, that the original lessees were not parties.—*Allen v. Indianapolis Oil Co.*, 60 N. E. 1003, 27 Ind. App. 158.

[i] (App. 1907)

In an action by a husband to remove a cloud from the title to his land, his wife is not a necessary party.—*Puritan Oil Co. v. Myers*, 39 Ind. App. 695, 80 N. E. 851.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quiet. T. §§ 64-66.

See, also, 32 Cyc. pp. 1346-1349.

§ 31. Process.

[a] (App. 1906)

The publication of a notice showing that a suit to quiet title has been filed by plaintiff, and that the nonresident defendant is a necessary party thereto, is sufficient.—*Morin v. Holiday*, 39 Ind. App. 201, 77 N. E. 861.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quiet. T. § 67.

See, also, 32 Cyc. p. 1346.

§ 33. Pleading.

General and specific allegations, see PLEADING, § 34.

In action to recover possession and quiet title, see EJECTMENT, § 79.

Judgment on pleadings, see PLEADING, § 345.

Motions to strike out pleadings, see PLEADING, § 352.

Surplusage, see PLEADING, § 35.

FOR CASES FROM OTHER STATES.

SEE 41 CENT. DIG. Quiet. T. §§ 69-87.

See, also, 32 Cyc. pp. 1349-1369.

§ 34. — Bill, complaint, or petition in general.

Complaint as stating single or separate causes of action, see ACTION, § 38.

[a] (Sup. 1866)

In an action to quiet title, an allegation in the complaint that plaintiff is seised in fee simple and is in possession of the lands in question, and that defendant asserts an unfounded claim of title in the same premises, is a sufficient averment, under the statute (2 Gav. & H. St. p. 284, § 611), that defendant's claim of title is adverse.—*Dumont v. Dufore*, 27 Ind. 263.

[b] (Sup. 1875)

A complaint to quiet title to real estate, which alleges that plaintiff owns the land in fee and that defendant is making an unfounded claim of title thereto, sufficiently shows that defendant claims title "adverse" to plaintiff.—*Gillett v. Carshaw*, 50 Ind. 381.

A complaint in an action to quiet title, which alleges that the land in question was conveyed to defendant and the ancestor of plaintiff by an instrument which was executed to reimburse plaintiff in part for payments made by him as surety of the grantor, and to secure both the grantees against other liabilities as sureties of the grantor, on which certain amounts were paid by each of the grantees after the execution of the instrument, does not show a claim of title by defendant adverse to plaintiff, and is therefore insufficient.—*Id.*

[c] (Sup. 1876)

A complaint to quiet title to real estate alleged that an owner thereof conveyed it, with full covenants, to plaintiff, and put him in possession thereof; that defendant was asserting title thereto through a subsequent conveyance thereof to him, made by the governor in pursuance of a sale by the auditor of state, under a mortgage of said real estate, executed to the treasurer of state by one who owned it before plaintiff's grantor became such owner; that, though said mortgage had been recorded in the county before plaintiff's grantor became the owner of the real estate, yet it had never been acknowledged by the mortgagor, nor was its execution ever proved, to entitle it to be recorded; and that plaintiff had no notice of said mortgage until after said sale and conveyance to the defendant. The complaint prayed that plaintiff's title be quieted, etc. *Held*, that the complaint was sufficient.—*Watkins v. Brunt*, 53 Ind. 208.

[d] In a suit to quiet title, an allegation that defendant claims an adverse estate or interest in the land is sufficient, without showing the nature of such claim or its invalidity.—(Sup. 1876) *Marot v. Germania Bldg. & Sav. Ass'n No. 2 of Indianapolis*, 54 Ind. 37; (1878) *Jeffersonville, M. & I. R. Co. v. Oyler*, 60 Ind. 383; (1886) *Rausch v. Trustees of United Brethren in Christ Church*, 107 Ind. 1, 8 N. E. 25; (1887) *McPheeters v. Wright*, 110 Ind. 519, 10 N. E. 634; (1890) *Wilson v. Wilson*, 124 Ind. 472, 24 N. E. 974.

[e] (Sup. 1878)

In an action to determine adverse claims to realty, where the complaint showed that the defendant had acquired a title which was adverse to that of the plaintiffs, a direct averment that he claimed a title or interest was unnecessary.—*Caress v. Foster*, 62 Ind. 145.

In an action by the widow and heirs of an intestate against A., B., and others, to quiet title to a certain tract of land, the complaint alleged that in his lifetime such intestate and his wife had conveyed said tract to A. by a deed absolute on its face, intended as a mortgage to secure the payment of a certain indebtedness; that, on payment of such debt by C., A. had, at the request of the intestate, conveyed a portion of such tract to C., who was to hold the same simply as security for repayment; and that on the death of the intestate, A., to defraud plaintiffs, had conveyed such tract for a merely nominal consideration to B., who had knowledge of the facts. *Held*, that the complaint was sufficient.—*Id.*

In an action to quiet title, it is not necessary that the complaint should aver, in the words of the statute, that defendant claims "title to or interest in" the land.—*Id.*

[f] (Sup. 1879)

In an action to quiet title to land, the complaint alleged that a certain company executed a deed of trust to secure its bonds, covering the land in question and other tracts; that said deed provided that, on the surrender of a certain amount in bonds, conveyance should be made by the company of a certain quantity of the land covered; that plaintiff's grantor had surrendered said amount of bonds, and received a conveyance in fee of the land in question; that a holder of one of said bonds had obtained a decree of foreclosure, to which plaintiff had not been made a party. *Held*, that a cause of action was set forth.—*Glendy v. Lanning*, 68 Ind. 142.

[g] (Sup. 1881)

Civ. Proc. 1852, § 78, providing that "when any pleading is founded on a written instrument, or on account, the original or a copy thereof, must be filed with the pleading," does not make a deed or a copy thereof under which defendant in an action to quiet title is alleged to claim an adverse title a necessary part of the complaint, and it is no objection in such a case that a copy is not filed therewith.—*Stribling v. Brougher*, 79 Ind. 328.

[h] (Sup. 1882)

A complaint in a suit to quiet title, besides charging that an infant, after attaining his majority, had, because of circumstances stated and lapse of time, neglected to disaffirm a deed given during minority, should further state that the delay was unreasonable. The question is one of fact.—*Stringer v. Northwestern Mut. Life Ins. Co.*, 82 Ind. 100.

[i] (Sup. 1882)

Where the complaint states facts which entitle plaintiff to judgment quieting his title, the suit may be regarded as an action to quiet title, and if the complaint is answered, such relief may be granted, though the complaint contains no such prayer.—*Stockton v. Lockwood*, 82 Ind. 158.

[j] (Sup. 1882)

A complaint in an action to quiet title by the owner of real estate sold on execution, alleging that defendant refused to recognize plaintiff's redemption of the land made within the time allowed therefor, but thereafter demanded and received the deed from the sheriff, sufficiently shows an adverse claim by defendant.—*Boyd v. Olvey*, 82 Ind. 294.

[j] (Sup. 1882)

A complaint to quiet title, which fails to allege payment or an offer to pay money, which it appears the grantee has paid in consideration of a deed, is bad on demurrer.—*Hays v. Carr*, 83 Ind. 275.

A complaint which by its prayer and general structure is plainly intended to quiet title, and not to obtain damages for a breach of contract, if insufficient for the purposes intended, will be held bad on demurrer, though it may aver facts which will be sufficient to entitle plaintiff to recover damages in a suit for that purpose.—*Id.*

[k] (Sup. 1882)

A party cannot plead facts in derogation of his own title, for the purpose of destroying his adversary's claim, while seeking to recover on the strength of his own title.—*Etter v. Anderson*, 84 Ind. 333.

[kk] (Sup. 1882)

A complaint to quiet title, which avers title and possession in plaintiff, and that defendant claims some title or interest, the value of which is unknown to plaintiff, which clouds plaintiff's title and impairs its value, is good on demurrer. So, also, if the character of defendant's claim be alleged, with facts showing its invalidity.—*Brown v. Ogg*, 85 Ind. 234.

[l] (Sup. 1882)

A complaint to quiet title, which fails to aver that defendant makes claim to the title or possession, is insufficient.—*Nutter v. Fouch*, 86 Ind. 451.

[ll] (Sup. 1883)

In an action to quiet title, an allegation that the defendants pretended to claim some "interest in," to wit, a title in fee, the use of

the word "in," instead of the word "therein," was immaterial.—*Madgett v. Fleenor*, 90 Ind. 517.

[m] (Sup. 1883)

In an action to quiet title, it is sufficient for the plaintiff to aver that he is the owner of the land and that the defendant claims title adverse to him, and it is not necessary for the plaintiff to aver or prove the claim of title to the defendant, as that is a matter of defense.—*Stumph v. Reger*, 92 Ind. 286.

[mm] (Sup. 1884)

In an action by a wife to quiet her title, as against the mortgagee, to lands held by her husband in trust for her, and mortgaged by him to secure his own debts, a complaint in which no demand is made for equitable relief as to her inchoate interest in her husband's lands is not sufficient on demurrer to remove the cloud on such interest.—*Paulus v. Latta*, 93 Ind. 34.

In a suit by a wife to quiet title and enforce a trust as against her husband, where the complaint contained no allegation that a purchaser from the husband, when he advanced his money and took his mortgage, had any notice of secret equities in complaint, it did not state a good cause of action.—*Id.*

[n] (Sup. 1884)

Where defendant claimed title under a sheriff's sale, a complaint to quiet title merely alleging that plaintiff's life interest in the land was sold at execution sale, without averring that plaintiff's remainder in fee was not sold, is demurrable.—*Darkies v. Bellows*, 94 Ind. 64.

[nn] (Sup. 1884)

A complaint to quiet title averred that a certain deed was not delivered, but stated that it was made by plaintiff to his minor child to avoid an unjust suit, that without her knowledge it was taken by him to the recorder's office, there recorded, and afterwards received by him and always kept in his papers. *Held*, that the court could not say, on demurrer, whether as a matter of law there was a delivery.—*Vaughan v. Godman*, 94 Ind. 191.

[o] In an action to quiet title there must be an allegation that defendant's claim is hostile or adverse to plaintiff's title.—(Sup. 1884) *Second Nat. Bank v. Corey*, 94 Ind. 457; (1887) *Otis v. Gregory*, 111 Ind. 504, 13 N. E. 39.

[oo] (Sup. 1884)

A complaint against a bankrupt's wife to quiet title, alleging a sale of bankrupt's land to plaintiff to satisfy liens thereon by an order of the bankruptcy court to which the wife was not a party, is bad on demurrer, as showing that the wife had an interest in the lands.—*Ragsdale v. Mitchell*, 97 Ind. 458.

[p] (Sup. 1885)

A complaint alleging that defendant is giving out in speeches that she was an infant when

she and her husband executed and signed a conveyance, and that such statements are false and are made for the fraudulent purpose of casting a cloud on plaintiff's title, and praying that it be quieted, is sufficient on demurrer.—*Sims v. Smith*, 99 Ind. 469, 50 Am. Rep. 99.

[pp] (Sup. 1885)

A complaint averring that real estate was partitioned to plaintiffs, and that thereafter defendant filed a transcript of the judgment in the clerk's office against one of the plaintiffs, and that the same became a junior lien upon the real estate, wherefore plaintiffs demand a judgment that the lien be now foreclosed or forever barred, was sufficient to show that defendant had or claimed to have an interest or title in the land.—*American Ins. Co. v. Gibson*, 3 N. E. 592, 104 Ind. 336.

[q] (Sup. 1886)

Under Rev. St. 1881, § 1070, the plaintiff in an action to quiet title need only allege in his complaint that the defendant's claim of title to, or interest in, the real estate in controversy, is "adverse to him."—*Rausch v. Trustees of United Brethren in Christ's Church*, 8 N. E. 25, 107 Ind. 1.

[qq] (Sup. 1888)

A complaint in a suit to quiet title, containing merely general charges of fraud, without specification of the facts whereon fraud is predicated, is insufficient.—*Brown v. Cody*, 115 Ind. 484, 18 N. E. 9.

[r] (Sup. 1888)

A complaint averring that plaintiff owns the fee in certain land, that defendant claims title thereto, and that he has no interest in the land, is one to quiet title, though it avers that plaintiff has been damaged by defendant's false statement.—*Bisel v. Tucker*, 121 Ind. 249, 23 N. E. 81.

[rr] (Sup. 1890)

In a suit to remove a cloud on title and set aside a certain tax deed, a complaint failing to aver a tender of the amount due for purchase money, interest, and subsequent taxes paid by the purchaser before the beginning of the suit, nor alleging a tender of such sum into court for the benefit of the purchaser, was fatally defective.—*Montgomery v. Trumbo*, 26 N. E. 54, 126 Ind. 331.

[s] (Sup. 1892)

It is not necessary that plaintiff in an action to quiet title seeking relief upon an oral contract for the sale of land should allege that he could not be compensated in damages resulting from a breach of contract.—*Puterbaugh v. Puterbaugh*, 30 N. E. 519, 131 Ind. 288, 15 L. R. A. 341.

A complaint in an action to quiet title alleged that plaintiff was a nephew of deceased, and had lived with him 24 years; that he was the sole heir of deceased, and claimed to be the

owner of the land described in the complaint; that deceased orally contracted with plaintiff, in consideration of love and affection, and for the further consideration that plaintiff would assist with his money, time, and labor in the erection of a house and barn on the premises, and take possession when married, and occupy the same, and make valuable and permanent improvements, that deceased would convey the premises to plaintiff; that plaintiff should pay deceased for life one-half of the crops raised on the premises; that plaintiff accepted the proposition, and performed his part of the contract in full; that deceased frequently promised to convey the premises to plaintiff, but that he died suddenly, without having done so; that defendant claimed title to such premises adverse to plaintiff; and that her claim was without right, and cast a cloud on plaintiff's title. *Held*, that a motion to make the complaint more specific was properly overruled, since the action not being for the recovery of money, it was not necessary to give the items of the consideration.—*Id.*

[ss] (Sup. 1894)

Where a complaint in a suit to quiet title alleged that defendants had no interest in the property or lien thereon, it was not subject to demurrer by reason of the fact that it was shown by subsequent pleadings and the evidence that one of the defendants had a valid lien for money paid on an invalid tax sale of land and for taxes paid thereon by his grantor and himself while holding such invalid tax title.—*Cole v. Gray*, 38 N. E. 856, 139 Ind. 396.

[t] (Sup. 1895)

Plaintiff alleged that he was the owner of, and entitled to possession of, real estate; that appellant had possession without right, and had for six years before the suit unlawfully kept plaintiff out of possession; and that the remaining defendants claimed some interest in the land adverse to plaintiff, which claim was without right, and a cloud upon plaintiff's title; and he demanded judgment for possession, and damages against appellant, and that all defendants' claims be declared void, and plaintiff's title be quieted. *Held*, that these allegations stated a cause of action.—*Cargar v. Fee*, 140 Ind. 572, 39 N. E. 93.

Where plaintiff alleges that he is the equitable owner in fee simple of the land in suit, and entitled to possession; that he and his grantors were in peaceable adverse possession from 1837 until six years before the beginning of the action, at which time defendant unlawfully took possession; and that he has since wrongfully kept plaintiff out of possession, to his damage,—a cause of action is stated.—*Id.*

[tt] (Sup. 1896)

In an action to quiet title, the allegation in the complaint that "defendant claims some interest in the land adverse to plaintiff's, which claim is without right, and unfounded, and a cloud on plaintiff's title," is sufficient, even

though the land in issue consists of several parcels.—*Tolleston Club of Chicago v. Clough*, 146 Ind. 93, 43 N. E. 647.

[u] (Sup. 1899)

Complaint in an action to determine right and quiet title to the oil under and a certain oil well on certain lands is sufficient, it being alleged that plaintiffs have a valid subsisting interest in the real estate described, and that defendants either claim title to the property adversely to them, or wrongfully hold possession thereof.—*Boyd v. Schott*, 52 N. E. 752, 152 Ind. 161.

[uu] (App. 1901)

Burns' Rev. St. 1894, § 3350, declares that every conveyance of lands not recorded in the county where the lands are situated within 45 days from the execution thereof is fraudulent and void as against subsequent purchasers in good faith and for a valuable consideration; and section 3345 provides that no conveyance of real estate in fee simple is valid against any other person than the grantor, his heirs and devisees, and persons having notice thereof, unless it is made by a deed recorded in the manner provided by statute. Plaintiff and her husband owned lands as tenants in common, and, in an action to quiet title, plaintiff alleged that her husband conveyed his interest to her, and that a debtor of the husband had subsequently levied an execution on the property, and that it had been sold thereunder to defendant, who would soon be entitled to a sheriff's deed therefor, but did not allege that the deed to plaintiff was recorded. *Held*, that a demurrer to the complaint was properly sustained, since it did not show that defendant was not an innocent purchaser without notice.—*Dodds v. Winslow*, 60 N. E. 458, 26 Ind. App. 652.

[v] (Sup. 1903)

Under *Burns' Rev. St. 1901, § 1082*, authorizing a person having an interest in real estate to bring an action against another claiming title to or interest in the property "adverse to plaintiff," a complaint in a suit to quiet title, which alleges that plaintiff is the owner in fee and entitled to the possession of certain real estate, and that defendant's claim of title and possession is unfounded, and without right, and casts a cloud upon his title, is good on demurrer, defendant's claim necessarily being "adverse."—*Brown v. Cox*, 63 N. E. 568, 158 Ind. 304.

[vv] (Sup. 1902)

The complaint in an action to quiet title containing no offer to reimburse the one in possession, claiming title under a life estate and tax deeds, for money paid by her grantors for street improvements and other taxes, which should have been allowed, was insufficient.—*Merrett v. Ritter*, 63 N. E. 855, 158 Ind. 491.

[w] (App. 1902)

Allegations in a complaint by a railroad company against a city to quiet title to certain land claimed by the company by adverse pos-

and to enjoin the construction of a street, that a street has never been laid on the land, that the city or public have not acquired the land for street or highway purpose, and that there is no highway thereon, is a sufficient denial of the existence of a highway over the lands.—*City of La-Wabash R. Co.*, 63 N. E. 237, 28 Ind. 497.

A complaint in an action to quiet title cannot anticipate a probable defense, nor defendant's claim to the real estate the cloud sought to be removed.—*Id.*

§ 1902)

Burns' Rev. St. 1901, § 1082, declaring an action to quiet title may be brought by any person, either in or out of possession, who claims title to or interest in real estate adverse to him, though the defendant is not in possession thereof, averments in the complaint that plaintiff is owner and in possession of the land, and that defendant claims an interest therein which is adverse and that plaintiff is in possession thereof, are sufficient against demurrer for want of facts.—*City of Huntington v. Town of Huntington*, 36 Ind. App. 269.

§ 1903)

A complaint for the cancellation of a lease showed on its face that the lease was made before the action was brought, and that there were no facts alleged showing title in the land or that defendant was claiming an interest in the land under the lease adverse to plaintiff, or that any claim of defendant was adverse to plaintiff, and was a cloud on plaintiff's title, was insufficient as a complaint to set aside the lease.—*Indiana Natural Gas & Oil Co. v. Searles*, 58 N. E. 692, 31 Ind. App. 575.

§ 1904)

A complaint by a municipal corporation alleging the passage of an ordinance granting to a water company an exclusive right to use a waterworks system in plaintiff city, and applying the city and inhabitants with water at an exorbitant and unreasonable price for an unreasonable and illegal time. It was urged that the franchise was ultra vires, and that defendant had executed a deed of trust, assigning to the trustees therein all hydrant service because of which the trustees claimed some interest in the contract, which was adverse to the plaintiff. It was prayed that the contract be revoked and declared null and void, and that there were no allegations that a waterworks system was ever built, or that the water company was attempting or threatening to occupy streets under the franchise, or assert a claim or title adverse to the city, or that the franchise was a cloud on the city's title. It was sufficient to state a cause of action against the water company for quieting title.—*Burns'* Ann. St. 1901, § 1082, providing that an action may be brought by any person claiming an interest against another who claims title or interest in real property, adverse to

him, for the purpose of quieting the question of title.—*Seymour Water Co. v. City of Seymour*, 70 N. E. 514, 163 Ind. 120.

Neither was it sufficient to state a cause of action against the trustees, because not showing that they claimed any interest in real property.—*Id.*

The complaint, however, was for the cancellation of the contract, and not to quiet title.—*Id.*

[y] (*Sup.* 1906)

An allegation in a complaint to quiet title, as against an oil and gas lease, that "defendant's claim is without right, and unfounded, and a cloud upon the plaintiff's rights," is good as against a demurrer.—*Ohio Oil Co. v. Detamore*, 73 N. E. 906, 165 Ind. 243.

[yy] (*App.* 1906)

An allegation that the claim made by defendants is a cloud on the title to the real estate in controversy is unnecessary in a complaint to quiet title.—*Chaplin v. Leapley*, 74 N. E. 546, 35 Ind. App. 511.

[z] (*App.* 1906)

A complaint in an action to quiet title does not show any cause of action against parties joined as defendants who are not named or referred to therein.—*Corbin Oil Co. v. Searles*, 75 N. E. 293, 36 Ind. App. 215.

[zz] (*Sup.* 1906)

Plaintiff alleged that she was the owner of the real estate in controversy, having derived her title by purchase and conveyance from B.; that defendant was her granddaughter, and that, having conceived a purpose to give defendant a life estate in the land, plaintiff caused her own name to be erased from the deed, which had been completely executed, but not recorded, and defendant's name to be written therein, as grantee, with the consent of the grantors and the notary before whom the original execution thereof had been acknowledged, after which the deed as changed was returned to plaintiff; that it had never been delivered to defendant, nor to any one else for her; that she was not a party to the conveyance, and neither paid nor promised any consideration therefor, or for the change of name; and that plaintiff had since changed her mind, and did not now desire to make the gift; wherefore she prayed a reformation of the deed. *Held*, that the complaint stated a cause of action to quiet title, under *Burns'* Ann. St. 1901, § 1082, declaring that such action may be brought by any person in or out of possession against another who claims title to or an interest in real estate adverse to him, though defendant may not be in possession.—*Gibbs v. Potter*, 77 N. E. 942, 166 Ind. 471.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quiet. T. §§ 69-72, 76, 77.

See, also, 32 Cyc. pp. 1349-1358.

§ 35. — Allegations as to title and possession.

[a] (Sup. 1862)

A complaint, in a suit to quiet title, need not set forth a copy of the deed or other evidence of title under which plaintiff claims. This is mere evidence of his title, and not the foundation of the suit.—*Lash v. Perry*, 19 Ind. 322.

[b] (Sup. 1877)

In an action by a grantee from the state of the Wabash & Erie Canal, to quiet title to certain real estate which he claimed had been appropriated under the provisions of Act Jan. 9, 1832, providing for the construction of the canal, the complaint alleged "that in the course of the construction of said canal the state of Indiana, in the exercise of her power of eminent domain, through the agency of her proper officers and in the manner directed by law, appropriated said land * * * to be used in the construction of said canal, and constructed said canal upon and across the same * * * prior to the 27th day of January, 1836; * * * that no record was kept of such appropriation, or of the quantity or location of the land appropriated, or, if any was kept, it has been lost or destroyed, and cannot now be found or the contents of it ascertained." Held a sufficient averment of the appropriation of the real estate under the authority of the act.—*Nelson v. Fleming*, 56 Ind. 310.

[c] (Sup. 1877)

Where, because of an alleged breach of a condition subsequent contained in a conveyance of real estate, the heir of the deceased grantor seeks to recover the possession of and to quiet his title to such real estate, the complaint should allege that such grantor, at the time of making such conveyance, was seised in fee simple of such real estate.—*Clark v. Holton*, 57 Ind. 564.

The complaint, in an action by an heir of a deceased grantor to recover possession of and quiet his title to real estate, should allege an entry on or a claim to such real estate by plaintiff prior to bringing suit.—*Id.*

[d] (Sup. 1878)

In a suit to quiet title, it is proper that a statement of the title of the different parties so far as known should be made in the complaint.—*Rose v. Nees*, 61 Ind. 484.

In an action to quiet title, the complaint need only show prima facie that plaintiff is entitled to immediate possession of the real estate of which defendant is unlawfully in possession.—*Id.*

[e] (Sup. 1882)

A complaint to quiet title, which shows that plaintiff has no title, is bad on demurrer.—*Hays v. Carr*, 83 Ind. 275.

[f] (Sup. 1882)

A complaint averring title merely under a tax sale and deed, without further describing

the proceedings under which the sale was made, does not show title on which a decree quieting title can be based.—*Keepfer v. Force*, 86 Ind. 81.

[g] (Sup. 1884)

A complaint to quiet title, alleging that plaintiff derived its title through "the Indianapolis Warm Air Company," is not demurrable, as such companies under certain circumstances may hold land.—*Gabe v. Root*, 93 Ind. 256.

[h] (Sup. 1884)

A complaint in a suit to quiet title brought by several plaintiffs, which alleges that the interest of one of the owners was sold pursuant to an order of the court, is demurrable because the allegation is not inconsistent with the fact that plaintiffs' interest might also have been sold in pursuance of the order of the court.—*Darkies v. Bellows*, 94 Ind. 64.

[i] (Sup. 1884)

In a suit to quiet title to land, a complaint alleging that the plaintiff holds the land in law and equity discharged of and free from all claims and liens of a husband and wife is a mere conclusion of law, and does not exert a controlling influence on the pleading.—*Ragsdale v. Mitchell*, 97 Ind. 458.

[j] (Sup. 1884)

A complaint to quiet title, which avers that plaintiff "is the owner in fee simple," is not vitiated by another averment that "the plaintiff, on — conveyed said premises to" a third person.—*Indiana, B. & W. Ry. Co. v. Brittingham*, 98 Ind. 294.

[k] (Sup. 1885)

In an action under Rev. St. 1881, § 1070, providing that any person claiming title to real property, either in or out of possession, may bring an action to quiet such title, it is not necessary to allege in the complaint either that plaintiff is entitled to the possession or has demanded possession before the commencement of the suit.—*McCasin v. State ex rel. Auditor of State*, 99 Ind. 428.

[l] (Sup. 1886)

A complaint in quieting title need only allege that plaintiff's title is legal or equitable, and need not specify facts which are technically sufficient in an action for specific performance.—*Grissom v. Moore*, 106 Ind. 296, 6 N. E. 629, 55 Am. Rep. 742.

[m] (Sup. 1889)

Plaintiff alleged that he purchased the land of defendant by parol sale, "and immediately upon said purchase entered into possession of said real estate, and has ever since kept actual and open possession, claiming to own the same," etc., and that defendant denies the sale, etc. There was a general denial, trial, and judgment for plaintiff. Held, in arrest of judgment, that it may fairly be inferred from the complaint that plaintiff's possession was under and by virtue of the contract.—*Hyneman v. Roberts*, 118 Ind. 137, 20 N. E. 656.

[a] (Sup. 1892)

A complaint in quieting title, which alleges that plaintiff "is the owner by a complete equitable title, and is entitled to the possession" thereof, is good on demurrer, without specifying the nature and extent of such title.—*Stanley v. Holliday*, 130 Ind. 464, 30 N. E. 634.

[o] (Sup. 1895)

In an action to quiet title, if plaintiff is not entitled to possession, the complaint must show the nature of his interest or title, and that it is consistent with the right of possession in another.—*Pittsburg, C., C. & St. L. Ry. Co. v. O'Brien*, 142 Ind. 218, 41 N. E. 528.

In an action to quiet title, an allegation that plaintiffs are "owners in entirety" will be considered as an allegation of the statutory estate by entireties.—*Id.*

[p] (Sup. 1897)

A complaint to quiet title will be bad on demurrer for want of sufficient facts to constitute a cause of action if the facts stated therein fail to show title in the plaintiff.—*Chapman v. Jones*, 47 N. E. 1065, 49 N. E. 347, 149 Ind. 434.

[q] (Sup. 1900)

A complaint in an action to quiet title to an easement in a way, and to remove obstructions placed there by defendants, which shows that the plaintiff, as owner of the abutting real estate, is entitled to use such way, is not demurrable.—*Roush v. Roush*, 55 N. E. 1017, 154 Ind. 562.

(App. 1902)

The complaint in an action to quiet title to land against a city, claiming the right to construct a street thereon, is only required to aver that plaintiff is the owner of the land, and that defendant's claim is unfounded and a cloud on plaintiff's title, and need not state the nature of plaintiff's title, or how derived.—*City of Lafayette v. Wabash R. Co.*, 63 N. E. 237, 28 Ind. App. 497.

[s] (Sup. 1904)

It being enough for the complaint in an action to quiet title to allege that complainant is the owner of the land, it is immaterial, where this is done, whether the further allegations concerning possession are a sufficient statement of title by prescription.—*Rennert v. Shirk*, 72 N. E. 546, 163 Ind. 542.

[t] (App. 1905)

A complaint in an action to quiet title to real estate and to cancel a lease as a cloud thereon must allege clearly and directly, and with certainty to a common intent, title to the real estate in plaintiff.—*Corbin Oil Co. v. Searles*, 75 N. E. 293, 36 Ind. App. 215.

[u] (Sup. 1906)

A complaint, alleging that a deed was executed to plaintiff, that afterwards with the consent of the grantors and the notary plaintiff caused her name to be erased and defendant's

to be inserted, that the deed was then retained by plaintiff, that she is the owner of the land, and that defendants are claiming title, is sufficient to show title in the plaintiff.—*Gibbs v. Potter*, 166 Ind. 471, 77 N. E. 942.

[v] (App. 1907)

A complaint to quiet title, averring that plaintiff was the fee owner of the land described, subject to an oil and gas lease held by C., described C.'s interest with sufficient definiteness.—*Erie Crawford Oil Co. v. Meeks*, 40 Ind. App. 156, 81 N. E. 518.

[w] (App. 1908)

In an action to quiet title and for partition, derivation of the title asserted need not be alleged, a general allegation of ownership being sufficient, and hence in such an action by an adopted heir she need not aver facts establishing the adoption.—*Jones v. Leeds*, 41 Ind. App. 164, 83 N. E. 526.

[x] (App. 1909)

A complaint must allege defendant claims title to or interest in the real estate, adverse to plaintiff, or claims title or interest therein, which claim is unfounded and a cloud on plaintiff's title.—*Garrick v. Garrick*, 43 Ind. App. 585, 87 N. E. 696, 88 N. E. 104.

FOR CASES FROM OTHER STATES.

SEE 41 CENT. DIG. Quiet. T. §§ 73, 74.

See, also, 32 Cyc. pp. 1350-1353.

§ 36. — Description of property.

[a] (Sup. 1884)

A complaint to quiet title, describing the land thus: "Commencing at the northeast corner of section ———," giving number, town, and range, "thence south 100 rods to a stone established by the county surveyor; thence west 24 rods; thence south 4 rods; thence west 56 rods to middle dividing line of northeast quarter of said section; thence north on said line to the north line of such section; thence east to the place of beginning"—gives a definite description.—*Pitcher v. Dove*, 99 Ind. 175.

[b] (App. 1902)

A complaint in a suit under Burns' Rev. St. 1894, § 1082, authorizing suits for quieting title, which describes the land as the west half of a certain quarter section, "except 10 acres around well number one," is demurrable because of indefiniteness of the description of the land.—*Jones v. Mount*, 63 N. E. 798, 30 Ind. App. 59.

[c] (App. 1904)

A complaint praying that plaintiff's title be quieted to a certain tract of land, "except a one-half acre tract surrounding each of said three wells," is insufficient in definiteness in its description of the land.—*Carr v. Huntington Light & Fuel Co.*, 70 N. E. 552, 33 Ind. App. 1.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quiet. T. § 75.

See, also, 32 Cyc. p. 1355.

§ 37. — Plea or answer.

Joinder of defenses, see PLEADING, § 90.

Joint or separate answers of codefendants, see PLEADING, § 84.

Statement of new matter constituting defense, see PLEADING, § 132.

[a] (Sup. 1866)

Where an action is to quiet title, and not simply to recover the possession of real estate, it is proper, if not absolutely necessary, that defendant should specially plead all matters in confession and avoidance of the complaint.—*Bunch v. Bunch*, 26 Ind. 400.

[b] (Sup. 1880)

A complaint sought to quiet title to three parcels of land. Defendant filed a pleading setting up a tax lien on the undivided three-fourths of three parcels of land, but not alleging that it was the same land described in the complaint. *Held* bad as an answer.—*Thompson v. Toohey*, 71 Ind. 290.

[c] (Sup. 1882)

In a suit to quiet title, a separate answer of a defendant alleging that he was the owner of part of the property described, disclaiming any interest in the residue, and denying that he had claimed it, was good as a denial.—*Porter v. Mitchell*, 82 Ind. 214.

[d] (Sup. 1883)

In an action to quiet title and to recover possession of land, an answer that when plaintiff took his covenants defendant was in possession under a deed with full covenants, under which he claims, but which does not allege that he entered believing in good faith that he had title, is insufficient.—*Elliott v. Frakes*, 90 Ind. 389.

[e] (Sup. 1883)

A defendant in an action to quiet title may plead his defenses specially.—*Eve v. Louis*, 91 Ind. 457.

[f] (Sup. 1887)

To a complaint to quiet title, plaintiffs claiming title as the only heirs of a deceased brother, an answer that such brother, in his lifetime, had brought an action against defendants' grantor to recover the real estate in controversy, and had been adjudged therein not to be the owner nor entitled to possession is sufficient on demurrer. It does not matter that the former judgment did not establish such grantor's title, as plaintiff must recover on the strength of his own title, not on the weakness of that of his adversary.—*Walker v. Hill*, 111 Ind. 223, 12 N. E. 387.

[g] (Sup. 1889)

Land was devised subject to the payment of a sum to the estate by the devisee, who was also executor. His grantee sued the heirs and devisees to quiet title. *Held*, that as the lien for the unpaid sum could only be enforced by the executor, it would constitute no defense to the action, without allegations that the execu-

tor neglected or refused to enforce it.—*Manifold v. Jones*, 117 Ind. 212, 20 N. E. 124.

[h] (Sup. 1891)

The only interest acquired by a railroad company under a license by a landowner to construct its roadbed on his land being an easement of way, an answer, in a suit against it by the grantee of the landowner to have his title quieted, which sets up the license and its rights thereunder as a bar to the entire cause of action, is bad on demurrer, for plaintiff is entitled, at any rate, to have his title to the fee quieted subject to the easement.—*Messick v. Midland Ry. Co.*, 128 Ind. 81, 27 N. E. 419.

[i] (Sup. 1897)

Where one claiming land under a will brings suit against the heirs of testator to quiet title, defendants may set up the invalidity of the will by cross complaint, and demand affirmative relief thereon, without complying with *Horner's Rev. St. 1897, § 2597*, requiring one contesting a will to give bond.—*Putt v. Putt*, 48 N. E. 356, 51 N. E. 337, 149 Ind. 30.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quiet. T. § 78.

See, also, 32 Cyc. pp. 1358-1361.

§ 38. — Disclaimer.**[a] (Sup. 1890)**

In an action to quiet title, a disclaimer is a good answer when defendant is out of possession.—*Miller v. Curry*, 124 Ind. 48, 24 N. E. 219, 374.

[b] (Sup. 1906)

A disclaimer by a defendant in a suit to quiet title operates as an estoppel, and between the parties and their privies is an absolute bar to any further assertion of the right renounced.—*New American Oil & Mining Co. v. Troyer*, 76 N. E. 253, 77 N. E. 739, 166 Ind. 402; *Same v. Wolff*, 166 Ind. 704, 76 N. E. 255.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quiet. T. § 79.

See, also, 32 Cyc. p. 1362.

§ 39. — Cross-bill, cross-complaint, or counterclaim, and plea or answer thereto.

Against codefendant or third parties, see PLEADING, § 149.

[a] (Sup. 1876)

Where real estate of a debtor is sold on execution, and the grantee by quitclaim of such purchaser brings suit against the widow of such debtor to enforce such sale and quiet his title, a counterclaim filed by her, alleging title in herself as widow and sole devisee of such decedent, illegality of such sale by reason of the nonexecution of such memorandum, certificate, and deed, and want of title in the plaintiff, and asking that her title to such real estate be quieted against the plaintiff, is good on demurrer for want of sufficient facts.—*Gossard v. Ferguson*, 54 Ind. 519.

[b] (Sup. 1878)

In an action to recover possession of land and to quiet title thereto, one of defendants set up, by way of counterclaim, that on enlisting in the army he agreed with his mother that he should send her money which should by her be invested for him in real estate; that in pursuance of said agreement he had sent his mother various sums with which she bought the land in question, and that she took the title of said real estate in her own name, and without his consent mortgaged it to secure the payment of her husband's debt, and that the mortgagee had notice of the existence of the trust; that complainant obtained title by purchase at the foreclosure of said mortgage. *Held*, that the counterclaim was sufficient on demurrer.—*Hampson v. Fall*, 64 Ind. 382.

[c] (Sup. 1880)

In an action to quiet title to lands purchased at a delinquent tax sale, defendant filed a counterclaim, by way of cross-complaint, alleging that he was the owner and in possession of the lands, and that plaintiff, by virtue of the pretended deed set forth in his complaint, or "by some other paper writing, the character or nature of which is unknown" to him, claimed a title which was unfounded, and was a cloud on his, defendant's title; and asking that the title thereto be quieted in him as against such plaintiff. *Held*, that the counterclaim was sufficient on demurrer under 2 Rev. St. 1876, p. 254, § 611.—*Cooper v. Jackson*, 71 Ind. 244.

[d] (Sup. 1880)

A complaint sought to quiet title to three parcels of real estate. Defendant filed a pleading setting up a tax lien on the undivided three-fourths of three parcels of land, but not alleging that the same was the land or parcels described in the complaint. *Held* insufficient as a counterclaim.—*Thompson v. Toohey*, 71 Ind. 296.

[e] (Sup. 1883)

In an action to quiet title, defendant may, by way of counterclaim, set up a title in equity in himself, and pray to have his title quieted.—*Barnes v. Union School Tp.*, 91 Ind. 301.

[f] (Sup. 1886)

A cross-complaint to quiet title must state all such facts as are required in a complaint for the same purpose, and must be good within itself, without aid from other pleadings in the cause.—*Conger v. Miller*, 104 Ind. 592, 4 N. E. 300.

Under section 1070, Rev. St. 1881, re-enacting section 611, Civ. Code 1852, a cross-complaint in a proceeding to quiet title, which does not describe the real estate, nor aver that plaintiff claims some adverse interest which is unfounded or a cloud on the cross-complainant's title, is bad on demurrer.—*Id.*

[g] (Sup. 1886)

A cross-complaint alleging, in substance, that the cross-complainant is the owner of the

real estate described in the complaint, and that plaintiffs claim an interest therein adverse to him, which is unfounded, and casts a cloud on his title, is good on demurrer.—*Johnson v. Taylor*, 106 Ind. 89, 5 N. E. 732.

[h] (Sup. 1886)

Although, in a cross-complaint to quiet title, it is not averred in express terms that plaintiff's claim of title is adverse to that of the cross-complainant, it is sufficient, on demurrer, if facts are alleged showing such to be the case.—*Kitts v. Willson*, 106 Ind. 147, 5 N. E. 400.

[i] (Sup. 1886)

In an action to quiet title, where the defendant alleged that he was the owner of the land in controversy, and that the plaintiff's claim was a cloud upon his title, and asked that the title be decreed to be in him and for such other relief as law and equity entitled him to, the facts stated constituted a good cross-complaint.—*Rausch v. Trustees of United Brethren in Christ's Church*, 8 N. E. 25, 107 Ind. 1.

A cross-complaint, to have an estimate and assessment for street improvements declared a lien on certain property, in an action to quiet title thereto, which shows that the property was sold and conveyed to the cross-complainant under a precept, but does not deny the title of the original plaintiff, nor show that the proceedings were irregular, or the sale invalid is bad on demurrer.—*Id.*

[j] (Sup. 1880)

A cross-complaint in an action for the recovery of real property alleged that defendant was the owner of the land in controversy, and had been in possession thereof for 15 years; that he had made valuable improvements thereon, and had paid the taxes and other assessments against the property; that plaintiff was setting up a title and had instituted an action to recover possession; that, after defendant had purchased the real estate, his grantor became insolvent; that plaintiff recovered a judgment against the grantor; that defendant was about to institute proceedings to enjoin a sale under the judgment, when plaintiff in person and by his attorney informed defendant that he need not pay any attention to the sale; that it was not the intention of plaintiff to purchase or disturb defendant's title; that plaintiff would bid it off at a nominal sum merely to get it out of the way, inasmuch as he had to have the real estate levied on sold in the inverse order from that in which the debtor had conveyed it; that, for this reason only had defendant's property been levied on and advertised for sale; that defendant relied on the promise and permitted the estate to be sold, and did not redeem from the sale; that the premises were purchased for the nominal sum of \$1, and that plaintiff knew that defendant was relying on the promise; that at the time of the sale the real estate was of the value of \$6,000. *Held*, that the cross-complaint stated a good cause of action to quiet title.—*Detwiler v. Schultheis*, 23 N. E. 709, 122 Ind. 155.

[k] (Sup. 1890)

In a suit to quiet title, a cross-complaint, stating the same facts as the answer, which alleged a purchase at a sale of the lot for an assessment for a public improvement, under a contract made by a city with the purchaser, and further alleging that defendant, relying on his contract and plaintiff's failure to object, completed said work at an expense of \$150, that he now understands there was an error made in the estimate of the frontage of plaintiff's lot, and that on account of such error plaintiff claims that the sale is void, and praying a lien on the lot for his said expenses, states a good cause of action.—*Trustees of the United Brethren in Christ's Church v. Rausch*, 122 Ind. 167, 23 N. E. 717.

[l] (Sup. 1893)

Where, in an action to quiet title, defendant's right constitutes the basis of a cross action for the same purpose, and her pleading contains all the essential elements of a cross complaint, the fact that such pleading is called a "counterclaim" does not determine its character, or affect the rights of the litigants.—*McClanahan v. Williams*, 136 Ind. 30, 35 N. E. 897.

[m] (Sup. 1894)

Where, in a suit to reform an agreement to convey land and for specific performance, defendants filed a cross-complaint to quiet title, which alleged that defendants were the owners of the land, and that the claim of plaintiff thereto was groundless and without right and was casting a cloud on defendants' title, the cross-complaint stated a sufficient cause of action.—*Island Coal Co. v. Streitlemier*, 37 N. E. 340, 139 Ind. 83.

[n] (Sup. 1895)

Rev. St. 1894, § 1067 (Rev. St. 1881, § 1055), permits every defense to the action to be shown under a general denial. Rev. St. 1894, § 353 (Rev. St. 1881, § 350), provides that any matter arising out of and connected with the cause of action may be set up as a counterclaim. *Held*, that a cross complaint in an action to quiet title, alleging that defendant was the owner of, and entitled to the immediate possession of, the land, and praying for possession and damages, set up a counterclaim which could properly be pleaded with a general denial.—*Gillenwater v. Campbell*, 41 N. E. 1041, 142 Ind. 529.

[o] (Sup. 1898)

A cross complaint in an action to quiet title alleged that the defendant turned out to the sheriff a certain piece of land on an execution; that the sheriff by mistake sold the land in controversy, which also belonged to the defendant; that the defendant then sold the land turned out to the sheriff, the consideration being that the grantee redeem the land sold by the sheriff; that the grantee borrowed money with which to redeem the land, and assigned the sheriff's certificate as security; that the loan was thereafter paid,

but the grantee neglected to have the certificate reassigned, and a sheriff's deed was issued to the lender of the money, who subsequently gave plaintiff a quitclaim deed. *Held*, that it stated facts sufficient to constitute a cause action.—*Allen v. Adams*, 50 N. E. 387, 150 Ind. 409.

[p] (App. 1901)

In an action to quiet title, a cross complaint alleging that the property had been devised to defendant, and that plaintiff's claim was under a deed procured by undue influence, was not demurrable as not stating a cause of action.—*Curtis v. Burns*, 60 N. E. 963, 27 Ind. App. 74.

A cross bill in an action to quiet title, which alleged that the deed under which plaintiff claimed was made when grantor was 87 years of age, and very feeble in mind and body; that she was unable to read or write, and easily influenced by the entreaties of others, especially the grantee; that grantee lived with grantor, and, taking advantage of such position, used undue influence to poison grantor's mind against cross complainant, to whom she had formerly devised the property,—stated facts sufficient to show undue influence invalidating the deed.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quiet. T. § 80.

See, also, 32 Cyc. pp. 1362-1364.

§ 41. — Demurrer.

[a] (Sup. 1877)

In an action to quiet title, where the complaint alleged that the real estate in question was conveyed by the plaintiffs to the defendant as security for the performance of a contract, etc., setting out the facts that the conveyance was made by a deed absolute on its face, but intended by the parties as a mortgage, and that it was a part of the agreement under which the deed was made that a defeasance should be executed by the grantee, which, after obtaining the deed, the grantee refused and still refuses to execute, the plaintiffs were seeking to enforce a parol contract or obligation outside the deed, and the complaint was not demurrable for failure to make the deed a part thereof.—*Butcher v. Stultz*, 60 Ind. 170.

[b] (Sup. 1881)

It is no ground for a demurrer to the complaint in an action to quiet title that the prayer for relief did not ask for the reformation of plaintiff's title deed so as to include the land in question.—*Stribling v. Brougher*, 79 Ind. 323.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quiet. T. § 82.

See, also, 32 Cyc. pp. 1357, 1358.

§ 42. — Amended and supplemental pleadings.

In action to recover possession and quiet title, see EJECTMENT, § 76.

[a] (Sup. 1898)

Where the complaint, in an action to quiet title, was insufficient on demurrer, in that it

failed to show title in plaintiff, such omission was not supplied by a supplemental complaint, on bringing in his grantee as a co-plaintiff, which also failed to show that such original plaintiff had any title or interest in the land in controversy.—*Chapman v. Jones*, 149 Ind. 434, 47 N. E. 1065, 49 N. E. 347.

[b] (App. 1901)

Under *Burns' Rev. St.* 1894, § 402, authorizing supplemental pleadings showing facts occurring after the filing of the former pleadings, it was error, in a suit to quiet title to real estate in which plaintiffs claimed interest and ownership, to permit an additional complaint, after the cause was submitted to the court, the object of which was to obtain damages for the destruction of an easement averred to have been destroyed after the commencement of the suit; for such complaint was not a supplemental pleading, but an independent cause of action, raising a new issue, and necessitating new proof.—*Mathews v. Rund*, 62 N. E. 90, 27 Ind. App. 641.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quiet. T. § 83.

See, also, 32 Cyc. pp. 1364, 1365.

§ 43. — Issues, proof, and variance.

[a] Under a general denial in an action to quiet title all defenses, whether legal or equitable, can be given in evidence.—(Sup. 1876) *Graham v. Graham*, 55 Ind. 23; (1883) *Hogg v. Link*, 90 Ind. 346; (1905) *Chicago & So. R. Co. v. Grant-ham*, 165 Ind. 279, 75 N. E. 265; (1906) *Gibbs v. Potter*, 77 N. E. 942, 166 Ind. 471.

[b] (Sup. 1878)

In a suit to quiet title against one who, while admitting the title claimed by plaintiff, answers specially that prior to the conveyance to plaintiff the land had been purchased by defendant at a sheriff's sale, under foreclosure of a mortgage from plaintiff's grantor to a third person, to which plaintiff replies by a general denial, the record in the foreclosure suit is competent evidence against plaintiff.—*Stevens v. Overturf*, 62 Ind. 331.

[c] (Sup. 1832)

In a suit to quiet title to land over which a railroad company claimed a right of way, articles of consolidation between the companies forming the defendant company were admissible over objection that no such companies were alleged in a counterclaim to have been consolidated, for, if in the counterclaim the consolidated companies were misnamed, the trial court on motion would have allowed an amendment of the counterclaim by inserting in it the true names of the consolidating companies.—*Jeffersonville, M. & I. R. Co. v. Oyler*, 82 Ind. 304.

[d] (Sup. 1832)

Plaintiff cannot declare on one theory and recover on another. If he brings defendant into court to answer a complaint to quiet title, he cannot prove a breach of contract or a violation of a trust.—*Hays v. Carr*, 83 Ind. 275.

[e] (Sup. 1883)

The general denial in a mortgage foreclosure suit, in which defendant files a cross-complaint to quiet title, is sufficient, under the statute, to admit proof of all legitimate matters of defense to the cross-complaint.—*Fitzpatrick v. Papa*, 89 Ind. 17.

[f] (Sup. 1833)

Under *Rev. St.* 1881, §§ 1055, 1071, in an action to quiet title, any matter of defense, legal or equitable, may be given in evidence under the general denial.—*Hogg v. Link*, 90 Ind. 346; *Eve v. Louis*, 91 Ind. 437.

[g] (Sup. 1884)

Where a plaintiff, in a suit to quiet title, describes a title specifically as the only title on which he relies, his recovery must be had on his title as laid.—*Ragsdale v. Mitchell*, 97 Ind. 458.

[h] (Sup. 1885)

A plaintiff suing to quiet his title may prove that defendant claims title, and that such claim is unfounded.—*Cuthrell v. Cuthrell*, 101 Ind. 375.

[i] (Sup. 1887)

Where plaintiff seeks to quiet title on the claim of absolute ownership, he is not entitled to relief by showing himself entitled to partition, or some other remedy of a different character.—*Johnson v. Murray*, 112 Ind. 154, 13 N. E. 273, 2 Am. St. Rep. 174.

[j] (Sup. 1888)

Where both parties ask relief, plaintiff can show that defendant, and those claiming under him, have no title.—*Brown v. Cody*, 115 Ind. 484, 18 N. E. 9.

[k] (Sup. 1890)

Under *Rev. St.* 1881, § 1055, providing that, under a denial of each material allegation of the complaint, defendant may give in evidence every defense he may have, either legal or equitable, he may, under such denial, in an action to quiet title, show that the deed under which plaintiff holds was intended as a mortgage.—*Hamilton v. Byram*, 122 Ind. 283, 23 N. E. 795.

[l] (Sup. 1892)

Where deceased contracted to convey land to plaintiff in consideration of certain services, and plaintiff took possession, and in a suit by him to quiet title it was shown that he had done all that he agreed to do, an allegation as to the time for making the conveyance was not material.—*Puterbaugh v. Puterbaugh*, 30 N. E. 519, 131 Ind. 288, 15 L. R. A. 341.

[m] (Sup. 1895)

Where defendant denies, in his answer, plaintiff's title to the land sued for, he cannot show that he is plaintiff's tenant.—*Carger v. Fee*, 140 Ind. 572, 39 N. E. 93.

[n] (Sup. 1895)

In an action to quiet title, where the source of plaintiff's title is specifically set out, no other

source can be proven.—Pittsburg, C., C. & St. L. Ry. Co. v. O'Brien, 142 Ind. 218, 41 N. E. 528.

[o] (Sup. 1897)

In an action to quiet title, the defendant is not compelled to become an actor by way of cross-complaint asking affirmative relief, but he has the right under his answer to rely on any equitable or legal defense to defeat the claim of his adversary.—Reed v. Kalfsbeck, 45 N. E. 476, 46 N. E. 466, 147 Ind. 148.

[p] (Sup. 1897)

In a suit to quiet title, under the Code, all matters of defense, including the statute of limitations, are admissible under the general denial.—Watson v. Lecklider, 45 N. E. 72, 147 Ind. 395.

[q] (Sup. 1900)

Under Rev. St. 1881, §§ 1074, 1075 (Burns' Rev. St. 1894, §§ 1087, 1088; Horner's Rev. St. 1897, §§ 1074, 1075), providing that where an occupant of land under color of title thereto has in good faith made improvements thereon, and is afterwards found not to be the rightful owner thereof, no execution shall issue to put the rightful owner in possession until after the filing of a complaint by the occupant setting forth the value of such improvements, etc., *held*, in an action to quiet title, that evidence as to the value of improvements made by the defendant while in possession was not admissible, where no claim had been made for improvements.—Doren v. Lupton, 56 N. E. 849, 154 Ind. 396.

[r] (App. 1901)

Where, in a suit to quiet title, defendant's adverse interest was claimed under a lease containing a misdescription, proof of a mistake in the description was admissible by way of equitable defense, under a general denial, under Burns' Rev. St. 1894, § 1067 (Horner's Rev. St. 1897, § 1055), providing that the answer may contain a general denial, under which defendant may give in evidence any defense, legal or equitable.—Allen v. Indianapolis Oil Co., 60 N. E. 1003, 27 Ind. App. 158.

[s] (Sup. 1902)

Under Burns' Rev. St. 1901, § 1067 (Rev. St. 1881, § 1055; Horner's Rev. St. 1901, § 1055), permitting defendants in suits to quiet title to give in evidence every defense, under a general denial, defendants, answering by way of general denial a complaint alleging that the defendants claim an interest in the premises through certain mortgages, and as heirs of a deceased grantee, which claims are unfounded, may prove the due execution and recording of the mortgages and the probate of the will of the deceased grantee.—Kaufman v. Preston, 63 N. E. 570, 158 Ind. 361.

[t] (App. 1902)

In a suit to set aside a deed, to compel a reconveyance, and to quiet title and recover possession because of a failure of the grantee to perform stipulations in the deed, all defenses

may be shown under an answer of general denial as provided by Burns' Rev. St. 1901, § 1062 et. seq.—Smith v. American Crystal Monument Co., 62 N. E. 1013, 29 Ind. App. 308.

[u] (Sup. 1905)

Defendant does not fail in his defense to a complaint to quiet title to a lot that he owns a well thereon because his answer setting out his deed excepting the well styles the exception as a "reservation."—Elsea v. Adkins, 74 N. E. 242, 164 Ind. 580, 108 Am. St. Rep. 320.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quiet. T. §§ 84-87.

See, also, 32 Cyc. pp. 1365-1369.

§ 44. Evidence.

Admissions as evidence, see EVIDENCE, § 236.

Documentary evidence, see EVIDENCE, § 372.

Evidence of mental incapacity of grantor, see DEEDS, § 68.

Order of proof, see TRIAL, § 60.

Presumptions and burden of proof as execution, existence, and identity of deed, see DEEDS, § 193.

[a] (Sup. 1866)

To an action to quiet the title to lands, defendant answered, claiming title to an undivided one-third, under a deed from plaintiff's grantor, and alleging possession under the deed for 20 years. On the trial defendant offered in evidence a deed executed jointly by himself and plaintiff's grantor for a part of the property. *Held*, that the evidence was admissible, as tending to show defendant's claim of title, and a recognition of it by plaintiff's grantor.—Dumont v. Dufore, 27 Ind. 263.

[b] (Sup. 1878)

In an action to quiet title, where defendant claims title by purchase under a decree of foreclosure of a mortgage of the property executed by plaintiff's grantor, the complaint and record in the foreclosure suit are competent evidence against plaintiff.—Stevens v. Overturf, 62 Ind. 331.

[c] (Sup. 1879)

In an action to quiet title, it appeared that on a certain date a certain railroad company conveyed to plaintiff's vendor, H., certain described real estate in B. county, Ind.; that on a certain date before that time the said railroad company executed a mortgage to the defendant, D., as trustee, to secure the payment of certain bonds to be issued and sold by D., which mortgage covered the above-described real estate, among other lands so mortgaged; that it was agreed in the said mortgage, and in each of the bonds secured thereby, that the said company would deed in fee simple to the holder of any said bonds at any time such holder might elect within five years \$1,000 worth of such real estate, described in said mortgage; that the said real estate above described as belonging to the plaintiff was conveyed to said H., in consideration of the surrender of certain of said bonds,

the same being not less than the amount of \$1,000 so secured by said mortgage within the said period of five years, according to the said agreement and stipulation in said mortgage; that at a certain term of the Circuit Court the defendant G., pretending to own one of said bonds, obtained a decree of foreclosure against the defendant D., without making the owners of said real estate parties to said suit, and an order for the sale of said real estate; that the defendant S., as sheriff of said county, was threatening and about to sell said real estate from the plaintiff to his irreparable damage. *Held*, that the deed of such lands executed by the mortgagor to H., reciting the conditions of the mortgage authorizing the sale and admissions by defendant that H. had conveyed to plaintiff, were admissible in evidence.—*Glendy v. Lanning*, 68 Ind. 142.

[d] (Sup. 1882)

In a suit to quiet title to land over which a railroad company claimed a right of way, it was not error to admit in evidence articles of association and the record of the organization of the railroad company, through which defendant claimed, as constituting links in the chain of evidence necessary to establish the defendant's rights.—*Jeffersonville, M. & I. R. Co. v. Oyer*, 82 Ind. 394.

[e] (Sup. 1884)

Where, in a suit to quiet title, defendant, by cross-complaint, sets up a deed, and demands that his own title be quieted, on the issue of the execution of the deed defendant has the burden of proof.—*Fitzgerald v. Goff*, 90 Ind. 28.

[f] (Sup. 1888)

In an action to quiet title, where plaintiff avers that he owns the land in fee without specifically setting forth his title, the presumption is that he owns the entire estate.—*Lane v. Schlemmer*, 15 N. E. 454, 114 Ind. 290, 5 Am. S. Rep. 621.

[g] (Sup. 1889)

Where evidence in the case supplied grounds for inferring that the land claimed by the plaintiff is the same as that mentioned in a valid devise to him, this is sufficient to sustain the finding of the trial court.—*Winslow v. Donnelly*, 22 N. E. 12, 119 Ind. 565.

[h] (Sup. 1893)

In an action to quiet title, *held*, that the verdict was sustained by the evidence.—*Hawley v. Zigerly*, 34 N. E. 219, 135 Ind. 248.

[i] (Sup. 1893)

In a suit to quiet title, evidence considered, and *held* insufficient to sustain the decision.—*Minnich v. Shaffer*, 34 N. E. 987, 135 Ind. 634.

[j] (Sup. 1900)

In an action to quiet title, where it appeared that defendant, who claimed under a tax deed, also became a grantee of a life tenant of the premises, the admission of evidence of the

rental value of the property, on the assumption that defendant acquired only a lien by the tax-title deed, and for the purpose of showing that the rental value exceeded the taxes, which, therefore, should have been paid by defendant, as owner of the life estate, was erroneous, where there was no evidence to show that the tax-title deed created only a lien, and defendant had not filed an affirmative pleading to recover for taxes or improvements.—*Doren v. Lupton*, 56 N. E. 849, 154 Ind. 396.

[k] (Sup. 1900)

Evidence, in an action to quiet title to an easement in a way, showing that the way was located by deeds from parties under whom the plaintiff and defendants claimed title, and that it had been open, used, and recognized as the boundary line by the abutting owners for 27 years, and that buildings had been erected and improvements made with reference to it, was sufficient to support a general verdict for the plaintiff.—*Roush v. Roush*, 55 N. E. 1017, 154 Ind. 562.

[l] (Sup. 1902)

The evidence amply authorized the court to find that defendant claimed title or interest in the land adverse to plaintiff in his suit to quiet title.—*Brown v. Cox*, 63 N. E. 568, 158 Ind. 364.

[m] (Sup. 1904)

In an action to quiet title to land, where it appears that plaintiff has been in possession of the property for 20 years apparently as owner, the presumption is that his occupancy was under a claim of right, and the burden is on defendant to show the contrary.—*Rennert v. Shirk*, 163 Ind. 542, 72 N. E. 546.

[n] (App. 1905)

In an action to quiet title the burden is upon plaintiff to prove title.—*Krotz v. A. R. Beck Lumber Co.*, 34 Ind. App. 577, 73 N. E. 273.

[o] (Sup. 1906)

In a suit to quiet title, evidence examined, and *held* to support a finding of title in plaintiff.—*Adams v. Betz*, 167 Ind. 161, 78 N. E. 649.

In a suit to quiet title, it appeared that plaintiff and defendant's grantor had located the boundary between them. A partition fence had been erected and maintained on the boundary for over 10 years. Each cultivated his respective premises to the fence. *Held*, that evidence relative to the establishment of the line was admissible against defendant, for the agreement between plaintiff and defendant's grantor was binding on them and on persons claiming through them or either of them.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quiet. T. §§ 89-92.

See, also, 32 Cyc. pp. 1369-1474.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

§ 47. Trial or hearing.

Applicability of instructions to pleadings and evidence, see TRIAL, §§ 251, 252.

Construction and operation of verdict in general, see TRIAL, § 343.

Failure to answer interrogatories or make findings, see TRIAL, § 356.

Instructions excluding or ignoring issues, defenses or evidence, see TRIAL, § 253.

Instructions invading province of jury, see TRIAL, § 191.

Right to open and close, see TRIAL, § 25.

Right to trial by jury, see JURY, §§ 13, 14.

Right to trial by jury in suit for partition and to quiet title, see JURY, § 13.

Separate trials in same cause, see TRIAL, § 3.

[a, b] (Sup. 1882)

In an action to recover and quiet title to real estate, defendant answering by a general denial, a finding, though in its technical sense a general one, may be so framed as to show the ground on which it was based, as that the deed under which plaintiff claimed was made when the possession was held adversely to the grantor.—*Evans v. Schafer*, 86 Ind. 135.

[c] (Sup. 1884)

Where one paragraph of a complaint is for the possession of real estate, and the second paragraph is to have the title quieted, and the facts alleged show plaintiff to be entitled to claim as widow in land sold by her husband, the jury may find that plaintiff has title and is entitled to possession of one-third part thereof, and that her title be quieted as to such one-third although the complaint asserts ownership of all, and asks to have such title quieted.—*Carver v. Carver*, 97 Ind. 497.

[d] (Sup. 1884)

Rev. St. 1881, § 2948, provides that whenever, before any public officer, the grantor of any deed signs by mark, it shall be the duty of the officer before signature fully to explain to him or her the contents and purport of the within deed, but the failure of such officer so to do shall not affect the validity of the deed. *Held*, in a suit to quiet title, that, where there was evidence that plaintiff did not sign an alleged deed under which defendant claimed, an instruction that if plaintiff's name was signed to the deed by her authority, and if her attention was called to that fact by the officer taking the acknowledgment of the deed, and if she knew what the instrument was, knew her name was signed to a deed, acknowledged the same, and thereafter delivered it, that would constitute a delivery of the deed within the requirements of the law, but, if not, the verdict should be for plaintiff, was not erroneous as making defendant's title under the deed depend upon the acknowledgment and explanation of the notary.—*Fitzgerald v. Goff*, 99 Ind. 28.

[e] (Sup. 1890)

In an action to quiet title, on judgment against plaintiff on the ground that he holds merely as mortgagee, the court need not find

the state of accounts between plaintiff and mortgagor, especially when the latter is a party to the action.—*Hamilton v. Byrum*, 128 Ind. 283, 23 N. E. 795.

[f] (Sup. 1891)

A material issue being whether defendant's entry on certain land and construction of a roadbed were with the knowledge and consent of the then owner, and there being no evidence on that subject, the owner being a witness, and testifying that he had not and protested against such appropriation, was error for the court to take the case from the jury, and direct a verdict for the plaintiff.—*Messick v. Midland Ry. Co.*, 128 Ind. 419.

[g] (Sup. 1891)

Two persons engaged in the business of buying land in partnership. Certain land was bought and paid for by one of the partners with his own money, and title taken in his name. The other partner took exclusive possession of the land, and after his death his heirs conveyed it to plaintiff, who sued the surviving partner and his wife to quiet title. The jury specially found that the land was bought for the firm; that there was no contribution from the surviving partner to the purchase; that the partner, but that the latter had fully paid for the land; and they rendered a special verdict for the plaintiff. *Held*, that the special findings were reconcilable on the facts, that the land, as firm property, had been conveyed by the firm to the deceased partner.—*Shirk*, 128 Ind. 278, 27 N. E. 733.

[h] (Sup. 1891)

In an action to quiet title to land mortgaged, to declare a conveyance, absolute on its face, void as to the mortgage, the jury, after finding that there was a special verdict, have no right to find a legal conclusion from those facts that the plaintiff has title, or that defendants have no title in the lands in controversy.—*Kitts v. Carver*, 130 Ind. 492, 29 N. E. 401.

[i] (Sup. 1892)

In an action to quiet title, brought by persons claiming under a conveyance executed by a second wife, who died without issue, to the children of the first wife, plaintiff's title in the second wife by reason of her death, and the agreement between the husband and her, should have the home farm—the land on which the house was situated—in fee, and claimed that such title was evidenced by a decree in an action to quiet title, the pleadings in which had been amended by fire. The decree merely provided that commissioners should set off one-third of defendant's lands to his widow in fee, but not as to the home farm. *Held*, that there was nothing in the decree to sustain plaintiff's contention, and that the court erred in its construction thereof to the jury.—*Heard v. Sheets*, 130 Ind. 185, 29 N. E. 1065.

[j] (Sup. 1892)

In an action to quiet title, the court, on the special verdict, that, relying on

tract of defendant's ancestor to convey certain land to him, and in pursuance thereof, and with the knowledge and consent of the deceased, plaintiff and wife entered into possession of the premises, and had been in the peaceable, uninterrupted, and exclusive possession thereof up to the death of deceased, and to the present time, excluded the inference that plaintiff's possession was that of tenant of deceased.—*Puterbaugh v. Puterbaugh*, 131 Ind. 288, 30 N. E. 519, 15 L. R. A. 341.

[k] (Sup. 1892)

In an action to quiet title, where the findings were silent on the subject of fraud, the presumption of good faith must control, as against defendants' allegation of fraud.—*Smith v. James*, 131 Ind. 131, 30 N. E. 902.

[l] (Sup. 1893)

In an action to quiet title, an instruction directing the jury to limit the application of certain evidence of the condition of the father's estate to a determination of the one question as to what was included in the alleged settlement and compromise was not erroneous where evidence was introduced by both parties as to the value of the father's estate, and, if it had any possible bearing on the question at issue, it was for the purpose pointed out by the court.—*Swaim v. Swaim*, 33 N. E. 792, 134 Ind. 596.

[m] (Sup. 1893)

Where a paragraph of a complaint shows an action to quiet title simply to give plaintiffs whatever title or interest they may have in the land, such action is triable by a jury.—*Jennings v. Moon*, 34 N. E. 996, 135 Ind. 168.

Where a paragraph of a cross-complaint contained an action to quiet title and one to declare a lien, it was not error to refuse a request that the issues made in such paragraph be tried by the court.—*Id.*

[n] (Sup. 1895)

A finding of fact that real estate sold on execution "had in all things been duly appraised according to law" sufficiently shows an appraisal of the rents and profits before sale, though the finding also recites that the "appraisement returned with the execution contains only an appraisal of the real estate."—*Lytton v. Baird* 141 Ind. 446, 40 N. E. 1063.

[o] (Sup. 1900)

A general verdict for the plaintiff in a suit to quiet title to an easement in a way is not in conflict with a special finding that persons under whom the parties acquired title to land abutting the way had conveyed a right of way over the same strip of ground to a third party.—*Roush v. Roush*, 55 N. E. 1017, 154 Ind. 502.

[p] (App. 1906)

By a general verdict a jury found that complainant's father purchased the property in question, paid a part of the consideration, and had it conveyed to L. in trust for himself and

heirs; that he had not intended to hinder or delay his creditors; that the father's widow procured L. to convey the property to her without consideration, and she then conveyed the same to defendant H. without consideration, who knew that the property had been held in trust by L., who subsequently died, and that complainants were the equitable owners of the land, subject to defendants' rights as occupying claimants. *Held*, that answers to special interrogatories by which the jury found the value of one of the lots in question unimproved, that defendant H. at the time improvements were made by the widow did not know of the trust, and that the jury did not know from the evidence that complainant's father had no intention of defrauding or hindering creditors in conveying the property in trust, did not conflict with the general verdict, so as to require judgment for defendants.—*Catterson v. Hall*, 76 N. E. 889, 37 Ind. App. 341.

[q] (App. 1907)

A special finding in a suit to quiet title is to be examined with the understanding that it was incumbent upon the appellee to seek recovery upon the strength of his own title, and not to rely upon the weakness of that of the appellant, that the burden of proof was upon the appellee, and that only facts, and not mere evidence, or conclusions of law, can have influence in the statement of facts in a special finding.—*Hornet v. Dumbeck*, 39 Ind. App. 482, 78 N. E. 691.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quiet. T. §§ 95-97.

See, also, 32 Cyc. pp. 1374-1377.

§ 48. Scope and extent of relief.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quiet. T. §§ 98-101.

See, also, 32 Cyc. pp. 1377-1384.

§ 49. — In general.

[a] (Sup. 1884)

Under Rev. St. 1881, § 1060 (2 Rev. St. 1876, p. 252, § 600), providing that, where there are two or more plaintiffs or defendants in suits to recover real property, any one or more of the plaintiffs may recover against any one or more of the defendants the premises or any part thereof, or any interest, or damages, according to the rights of the parties, but the recovery may not be for a greater interest than that claimed, title to an undivided interest may be quieted under a complaint asking the title quieted to the whole.—*Carver v. Carver*, 97 Ind. 497.

[b] (Sup. 1895)

Where in an action to quiet title and in ejectment the issue of possession was not decided, it was error to award damages.—*Muffley v. Turner*, 40 N. E. 913, 141 Ind. 580.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quiet. T. §§ 98, 99.

See, also, 32 Cyc. p. 1380.

§ 51. — Relief to defendant.**[a] (Sup. 1887)**

In a suit to quiet title, the answer alleged that plaintiff was a married woman residing in Michigan, and owning certain real property there in her own right; that by the statute of that state married women may contract concerning their separate real estate, and convey and mortgage it; that plaintiff and her husband became indebted to defendant, which debt was secured by mortgage on such separate real estate; that plaintiff sold said property, and purchased the property in dispute in Indiana; that, in order to enable her to make such purchase, defendant agreed to release said mortgage, plaintiff agreeing to give him a mortgage on the new property, which was done, the husband not joining in the new mortgage, both parties believing it unnecessary in Indiana as in Michigan; that but for such belief defendant would not have released the Michigan mortgage; that such interest is all that defendant claims in the land in controversy; and that the only purpose of the action is to cancel such last mortgage, and to remove the apparent cloud cast by it on plaintiff's title. *Held* a good equitable defense, and that, before complainant could obtain the relief which she sought, she must recognize the equity of defendant.—*Otis v. Gregory*, 111 Ind. 504, 13 N. E. 39.

[b] (Sup. 1890)

In a suit to quiet title to a lot as against a purchaser at a sale for an assessment under a contract for a public improvement, plaintiff, being prohibited by Rev. St. 1881, § 3165, from trying any question of fact arising before the letting of the contract, cannot complain because the court, after setting aside the sale for excess in the amount of the assessment, gives defendant, who did the work under the contract, a lien on the lot for its proper proportion of the assessment.—*Trustees of the United Brethren in Christ Church v. Rausch*, 122 Ind. 167, 23 N. E. 717.

In a suit to quiet plaintiff's title against defendant's adverse claim derived by the sale of the land in satisfaction of a street improvement, it was shown that the engineer made a mistake in estimating the work done under the contract for the improvement and assessable against the land making the amount too great, and other irregularities occurring subsequent to the making of the contract for the improvement were also shown. No objection was presented as to the manner of raising the question, and the court inquired into the matter and set the same aside, and corrected and ascertained the amount chargeable against the land. *Held*, that plaintiff had no cause to complain, defendant having a clear lien against the land, and all the relief plaintiff was entitled to, even if the sale was void, was the quieting of its title as to all claims, except the lien for the assessment chargeable against it for the improvement.—*Id.*

[c] (Sup. 1892)

When plaintiff purchased certain land, she required and obtained from the person who owned the land at the time a drainage assessment became a lien, and who was a party to the proceedings, a bond to indemnify her should the assessment be a valid lien on the land, and she be compelled to pay it. *Held*, in an action to quiet title, that, as defendant, who held such lien, had not relied on such bond, and had not made the principal on the bond a party defendant to the cross-complaint, he could not obtain affirmative relief.—*Killian v. Andrews*, 130 Ind. 579, 30 N. E. 700.

[d] (Sup. 1906)

Where a defendant, in a suit to quiet title, claimed in a cross-complaint that the land was his under a deed executed by a third person who had by mistake omitted the land in controversy, he was, on making the third person a codefendant with plaintiff to the cross-complaint, and on establishing his claim, entitled to a reformation of the deed, and to a decree quieting his title as against plaintiff.—*Adams v. Betz*, 167 Ind. 161, 78 N. E. 649.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quiet. T. § 101.

See, also, 32 Cyc. pp. 1382, 1383.

§ 52. Judgment or decree and enforcement thereof.

Actions or other proceedings to review, see JUDGMENT, § 335.

Collateral attack, see JUDGMENT, §§ 490, 501-503.

Conclusiveness, see JUDGMENT, §§ 634-749.

Equitable relief, see JUDGMENT, §§ 442, 463.

Merger and bar of causes of action and defenses, see JUDGMENT, §§ 540-633.

[a] (Sup. 1880)

If one having a claim is brought into court by a complaint to quiet title, and fails to assert his claim, he is concluded by the judgment, even though he omitted to assert his real claim.—*Green v. Glynn*, 71 Ind. 336.

[b] (Sup. 1885)

A decree quieting title destroys all liens and claims not protected by proper provisions.—*Watkins v. Winings*, 102 Ind. 330, 1 N. E. 638.

[c] (Sup. 1888)

In a suit for the possession of and to quiet real estate against several defendants, the court found generally that plaintiff was the owner in fee simple and entitled to the possession of the land described, and that the possession was unlawfully withheld by one defendant. There was judgment against that defendant for possession. After the judgment there was the following recital: "It is * * * considered * * * that there has been in this action no adjudication as to any alleged or supposed right * * * of other defendants * * * of any interest * * * which they or either of them

ive to the real estate." *Held*, that the was not conclusive as to what was adjudged in the suit.—*People's S., L. & B. Ass'n vs.*, 17 N. E. 570, 115 Ind. 297.

(*Sup.* 1889)

here, in a suit to quiet title by the grantor, a devisee, defendants claimed that the estate was conditional, if it be conceded the will created an estate on a condition subsequent, and that the defendants were heirs of the devisee, the judgment for the grantor was right where there were no facts proved showing a proper exercise of the power of entry, and the courts will not enforce the judgment where such facts are absent.—*Mani-Jones*, 20 N. E. 124, 117 Ind. 212.

(*Sup.* 1889)

a decree quieting title to land is void unless the description can be ascertained from the facts.—*Ratliff v. Stretch*, 117 Ind. 526, 20 N. E. 438.

(*Sup.* 1889)

2 Rev. St. 1881, § 318, expressly authorizes a decree quieting title on notice by publication. It is no objection to such a decree that it is apparently in personam.—*Essig v. Lower*, 117 Ind. 239, 21 N. E. 1090.

(*Sup.* 1894)

here, in a suit to quiet title, on report of the master, judgment is entered in a cause in which the court had jurisdiction, a motion, four months thereafter, to refer said cause back to the master, is properly denied.—*Case v. Case*, 117 Ind. 526, 37 N. E. 337.

(*Sup.* 1899)

a suit by the holder of a tax title to quiet title against the holder of the record title, who executed a deed that was never recorded, and a decree for a sale of the land, does not affect title in the record holder, though Rev. St. 1881, § 6496, provides that no unrecorded deed shall affect the title or rights of a competent person in such a suit.—*Pattison v. Wert*, 55 Ind. 227, 153 Ind. 453.

(*App.* 1904)

here, in a suit to quiet title, defendant sought to have title quieted in him subject to a claim in plaintiff, but the court erroneously quieted title in defendant in fee, the judgment was not void, but merely erroneous.—*Williams v. Haynes*, 69 N. E. 469, 33 Ind. App. 270.

(*App.* 1907)

a decree quieting title cannot be entered unless the description of the land is indefinite.—*Enger v. Ramage*, 40 Ind. App. 486, 82 Ind. 478.

(*App.* 1910)

a decree, quieting title of a widow to land conveyed by her from her husband, could not be entered on the operation of the statute of descents, which conferred no right upon a granddaughter of the husband, who, if she survived, would be the heir of the widow as to the land to which

title was quieted, but was against her as to any then present title.—*Dodd v. Shanton*, 90 N. E. 1041.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quiet. T. §§ 99, 102, 103.

See, also, 32 Cyc. pp. 1377-1384.

§ 53. Appeal.

Appellate jurisdiction as dependent on whether title to real property is involved, see COURTS, § 220 (13).

Decisions reviewable, see APPEAL AND ERROR, § 79.

Estoppel to take appeal, see APPEAL AND ERROR, § 161.

[a] (*Sup.* 1892)

In an action to quiet title, where plaintiff shows a clear legal title, and defendant's title is based on a partially executed parol contract of purchase with plaintiff's grantor, the evidence as to the existence of which being conflicting, a judgment for plaintiff will not be reversed on appeal.—*Barr v. Vermilya*, 130 Ind. 512, 30 N. E. 698.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quiet. T. § 104.

See, also, 32 Cyc. p. 1384.

§ 54. Costs.

[a] (*Sup.* 1857)

In an action to quiet title to land, one of the defendants disclaimed any interest therein, and judgment was rendered in accordance with the prayer for plaintiff, and for costs for defendants. *Held*, that this case, except so far as relates to the party who disclaimed, is not within the exception of 2 Rev. St. p. 126, § 396, that in all civil actions the party recovering judgment shall recover costs, except in those cases in which a different provision is made by law.—*Erskine v. McCutchan*, 9 Ind. 255.

[b] (*Sup.* 1858)

2 Rev. St. p. 168, § 613, does not give costs to a defaulted defendant who actually withholds the land, but only to a defendant out of possession, in a suit to quiet title.—*Ragan v. Haynes*, 10 Ind. 348.

[c] (*Sup.* 1906)

Under the express provisions of Burns' Ann. St. 1901, § 1084, the court, in a suit to quiet title, must, on defendant pleading a disclaimer, dismiss the case at the costs of plaintiff.—*New American Oil & Mining Co. v. Troyer*, 76 N. E. 253, 77 N. E. 739, 166 Ind. 402; *Same v. Wolff*, 166 Ind. 704, 76 N. E. 255.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quiet. T. § 105.

See, also, 32 Cyc. pp. 1386, 1387.

QUI TAM ACTIONS.

See PENALTIES, §§ 17-40.

QUITCLAIM.

See—

Assignment of mortgage on quitclaim deed of mortgaged property by mortgagee. MORTGAGES, § 226.

Conveyance. DEEDS, § 121.

Estoppel by. ESTOPPEL, §§ 38, 39.

Execution by donee of testamentary power. WILLS, § 693.

Grantee in quitclaim deed as bona fide purchaser. VENDOR AND PURCHASER, § 224.

Reformation. REFORMATION OF INSTRUMENTS, § 28.

QUOD RECUPERET TERMINUM.

See EJECTMENT, § 114.

QUORUM.

See—

Board of commissioners. COUNTIES, § 49.

Discounts by bank not made by quorum of directors. BANKS AND BANKING, § 178.

Judges necessary to adjudication. COURTS, § 101.

Meetings of corporate directors. CORPORATIONS, § 298.

What constitutes. PARLIAMENTARY LAW, § 5.

QUOTATIONS.

See—

Liability of telegraph company for failure to furnish market quotations. TELEGRAPHS AND TELEPHONES, § 44.

Prices and transactions on exchange or board of trade. EXCHANGES, § 13.

QUOTIENT VERDICT.

See TRIAL, § 315.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

QUO WARRANTO.

Scope-Note.

[INCLUDES writs of quo warranto and proceedings by information or action in the nature of writs of quo warranto to try title to offices, franchises, etc.; nature and scope of the remedy in general; grounds of such writs or proceedings and defenses thereto; to and against whom and as to what offices, franchises, etc., they are allowed; jurisdiction over and proceedings on such writs, informations, or actions; judgments and enforcement thereof; review of proceedings; and costs in such proceedings.

[EXCLUDES rights to and forfeiture of offices, franchises, etc. (see *Officers; Franchises; Corporations*); and titles of particular classes of officers and corporations). For complete list of matters excluded, see cross-references, post.]

Analysis.

I. Nature and Grounds.

- § 1. Nature and scope of remedy.
- § 3. Existence and adequacy of other remedies.
- § 5. Exclusiveness of remedy by quo warranto.
- § 8. Exercise of powers by municipality.
- § 9. Exercise of public office.
- § 10. — In general.
- § 11. — Trial of title to office.
- § 12. — Usurpation of or intrusion into office.
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- § 17. — Usurpation of corporate franchise.
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II. Jurisdiction, Proceedings, and Relief.

- § 26. Form of remedy and conditions precedent.
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- § 29. Time to sue, limitations, and laches.
- § 30. Parties plaintiff or petitioners.
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- § 61. Judgment or order and enforcement thereof.
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This Digest is compiled on the Key-Number System. For explanation, see page iii.

Cross-References.

Remedy by quo warranto as affecting right to mandamus, see MANDAMUS, § 3.

I. NATURE AND GROUNDS.

To annul license to practice medicine, see PHYSICIANS AND SURGEONS, § 11.

§ 1. Nature and scope of remedy.

[a] (Sup. 1877)

An information in the nature of a quo warranto is not a proper remedy for the recovery of real estate, except where the real estate has escheated or been forfeited to the state, for its use.—State ex rel. Mt. Carmel School Corp. v. Shields, 56 Ind. 521.

[b] The remedy by information in the nature of a quo warranto is a civil proceeding.—(Sup. 1878) Reynolds v. State ex rel. Titus, 61 Ind. 392; (1887) Robertson v. State ex rel. Smith, 109 Ind. 79, 10 N. E. 582, 643.

[c] (Sup. 1878)

An information in the nature of quo warranto lies to recover real estate which has escheated to the state.—State ex rel. Attorney General v. Meyer, 63 Ind. 33.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quo. W. §§ 1, 3, 23, 28.
See, also, 32 Cyc. p. 1412.

§ 3. Existence and adequacy of other remedies.

[a] (Sup. 1882)

Notwithstanding 2 Rev. St. 1876, pp. 298, 299, §§ 749, 750, providing for a trial of contested elections, the right to an office may be contested by an information in the nature of quo warranto.—State ex rel. Morley v. Gallagher, 81 Ind. 558.

[b] (Sup. 1885)

Quo warranto will lie to try title to office, even when a statutory method is prescribed.—State ex rel. Waymire v. Shay, 101 Ind. 36.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quo. W. § 4; 12 CENT. DIG. Corp. §§ 79, 80.
See, also, 32 Cyc. pp. 1416-1419.

§ 5. Exclusiveness of remedy by quo warranto.

[a] (Sup. 1862)

A forfeiture of corporate franchises can be enforced only by a direct proceeding by quo warranto.—Little v. Danville & W. L. Plank-Road Co., 18 Ind. 86.

[b] (Sup. 1870)

An information in the nature of quo warranto is the proper mode of attacking the validity of the election of a city officer; there

being no provision of law for the election of such officer.—Gass v. S. Clark, 34 Ind. 425.

[c] (Sup. 1898)

The eligibility to hold office cannot be terminated in a quo warranto proceeding; the right to the office.—Parsons v. N. E. 1047, 150 Ind. 203.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quo. W. § 1.
See, also, 32 Cyc. p. 1415.

§ 8. Exercise of powers by city.

Information, see post, § 48.

[a] (Sup. 1879)

The legality of the annexation of territory to a city cannot be questioned by quo warranto; the question is one of the nature of quo warranto officers.—Stultz v. State ex rel. Bloomington, 72 Ind. 161.

[b] (Sup. 1880)

Quo warranto is a proper remedy to determine the question of the legal existence of a municipal corporation.—Mullikin v. Bloomington, 72 Ind. 161.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quo. W. § 1.
See, also, 32 Cyc. pp. 1424, 1425.
L. R. A. 243.

§ 9. Exercise of public office.

Appeal, see post, § 62.

Complaint, see post, § 49.

Evidence, see post, § 55.

Exclusiveness of remedy by quo warranto, see ante, § 5.

Existence of other remedy, see ante, § 3.

Information, see post, § 48.

Jurisdiction, see post, § 27.

Parties plaintiff, see post, § 30.

Persons entitled to relief, see post, § 57.
Scope of inquiry and powers of court, see post, § 57.

Time to sue, see post, § 29.

Venue, see post, § 28.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quo. W. §§ 1, 2.
See, also, 32 Cyc. pp. 1420-1421.

§ 10. — In general.

[a] (Sup. 1887)

An information in the nature of quo warranto is the appropriate remedy for the possession of an office to which

en legally elected and has become duly d to hold. It is also the proper remedy removal of the incumbent of an office s usurped and illegally continues to hold both remedies may be sought by the same ation. Rev. St. 1881, §§ 1131, 1133, Griebel v. State ex rel. Niezer, 12 N. E. 1 Ind. 369.

(Sup. 1908)

quo warranto to oust another from a office and to award relator the posses- ereof, it is incumbent on relator to estab- at, under the law, he was eligible to be to the office, and he must recover, if at the strength of his own title, and cannot on any infirmity or weakness in the ti- such other.—State ex rel. Benham v. 170 Ind. 480, 84 N. E. 1084.

ASES FROM OTHER STATES,

41 CENT. DIG. Quo W. §§ 10-12.

, also, 32 Cyc. pp. 1420, 1421.

— Trial of title to office.

(Sup. 1898)

an action by the state by its own officer t one from an office as an alleged usurp- endant's right to hold depends entirely ne strength of his own title.—Relender v. x rel. Utz, 49 N. E. 30, 149 Ind. 283.

(Sup. 1898)

here the title to the office of mayor is d, quo warranto is the proper remedy to ine it.—Parsons v. Durand, 49 N. E. 50 Ind. 203.

ASES FROM OTHER STATES,

41 CENT. DIG. Quo W. § 13.

, also, 32 Cyc. pp. 1420-1424.

— Usurpation of or intrusion in- to office.

(Sup. 1898)

urns' Rev. St. §§ 1145, 1146 (Horner's t. 1897, §§ 1131, 1132), expressly author- information in the name of the state illed by any person claiming an interest public office against one usurping the Held to authorize the filing of an in- on of quo warranto in the name of the gainst one alleged to be usurping the of county superintendent rightfully be- to the relator.—State ex rel. Bishop v. 50 N. E. 471, 150 Ind. 455.

ASES FROM OTHER STATES,

41 CENT. DIG. Quo W. § 14.

, also, 32 Cyc. p. 1423.

Exercise of corporate franchises and powers.

ASES FROM OTHER STATES,

41 CENT. DIG. Quo W. §§ 17-20; 12

ENT. DIG. Corp. § 79.

, also, 32 Cyc. pp. 1424-1427; note, 24 R. A. 295.

§ 16. — In general.

[a] (Sup. 1880)

A writ of quo warranto, or an information in the nature thereof, is the proper remedy for testing the legality of a corporation.—Board of Com'rs of Lawrence County v. Hall, 70 Ind. 469.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quo W. § 17.

See, also, 32 Cyc. pp. 1424-1426.

§ 17. — Usurpation of corporate fran- chise.

[a] (Sup. 1897)

Information is the proper remedy, though the complaint be one against defendants for wrongfully assuming to act as a corporation when they are not one.—Carmel Natural Gas & Improvement Co. v. Small, 150 Ind. 427, 47 N. E. 11, 50 N. E. 476.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quo W. § 18; 12

CENT. DIG. Corp. § 79.

See, also, 32 Cyc. p. 1425.

§ 18. — Acts in excess of corporate powers.

[a] (Sup. 1875)

An information, as provided in Code, § 749, where an association acts as a corporation with- out being legally incorporated, will not lie against a railroad because it does not intend to construct the whole of its road according to its articles, and does intend to use its organization to condemn private property over which to construct its road.—State ex rel. Cofer v. Kingan, 51 Ind. 142.

[b] (Sup. 1889)

The state cannot attack an execution sale of a gravel road franchise by quo warranto, on the ground that the consideration was in- adequate, in the absence of any complaint on the part of the persons interested.—State ex rel. Wood v. Hare, 121 Ind. 308, 23 N. E. 145.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quo W. § 19.

See, also, 32 Cyc. pp. 1425, 1426; note, 63 L. R. A. 761.

§ 19. — Forfeiture of franchise and dissolution of corporation.

Exclusiveness of remedy, see ante, § 5.

Information, see post, § 48.

[a] (Sup. 1861)

When a corporation does or omits acts which amount to a forfeiture of its charter, or exercises powers not conferred by such charter, an information may be sustained against it. Ind. Pr., p. 551, 2 Rev. St. p. 198.—Danville & W. L. Plank-Road Co. v. State ex rel. Kennedy, 16 Ind. 456.

[b] (Sup. 1875)

An information in the nature of quo war- ranto, as provided by Code, § 749, will not lie

against persons incorporated as a railroad company, on the grounds that they do not intend to construct the whole of the road described in the articles of association, and that they intend to make use of their organization for the purpose of condemning private property.—State ex rel. Cofer v. Kingan, 51 Ind. 142.

[c] (Sup. 1879)

An information in the nature of quo warranto lies to compel the winding up of an illegally organized corporation.—Albert v. State ex rel. Atkinson, 65 Ind. 413.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quo W. § 20.

See, also, 32 Cyc. pp. 1427, 1428.

§ 20. Exercise of corporate office.

Jurisdiction, see post, § 27.

[a] (Sup. 1852)

Quo warranto lies to oust directors of a corporation where illegally elected.—Covington Coal Creek & J. Plank Road Co. v. Moore, 3 Ind. 510.

[b] (Sup. 1862)

Quo warranto is the proper remedy for removing directors of a bank.—Smith v. Bank of State of Indiana, 18 Ind. 327.

The validity of an election of corporate officers is to be determined by quo warranto or information in the nature of quo warranto.—Id.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quo W. § 21; 12

CENT. DIG. Corp. § 1222.

See, also, 10 Cyc. pp. 750-755; 32 Cyc. pp. 1426, 1427.

§ 24. Persons entitled to relief.

[a] (Sup. 1859)

Where subscriptions to the capital stock of a corporation were received through agents under the superintendence of the state, the state, on an information in the nature of a writ of quo warranto against the corporation, cannot charge the corporation as subsequently organized with the bad faith of those who controlled the original subscriptions.—McCulloch v. State, 11 Ind. 424.

[b] (Sup. 1866)

Under Code, § 749, authorizing an information against a person for unlawful exercise of a franchise, by one claiming an interest therein, an information cannot be filed by one having no interest therein, but his remedy is by injunction.—State ex rel. Davis v. Smith, 32 Ind. 213.

[c] (Sup. 1903)

Under Burns' Rev. St. 1901, §§ 1145, 1146 (Rev. St. 1881, §§ 1131, 1132; Horner's Rev. St. 1901, §§ 1131, 1132), authorizing quo warranto to determine right to hold an office on relation of a private citizen only when he claims an interest in the office, it is not enough that he is a citizen and taxpayer.—State ex rel. Antrim v. Reardon, 68 N. E. 169, 161 Ind. 249.

[d] (Sup. 1909)

A person who received neither a majority nor a plurality of the votes cast for candidates for a public office has no such interest in the office as entitles him to maintain quo warranto.—State ex rel. Davis v. Johnson, 89 N. E. 393.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quo W. § 27.

See, also, 32 Cyc. pp. 1440, 1441.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

Power of prosecuting attorney to bring, see DISTRICT AND PROSECUTING ATTORNEYS, § 9.
Right to trial by jury, see JURY, § 19.

§ 26. Form of remedy and conditions precedent.

[a] (Sup. 1823)

The provision in the Constitution (article 1, § 12) that no person shall be put to answer to any criminal charge, but by presentment, indictment, etc., does not prohibit a quo warranto information.—President, etc., of Bank of Vincennes v. State, 1 Blackf. 267, 12 Am. Dec. 234.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quo W. § 28.

See, also, 32 Cyc. pp. 1436, 1437.

§ 27. Jurisdiction.

Exclusive or concurrent jurisdiction, see COURTS, § 472.

[a] (Sup. 1869)

The court of common pleas has concurrent jurisdiction with the circuit court of a proceeding by information for the usurpation of the office of director of a corporation; the proceeding being a "civil" case within the meaning of the act of 1859, giving the two courts concurrent jurisdiction in civil cases.—Beckett v. Houston, 32 Ind. 393.

[b] (Sup. 1870)

The court of common pleas has jurisdiction of an information in the nature of a quo warranto for usurping an office.—Gass v. State ex rel. Clark, 34 Ind. 425.

[c] (Sup. 1873)

An information in the nature of a quo warranto to declare a corporation dissolved may be filed in the court of common pleas by the district attorney in the same manner as it might be filed by the prosecuting attorney in the circuit court.—State ex rel. Ford v. Kankakee Valley Draining Co., 42 Ind. 353.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quo W. § 29.

See, also, 32 Cyc. pp. 1428-1430.

§ 28. Venue.

Proceeding against corporation, see CORPORATIONS, § 503.

(Sup. 1887)

In a quo warranto to try the title to the of lieutenant governor of Indiana, where respondent resides in Ablen county, and information is filed in Marion county, there absolute failure of jurisdiction; and the me court is under no obligation, in re- ing the case on appeal, to "give a state- in writing of each question arising in record, * * * and the decision of the thereon," as provided by Const. art. 7, § Robertson v. State ex rel. Smith, 109 Ind. N. E. 582, 643.

(Sup. 1900)

The prosecuting attorney, who has filed information in the nature of a quo warranto e proper county, on his own relation, as rized by Burns' Rev. St. 1894, § 1146, re- relator in such proceeding though the is afterwards changed to another county. Stiver R. Co. v. State ex rel. Kistler, 57 388, 155 Ind. 433.

CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quo W. § 30.
See, also, 32 Cyc. pp. 1429, 1430.

Time to sue, limitations, and laches.

Information of action by state to forfeit cor- te franchise, see LIMITATION OF AC- ts, § 11.

(Sup. 1882)

Where a turnpike company has acted under es of incorporation, defective in not set- out a route, for 19 years, quo warranto ut those holding the franchises is barred e lapse of time.—State ex rel. Sleeth v. n, 87 Ind. 171.

(Sup. 1890)

Petition filed by one asserting his claim office on the ground that his competitor ot eligible was prematurely filed when it led before the time for defendant's induc- ato office, and his eligibility at the time of ction was immaterial, inasmuch as his in- lity to prevent his entering the office must at the time fixed for his term to begin.— a v. Goben, 23 N. E. 519, 122 Ind. 113.

CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quo W. §§ 31-33.
See, also, 32 Cyc. pp. 1430-1432; note, 52 Am. St. Rep. 312.

Parties plaintiff or petitioners.

(Sup. 1866)

Quo warranto proceedings may be institut- a claimant for the office.—Yonkey v. State r. Cornelison, 27 Ind. 236.

(Sup. 1869)

In information, under Code, §§ 749, 750, e unlawful exercise of a franchise, cannot d on his own relation by one not the pros- g attorney, and who has no interest in the ise.—State ex rel. Davis v. Smith, 32 Ind.

[c] (Sup. 1878)

Under Act March 10, 1873, § 9 (1 Rev. St. 1876, p. 151), providing that where the proper officer shall neglect for 12 months to sue to re- cover any property which has escheated to the state, the attorney general shall institute and prosecute "all necessary proceedings" to compel the recovery of any such property, he may file an information in the nature of a quo warranto, in the name of the state, on his own relation, to recover for the use of the common-school fund the possession of real estate which has escheat- ed to the state for want of heirs or kindred en- titled to inherit.—State ex rel. Attorney General v. Meyer, 63 Ind. 33.

[d] (Sup. 1882)

A defeated candidate not entitled to the of- fice in any event cannot maintain quo warranto against an opponent who is not entitled to the office, although the state might institute proceed- ings to oust him.—State ex rel. Daniels v. Biel- er, 87 Ind. 320.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quo W. §§ 38-43.
See, also, 32 Cyc. pp. 1440-1444.

§ 33. — Public officers.

[a] (Sup. 1898)

Under Acts 1897, p. 238, providing that the term of county treasurer shall begin on the 1st day of January next following the term of the present incumbent, which expired in Sep- tember, the treasurer-elect is not qualified to enter on the discharge of the duties of the of- fice until the succeeding January, and hence has no "interest," within Rev. St. 1894, § 1146 (Rev. St. 1881, § 1132; Horner's Rev. St. 1897, § 1132), so as to entitle him to be a relator in an information to oust the incumbent before the succeeding January.—Scott v. State ex rel. Gibbs, 52 N. E. 163, 151 Ind. 556.

[b] (Sup. 1903)

Acts 1899, p. 500, c. 218, as amended by Acts 1901, p. 311, c. 146, pertaining to the sup- pression of mob violence, vacates the office of sheriff on the lynching of a prisoner, and re- quires the coroner to exercise the duties of the office until a sheriff is elected or appointed, or the former sheriff reinstated. *Held*, that quo warranto by the coroner will not lie to oust the sheriff, under a claim of right to exercise the duties of the office under such act, since Burns' Rev. St. 1901, §§ 1145, 1146, limit that action to the prosecuting attorney or a person who claims "an interest in the office," and not mere- ly an interest in the duties pertaining to the of- fice.—State ex rel. Maxwell v. Dudley, 68 N. E. 899, 161 Ind. 431.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quo W. § 40.
See, also, 32 Cyc. pp. 1441, 1442; note, 1 L. R. A. (N. S.) 826.

§ 34. — Private persons.

[a] (Sup. 1868)

Under Code, § 750, authorizing information by the prosecuting attorney, "or by any other person on his own relation whenever he claims an interest in the franchise or corporation which is the subject of the information," stockholders claiming to have been legally elected directors thereof, but prevented from exercising the same by usurpation of defendants, may file information on their own relation, without the prosecuting attorney.—Beckett v. Houston, 32 Ind. 393.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quo W. § 41.

See, also, 32 Cyc. pp. 1442, 1443.

§ 37. Parties defendant or respondents.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quo W. §§ 44, 45; 12

CENT. DIG. Corp. § 80.

See, also, 32 Cyc. pp. 1445-1447.

§ 38. — In general.

[a] (Sup. 1872)

Proceedings for usurpation of a corporate franchise must be against the persons assuming to act as a corporation, and not against the corporation by name.—Mud Creek Draining Co. v. State ex rel. Marley, 43 Ind. 236.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quo W. § 44; 12 CENT.

DIG. Corp. § 80.

See, also, 32 Cyc. pp. 1445, 1446.

§ 46. Pleading.

Aider by verdict or judgment, see PLEADING, § 433.

Consistency or repugnancy of allegations, see PLEADING, § 21.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quo W. §§ 48-62.

See, also, 32 Cyc. pp. 1447-1459.

§ 48. — Information.

[a] (Sup. 1843)

An information in the nature of a quo warranto, under Rev. St. 1838, p. 408, should be exhibited by the prosecuting attorney, on the relation of A. B., etc., and not by the relator himself.—Eaton v. State ex rel. Baird, 7 Blackf. 65.

[b] (Sup. 1859)

An averment in the information in quo warranto proceedings against a corporation, based on the fact that persons appointed under the act authorizing the incorporation of the corporation acted fraudulently in preventing persons desirous of subscribing for stock that the persons elected directors had before and at the time of their election full knowledge of all the facts, is bad; it not being averred that such persons or any of them were stockholders when the corporation became a corporation or parties in interest when the suit was commenced.—McCulloch v. State, 11 Ind. 424.

[c] (Sup. 1861)

A prayer for relief at the close of information should be taken distributed to a prayer at the end of each paragraph necessary.—State ex rel. Brown v. Ind. 46, 79 Am. Dec. 405; Matlock v. & I. C. R. Co., Id. 176.

[d] (Sup. 1861)

A quo warranto information against a corporation for a forfeiture of its charter should inform the court under what law the corporation was organized and acting, so that the court may know what its powers and duties are.—State ex rel. Plank-Road Co. v. Strickland & W. L. Plank-Road Co. v. State ex rel. Kennedy, 16 Ind. 456.

[e] (Sup. 1862)

A complaint by quo warranto against a plank road company must aver the time of incorporation or the date of organization, so that the court may know by what statute the corporation is to be governed.—Covington v. Plank-Road Co. v. Van Sickie, 18 Ind. 100.

[f] (Sup. 1866)

On an information in the nature of a quo warranto to try the right to a county office filed by one who claims the office under appointment from the county board, the appointment is alleged to have been made at a time when the county board could not have been in regular session, it was not necessary to allege the giving of the requested appointment, nor to convene the board in special session for the purpose of making the appointment, if the board was sufficient.—Yonkey v. State ex rel. Cornelson, 27 Ind. 236.

It is not necessary that one who claims an information in the nature of a quo warranto to enforce his right to an office under appointment by the board of commissioners should file with the information a copy of the proceedings of the board of commissioners, showing the appointment. The information is not a pleading founded on a ten instrument, within the meaning of § 78 of the Code.—Id.

[g] (Sup. 1869)

Where the information in the nature of a quo warranto against a gravel road company alleged that the company did not file with the recorder of the articles of association "with the proper officers of" the county in which, etc., it was a reasonably certain averment that the information was not filed in the recorder's office, if it was required by statute.—State ex rel. O'Brien v. State ex rel. Hem & Z. Gravel Road Co., 32 Ind. 100.

An information in the nature of a quo warranto against a gravel road company, which had been attempted to organize under an act of 1852, as amended in 1859 (1 Cent. Dig. p. 474), alleged that the pretended association did not set forth the name of the company, or contain an accurate description of the line of the route of the road, or the place from and to which it was proposed to construct the road, or the amount of

ock of the company, or the number of into which it was divided, or the names places of residence of the subscribers and amount of stock subscribed by each. *Held*, *murrer*, that the information alleged sufficient.—*Id.*

(Sup. 1873)
n information against a corporation in its ate name, charging that it has not been organized, etc., is bad for not being at against certain persons claiming to be oration. When it is brought into court corporate name, its existence as a corporation is admitted.—*Mud Creek Draining Co. State ex rel. Marley*, 43 Ind. 236.

(Sup. 1875)
n information as provided by Code, § against persons acting as a corporation, allege that they have so acted within the —*State ex rel. Cofer v. Kingan*, 51 Ind.

Where an information is filed by a person to oust the incumbent from an office and to instate the relator therein, it must facts showing that the relator is entitled to such office.—(Sup. 1878) *Reynolds v. State*, Titus, 61 Ind. 392; (1883) *State ex rel. Long*, 91 Ind. 351; (1889) *State ex rel. Hyde*, 121 Ind. 20, 22 N. E. 644.

(Sup. 1878)
n information in the nature of a quo warranto filed by a claimant to an office which does not contain an averment that such claimant is eligible or of facts which would show he was eligible at the date of the election to such office in controversy, nor an averment that such election he had received the high number of votes given for said office, is defective.—*Reynolds v. State ex rel.* 61 Ind. 392.

(Sup. 1879)
n information in the nature of quo warranto was brought in the name of the state of Indiana, on the relation of a prosecuting attorney, against certain persons named therein "pretended officers of the so-called city" alleging that they were assuming to do the official acts ordinarily done by such officers. On demurrer, *held*, that it would be sustained both that said "City of H." was not incorporated, and that the defendants were not fully elected officers, and that, therefore, the information not being brought within the provisions of section 749 of the Code, it was not authorized thereby.—*Stultz v. State ex rel.* 65 Ind. 492.

(Sup. 1881)
he incorrect designation of an individual in an information in quo warranto as "cutting attorney" is surplusage, and he may be stricken on motion.—*State ex rel. Peterson*, 74 Ind. 174.

[n] (Sup. 1882)

An information under Rev. St. 1876, p. 298, § 749, providing that an information may be filed against any corporation where any association of persons acts within the state as a corporation without being legally incorporated, is sufficient, where it appears that defendants pretended to be organized as a corporation, and exercised corporate powers, when they were not so organized.—*State ex rel. Collings v. Beck*, 81 Ind. 500.

[o] (Sup. 1884)

An information to oust an officer of a private corporation, alleging that he was elected at an illegal meeting and deceived the relators as to the time of such meeting, need not allege that the relators would have voted against him if present.—*Armington v. State ex rel. Edwards*, 95 Ind. 421.

[p] (Sup. 1887)

An information in a proceeding in the nature of a quo warranto to test the legality of the organization and incorporation of a city, which avers that a census was not taken as required by law, and that a majority of the legal voters of the town did not vote in favor of the adoption of a city charter, but which fails to aver that the clerk and inspector did not do their duty, and make a suitable record, as required by law, is bad on demurrer, because such record, which it will be presumed was made by the officers in accordance with their duty is conclusive as to all questions except as to whether a majority of the votes cast were in favor of the proposed change.—*State ex rel. Prilliman v. Town of Tipton*, 109 Ind. 73, 9 N. E. 704.

The averment that a majority of the legal voters did not vote in its favor is not equivalent to an averment that a majority of the votes cast were not favorable.—*Id.*

An information by a private citizen of a place to test the legality of its organization as a city, which does not show that he did not vote in favor of adopting a city charter, or otherwise concur in the proceedings of which he complains, is bad on demurrer.—*Id.*

[q] (Sup. 1887)

An information in the nature of a quo warranto, on the relation of an individual, to determine the right to an office, should contain a plain statement of facts as to the grounds of the relator's claim, so as to show his title to the office, and interest in the matter, but, as it is governed by the rules applicable to pleadings in civil actions, it may be sufficient on demurrer, although such facts are stated in such general and indefinite terms that a motion to make more specific and certain would lie.—*Jones v. State ex rel. Snodgrass*, 112 Ind. 193, 13 N. E. 416; *Barrett v. State ex rel. Marshall*, 112 Ind. 322, 13 N. E. 677.

[r] (Sup. 1890)

An information alleging facts showing the date of relator's appointment to an office, that

there was at the time a vacancy in the office, that relator was eligible and was duly appointed by the governor, that defendant has usurped and illegally held the office, and making a demand for the office, states facts sufficient to entitle relator to be given possession of the office.—*State ex rel. Worrell v. Peelle*, 121 Ind. 495, 22 N. E. 654.

[s] (Sup. 1890)

An information in a suit for the possession of the office of director of the department of geology and natural resources of the state, which alleges that the relator possesses all the necessary qualifications for the office, is not bad for failing to assert that he is skilled in the science of geology.—*State ex rel. Collett v. Gorby*, 23 N. E. 678, 122 Ind. 17.

[t] (Sup. 1891)

An information against alleged usurpers of a corporate franchise, alleging that relator "claims an interest in the corporation and franchise," states a conclusion of the pleader, and is insufficient, under Code, § 1133, which requires the information to "consist of a plain statement of the facts which constitute the grounds of the proceeding."—*State ex rel. Hatfield v. Ireland*, 130 Ind. 77, 29 N. E. 396.

[u] (Sup. 1895)

Rev. St. 1894, § 1145 (Rev. St. 1881, § 1131), provides that, when any association or number of persons shall act as a corporation without being legally incorporated, an information may be filed against them. *Held*, that an information stating that defendants, without having been incorporated, are, and since a certain time have been, usurping the franchise of a corporation under a name specified, and by that name pleading in a certain court of Indiana, and contracting, and attempting to acquire and use streets in a certain city in Indiana for the purpose of constructing and operating a street railway thereover, is sufficient as to the acting as a corporation, and as to acting as such in Indiana.—*Smith v. State ex rel. Hamill*, 140 Ind. 343, 39 N. E. 1060.

[v] (Sup. 1898)

Rev. St. 1894, § 1145, subd. 2 (Rev. St. 1881, § 1131, subd. 2), provides that "an information may be filed * * * whenever any public officer shall have done or suffered any act which by the provision of law shall work a forfeiture of his office." *Held*, that an information filed for the purpose of ousting a township trustee, on the ground that, since he entered upon the duties of his office, he accepted the office of postmaster, is insufficient, when it does not show that the salary attached thereto exceeds the amount excepted in Const. art. 2, § 9, providing that no person shall hold more than one lucrative office, except deputy postmasters, when their compensation does not exceed \$90 per annum.—*Bishop v. State ex rel. Griner*, 48 N. E. 1038, 149 Ind. 223, 39 L. R. A. 278, 63 Am. St. Rep. 270.

[w] (Sup. 1898)

An information, in the nature of a quo warranto, to dissolve a corporation, under Rev. St. 1894, § 1145 (Horner's Rev. St. 1881, § 1131), providing that such information may be filed against a corporation where it omits acts amounting to a forfeiture of its rights as a corporation, or when it exercises powers not conferred by law, which fact alone is not sufficient to render the information defective on demurrer, since that fact may be presumed.—*State ex rel. Snyder v. Gas & Oil Min. Co.*, 51 N. E. 1067, 150 Ind. 505.

[x] (Sup. 1899)

An averment in an information that the relator was "not qualified to be elected to the office," is not a conclusion, and is sufficient to sustain the information, if the facts constituting eligibility are pleaded; the statute requiring only that the information shall consist of a plain statement of the facts constituting the grounds of the proceeding.—*Jones v. State ex rel. Wilson*, 153 Ind. 440.

[y] (Sup. 1900)

An information in proceedings by quo warranto against a railroad corporation to declare its franchises on the ground that it has ceased to engage in the business, is not defective, if it was organized, and has surrendered its corporate property and franchises to another company in order to destroy competition, though it fails to allege that the corporation is prohibited by statute, or that public policy has resulted therefrom.—*Eel River R. Co. v. State ex rel. Kistler*, 57 N. E. 388, 151 Ind. 433.

[yy] (Sup. 1903)

Under Const. art. 15, § 4, providing that every person elected or appointed to an office shall, before entering on the duties thereof, take an oath to support the Constitution and to discharge the duties of his office; and Burns' Rev. St. 1894, § 5519, requiring every officer and every deputy, before entering on the duties of his office, to take an oath to support the Constitution and to discharge the duties of his office; and section 2131, Burns' Rev. St. 1904, (Horner's Rev. St.), requiring every officer to give bond before performing the duties of his office—an information in the nature of a quo warranto is fatally defective if it fails to allege that relator has taken the required oath or given the required bond.—*State ex rel. Keifer v. Wheatley*, 66 N. E. 684, 160 Ind. 433.

[z] (Sup. 1903)

An information in the nature of a quo warranto to oust defendant from the office of justice of the peace, which avers that plaintiff and another were duly elected and commissioned as justices in a certain township, and that defendant, who was not elected,

ed a certificate of election and a commis-
sioner, and proceeded to perform the duties of
the office in such township, but which fails to
show that the office which defendant claims and
the duties of which he performs is the office to
which relator is entitled, is insufficient.—State
ex rel. Strass v. Tancey, 69 N. E. 155, 161 Ind.

[Sup. 1907]

Within Burns' Ann. St. 1901, §§ 1145,
1146, providing that an information may be
returned against a person unlawfully holding a pub-
lic office by any person, on his own relation,
if he claims an interest in the office, one has
such an interest in the office held by the
person who received the most votes therefor merely
because he received the next highest number of
votes, and the person who received the most was
eligible, unless the votes for such person were
returned with full knowledge or notice of his in-
eligibility, so that, to show his right to main-
tain a quo warranto, the information or com-
plaint must allege such fact.—State ex rel.
Ewing v. Bell, 169 Ind. 61, 82 N. E. 69, 13
R. A. (N. S.) 1013, 124 Am. St. Rep. 203.

CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quo W. §§ 49-52, 59,
60.

See, also, 32 Cyc. pp. 1448-1452.

§ 50. — Complaint or petition.

[Sup. 1881]

A complaint in an action to recover cer-
tain church property, alleging that the plain-
tiffs were the duly elected, qualified, and acting
trustees of the church, and that the defendants
wrongfully usurped the authority of trust-
ees and taken charge of the property and ex-
cluded the plaintiffs therefrom, and praying that
the plaintiffs be declared trustees of the church
and given possession of the property, was not
sustainable.—Creek v. State ex rel. Wiles, 77
Ind. 180.

[Sup. 1884]

Complaint on quo warranto against a cor-
poration, setting forth in the same paragraph
several illegal acts, must be construed as a sin-
gle paragraph, and, if the acts are contra-
dictory, the paragraph is bad.—State ex rel.
Gett v. Foulkes, 94 Ind. 493.

[Sup. 1885]

In an action against a turnpike corpora-
tion, particularly where it is sought to termi-
nate its existence, the complaint must show by
its averment when the corporation was or-
ganized or under what law it was created.—
Fletcher v. Fordville & S. W. Turnpike Co. v. Fletcher,
104 Ind. 97, 2 N. E. 243.

[Sup. 1888]

Acts 1885, p. 69, provides that the terms
of a county commissioner for each district shall
be determined by calculating periods of three
years from the end of the term for which the
commissioner for that district was elected, on
the organization of the board of commissioners

for the county. A complaint on quo warranto
averred that, on the organization in 1839 of
the county into districts for the election of
county commissioners, a commissioner for dis-
trict No. 2 was elected and qualified to serve
for a term of three years, and the succession
of said office and the terms thereof have been
continuous until, etc. Held not an averment as
to when the board of commissioners of the
county was organized, nor when the term of
the first commissioner elected for the Second
district ended, and that the complaint was
therefore defective.—State ex rel. Ewing v. Bell,
116 Ind. 1, 18 N. E. 263.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quo W. §§ 49-52, 59,
60.

See, also, 32 Cyc. pp. 1448-1452.

§ 50. — Plea or answer.

[a] (Sup. 1885)

An answer, in quo warranto to try title
to office, that on a recount of the ballots de-
fendant was shown to have the highest number
of votes, is sufficient.—State ex rel. Waymire v.
Shay, 101 Ind. 36.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quo W. §§ 53-55.

See, also, 32 Cyc. pp. 1453-1455.

§ 52. — Demurrer.

Form and requisites of demurrer in general, see
PLEADING, § 201.

[a] (Sup. 1878)

A motion to make an information in the
nature of a quo warranto more specific in its
averments is the appropriate remedy where an
information contains an averment of a fact
which is too general, indefinite, and uncertain;
but, where the proper averment of a necessary
fact is wholly omitted, the defect is one which
will be reached by a demurrer for the want of
sufficient facts.—Reynolds v. State ex rel. Titus,
61 Ind. 392.

[b] (Sup. 1881)

A demurrer to a plea reaches a defect in
the information.—Elam v. State ex rel. Taylor,
75 Ind. 518.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quo W. § 57.

See, also, 32 Cyc. pp. 1458, 1459.

§ 54. — Issues, proof, and variance.

[a] (Sup. 1873)

By a proceeding by information in the na-
ture of a quo warranto against a corporation
by name, the state admits the corporate exist-
ence, and defendant is not required to set up
facts necessary to show the validity of its or-
ganization.—Mud Creek Draining Co. v. State
ex rel. Marley, 43 Ind. 236.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quo W. § 61.

See, also, 32 Cyc. p. 1447.

§ 55. Evidence.

[a] (Sup. 1885)

In quo warranto proceedings to try title to an elective office, the ballots actually cast may be shown in evidence, and also the indorsement made by the inspector of election on the bag containing them.—State ex rel. Waymire v. Shay, 101 Ind. 36.

The certificate of the commissioners appointed to recount the ballots cast at the election of a township trustee is competent evidence in quo warranto proceedings to test the title to the office.—Id.

The ballots cast at the election are admissible in quo warranto to try title to office.—Id.

On quo warranto to try title to an elective office, the certificate of election is only prima facie evidence.—Id.

[b] (Sup. 1885)

In case of a direct contest of election between two candidates claiming to have been elected to an office, the certificate of election is merely prima facie evidence of the election of the party therein named; but in a proceeding by the state, by information, to oust an incumbent holding over his term, a certificate of election in favor of another cannot be collaterally attacked by such incumbent.—Parmater v. State ex rel. Drake, 102 Ind. 90, 3 N. E. 382.

[c] (Sup. 1886)

While it may be sufficient prima facie to show the filing of articles of association and a subscription of the minimum amount of stock required by law, such showing is not conclusive upon the state in the proceeding against the corporation by information in the nature of a quo warranto.—Holman v. State ex rel. Gibson, 5 N. E. 702, 105 Ind. 569.

[d] (Sup. 1903)

In quo warranto to oust the incumbent of a public office, the relator must show a good right thereto, and cannot recover on the weakness of respondent's right or title.—State ex rel. Keifer v. Wheatley, 66 N. E. 684, 160 Ind. 183.

[e] (Sup. 1909)

In quo warranto for an office, which the relator resigned on condition that another person, who was ineligible, should be appointed his successor, evidence that the latter, after his appointment, proposed, without relator's knowledge or authority, to resign his rights for a certain sum, was inadmissible.—State ex rel. McGuyer v. Huff, 172 Ind. 1, 87 N. E. 141.

[f] (Sup. 1909)

In the absence of a showing that voters had either actual or constructive knowledge of a candidate's ineligibility when they voted, the law will not presume that they "willfully or obstinately" threw away their votes by casting them for a candidate known to be ineligible.—State ex rel. Davis v. Johnson, 89 N. E. 393.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quo W. §§ 63-65.

See, also, 32 Cyc. pp. 1460, 1461; note, 100 Am. Dec. 268.

§ 57. Scope of inquiry and powers of court.

[a] (Sup. 1882)

No question as to whether corporators intended, in good faith, to carry out the purposes of their organization, can be raised in quo warranto proceedings.—State ex rel. Collings v. Beck, 81 Ind. 500.

[b] (Sup. 1885)

A recount of votes can be had in quo warranto to try title to office.—State ex rel. Waymire v. Shay, 101 Ind. 36.

The defendant in a proceeding by information in the nature of quo warranto to determine the title to an office is not bound to confine the controversy to the single question of the force and effect of the certificate of the election officers, but may go into the merits of the controversy, and have the question of the title to the office finally settled.—Id.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quo W. § 68.

See, also, 32 Cyc. pp. 1462, 1463.

§ 58. Trial or hearing.

Right to trial by jury, see JURY, § 19.

[a] (Sup. 1898)

A finding that a person elected to fill the office of an alleged disqualified county commissioner received the highest number of votes at the election and was given a certificate of his election and qualified as such commissioner was prima facie sufficient to show that he was elected and entitled to the office in controversy.—Relender v. State ex rel. Utz, 49 N. E. 30, 149 Ind. 283.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quo W. § 69.

See, also, 32 Cyc. pp. 1462, 1463.

§ 60. Scope and extent of relief.

[a] (Sup. 1899)

In quo warranto proceedings against a corporation, the court may either declare a forfeiture of its corporate franchises, or merely a forfeiture or ouster of the right to continue the illegal act or acts charged and established.—State ex rel. Snyder v. Portland Natural Gas & Oil Co., 53 N. E. 1089, 153 Ind. 483, 74 Am. St. Rep. 314.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. Quo W. § 71.

See, also, 32 Cyc. pp. 1464, 1465.

§ 61. Judgment or order and enforcement thereof.

Suit to review, see JUDGMENT, § 335.

(Sup. 1892)
Under Rev. St. 1881, § 1131, subd. 2, providing that an information may be filed against any public officer who "shall have done or suffered any act which, by the provisions of the law, shall work a forfeiture of his office," there shall be a judgment of ouster, although the sur- render of the office has not been demanded.—*State v. State*, 130 Ind. 364, 30 N. E. 309.

CASES FROM OTHER STATES,
SEE 41 CENT. DIG. Quo W. § 72.
See, also, 32 Cyc. pp. 1463-1465.

Appeal and error.

(Sup. 1908)
The theory of the trial below in quo war- rant, will be held to be the right to the office arising from the election of July 3d, the leading element of the information, the evidence offer- ing a special finding, and the judgment clear- ly relating to the state of facts as they existed at the time of the election on that day, though the information, before its allegations as to such election (a special election, because of a va- riation, at which relator received all the votes), stated that, at the election for the office in the preceding month, W., an ineligible person, re- ceived a majority of the votes, and that relator, having received a minority of the votes, was elected because of W.'s ineligibility; it clearly arising from the subsequent averments that neither W. nor relator asserted any right in such election, but treated it as nullity.—*State ex rel. White v. Scott*, 171 Ind. 86 N. E. 409.

CASES FROM OTHER STATES,
SEE 41 CENT. DIG. Quo W. § 73.
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RAILROADS.

Scope-Note.

[INCLUDES the construction, maintenance, regulation, and operation of railroads in general; organization of railroad companies, and their rights, powers, and liabilities in respect of grants of franchises and public aid, and of the construction and maintenance of their roads and other property, and their ownership and conveyance thereof, and the rights and liabilities of their stockholders and officers; and also rights, duties, and liabilities of railroad companies, as to the public and as to individuals, in respect of the management and operation of their roads, otherwise than in their capacities of employers or carriers.

[EXCLUDES regulations of commerce (see *Commerce*) and of carriers (see *Carriers*); matters applicable to corporations in general (see *Corporations*); powers of states or municipalities to aid railroads and liabilities incurred by them for that purpose (see *States*; *Municipal Corporations*; *Counties*; *Towns*); grants of rights of way through public lands, or of public lands, in aid of railroads (see *Public Lands*); exercise by railroad companies of the power of eminent domain, and rights and remedies of owners of property taken or injured (see *Eminent Domain*); railroad companies as employers (see *Master and Servant*); carriage of passengers and goods (see *Carriers*); railroads in city streets (see *Street Railroads*); and taxation of railroads (see *Taxation*). For complete list of matters excluded, see cross-references, post.]

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Cross-References.

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 - Assessment of property for public improvements, apportionment of expenses. **MUNICIPAL CORPORATIONS, § 465.**
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 - Carriage of goods and passengers. **CARRIERS.**
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 - Competency of stockholders as witnesses for company in actions. **WITNESSES, § 99.**
 - Condemnation of property for railroad purposes as taking for public use. **EMINENT DOMAIN, § 20.**
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 - Regulation of, as regulation of commerce. **COMMERCE, §§ 27, 58.**
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 - Regulations constituting exercise of power of eminent domain. **EMINENT DOMAIN, § 2.**
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 - Relief department for employés, effect of receipt of benefits on liability of railroad for injury to employé. **MASTER AND SERVANT, § 100.**
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I. CONTROL AND REGULATION IN GENERAL.

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Regulation of, as regulation of commerce, see COMMERCE, §§ 27, 58.

Regulation of transportation of goods as regulation of commerce, see COMMERCE, §§ 32-34, 61.

Regulations constituting exercise of power of eminent domain, see EMINENT DOMAIN, § 2.

Regulations denying equal protection of laws, see CONSTITUTIONAL LAW, § 241.

Regulations depriving of property without due process of law, see CONSTITUTIONAL LAW, § 297.

§ 2. What constitutes a railroad.

[a] (Sup. 1907)

Technically a railroad is a way or road on which rails are laid for wheels to run on for the conveyance of heavy loads and vehicles. The term is generic, and embraces all species of road constructed by corporations of a quasi public character. Whether a road is a railroad depends on the mode of construction and chartered use and not on the motive power; it being declared in the original act for the incorporation of railroads (1 Rev. St. 1852, p. 409, c. 83; section 5153, cl. 8, Burns' Ann. St. 1901) that they should have power to convey persons and property by steam, animal, or any mechanical power of any combination of them.—*McCleary v. Babcock*, 169 Ind. 228, 82 N. E. 453.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 2.

See, also, 33 Cyc. pp. 33-36.

§ 5. Power to control and regulate.

Delegation of power, see CONSTITUTIONAL LAW, § 62.

[a] (Sup. 1908)

Railroads are not exempt from the police power.—*Cincinnati, I. & W. Ry. Co. v. City of Connersville*, 170 Ind. 316, 83 N. E. 503.

[b] (Sup. 1908)

The property of a railroad company is devoted to a public use in a limited sense for the purposes of a public highway and the Legislature may, to a reasonable extent, convert such imperfect obligations owing by a railroad company to the public, left to the performance of such railroad companies, into absolute legal duties.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Railroad Commission*, 171 Ind. 189, 86 N. E. 328.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 5, 6.

See, also, 33 Cyc. pp. 43, 44.

§ 6. Constitutional and statutory provisions.

Amendment of charter in general, see CORPORATIONS, § 38.

Construction of remedial statutes, see STATUTES, § 236.

Publication of statute as time of taking effect, see STATUTES, § 257.

[a] (Sup. 1908)

The acceptance by a railroad corporation of its franchise carries with it an assumption of all the duties and obligations imposed by existing statutes.—*Cincinnati, I. & W. Ry. Co. v. City of Connersville*, 170 Ind. 316, 83 N. E. 503.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 7.

See, also, 33 Cyc. pp. 43, 44.

§ 8. License fees and taxes.

[a] (Sup. 1906)

Loc. Laws 1847, p. 77, creating the Terre Haute & Richmond Railroad Company, afterward changed to the Terre Haute & Indianapolis Railroad Company, and providing that, after payment of the original cost and 10 per cent. dividends on the investment per annum, the Legislature should have the right to regulate the toll, and that all net profits above 15 per cent. on the investment per annum should be paid to the state, is permissive and discretionary and requires regulation by the state as a condition precedent to recovery by the state.—*State ex rel. Ketcham v. Terre Haute & I. R. Co.*, 106 Ind. 580, 77 N. E. 1077.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 9; 36 CENT.

DIG. Mun. Corp. § 1488.

See, also, 33 Cyc. pp. 42, 43.

§ 9. Supervision by public officers.

Connections with other railroads, see post, § 51. Determination as to necessity, place, mode, and expense of crossing of one railroad by another, see post, § 91.

Supervision of rates, see CARRIERS, § 10.

[a] (Sup. 1906)

Acts 1905, pp. 88, 89, c. 53, § 6 (Burns' Ann. St. Supp. 1905, § 5405f), provides for an appeal to the Appellate Court from any "rate, classification, rule, charge or general regulation" of the Railroad Commission, and for an appeal to the circuit or superior court from an order as to the crossing of one railroad by another. *Held*, that no appeal lies to the Appellate Court from an order of the commission in a proceeding under Acts 1897, pp. 237-239, c. 157 (Burns' Ann. St. 1901, §§ 5158a-5158h), authorizing a petition by one road to compel the use of an interlocking device at a crossing with

road.—Grand Rapids & I. Ry. Co. v. Railroad Commission of Indiana, 167 Ind. 214, E. 981.

(App. 1906)

Appeals taken from the action of the railroad commission to the appellate court are taken under the special statute (Act Feb. 28, 1905, p. 83, c. 53), and not under the general statutes providing for appeals. Chicago, I. & L. Ry. Co. v. Railroad Commission of Indiana, 38 Ind. App. 439, 78 N. E. 9 N. E. 520.

(App. 1906)

The railroad commission act (Acts 1905, c. 53, § 6), vests in such commission the authority theretofore vested in the auditor of state as to interlocking devices, and whether an appeal lies from an order concerning such devices must be determined from such act.—Grand Rapids & I. Ry. Co. v. Railroad Commission of Indiana, 38 Ind. App. 657, 78 N. E.

Under Acts 1905, p. 88, c. 53, § 6, authorizing a railroad company to appeal to the Appellate Court from any "rate, classification, charge, or general regulation," adopted by the railroad commission, no appeal lies to the Appellate Court from an order of the commission requiring the installation of an interlocking device at a crossing, the order not coming within the duties exercised by the commission "rate, classification, rule, charge, or general regulation."—Id.

(App. 1907)

Under Burns' Ann. St. 1905, § 5405f, the appeals which come to the Appellate Court are those made by a concise written statement of its or his causes of complaint against the action of the commission.—Chicago, I. & L. Ry. Co. v. Railroad Commission of Indiana, 39 Ind. App. 358, 79 N. E. 927.

No strictness of pleading is required by statute, and the concise written statement will be liberally construed for the purpose of disposing of the matters involved on their merits.—Id.

Where an appeal from a railroad commission presents only a moot question, the appeal will be dismissed.—Id.

(App. 1907)

An action to set aside or modify an order of the railroad commission requiring the maintenance of an interlocking switching device will not constitute an appeal from such order. Grand Trunk Western Ry. Co. v. Railroad Commission of Indiana, 40 Ind. App. 168, 81 N. E. 524.

The railroad commission act (Acts 1905, p. 83, § 6) provides that, "If any such railroad company * * * shall be dissatisfied with any order or regulation of said commission relating to the location or construction of sidings, switches or connections between railroads,

or the crossing of one railroad by another, * * * such dissatisfied company * * * may file a written petition to the circuit or superior court of the county wherein any such * * * crossing * * * is situated, * * * and the court may affirm, modify, or set aside the action of the commission. *Held*, that the term "any order or regulation respecting crossings" was broad enough to include orders made by the railroad commission installing interlocking plants for the purpose of protecting such crossings.—Id.

Where a railroad company petitioned the court for a judicial hearing on an order of the railroad commission with reference to the installation of an interlocking switch at the crossing of two roads the burden was upon it to affirmatively show by the averment of facts set forth in its petition that the order did it an injustice or was in some manner unwarranted by law.—Id.

[f] (Sup. 1308)

Orders of the railroad commission created by Act March 9, 1907 (Laws 1907, p. 454, c. 241), while not conclusive in any given case, where seasonably attacked, are presumptively valid, and will be set aside only when a clear case is made against them.—Pittsburgh, C., C. & St. L. Ry. Co. v. Railroad Commission, 171 Ind. 189, 86 N. E. 328.

Dangerous railroad and street intersections being matters over which the railroad commission is given quasi jurisdiction by Burns' Ann. St. 1908, § 5553, a commission's order, fixing the place for a connection between railroads at a junction point, will not be set aside by the courts, except on a plain case of mistake or an abuse of the commission's powers.—Id.

A railroad commission passed an order directing complainant within 60 days to put in a connection with another road at a junction, to be used for the interchange of freight, and also ordered that jurisdiction be retained to determine, if necessary, any question of expense, trackage, interchange, or other matters pertinent to the proceeding and within the jurisdiction of the commission, and to enforce compliance with the law and order. *Held* that, as the jurisdiction so retained related only to the execution of the order, it would be treated as final for purposes of attack in the courts, in the absence of any question being raised concerning it, in that respect.—Id.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 12-19.

See, also, 33 Cyc. pp. 45-52; note, 95 C. C. A. 132.

§ 12. Offenses incident to construction and maintenance of railroad.

Duplicity in indictment or information, see INDICTMENT AND INFORMATION, § 125.

Laws relating to as violation of vested rights, see CONSTITUTIONAL LAW, § 101.

Offenses in operation of roads, see post, § 255.

[a] (Sup. 1882)

While a corporation to which has been granted the right to use the streets of a town may not unnecessarily obstruct them by the mode of construction and use of its track, it may use them in a reasonable manner for the necessary transaction of its business, without being liable to indictment for maintaining a public nuisance.—*State v. Louisville, N. A. & C. Ry. Co.*, 86 Ind. 114.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 20–25.

See, also, 33 Cyc. pp. 377–379.

II. RAILROAD COMPANIES.

Liability for false imprisonment by officers or agents, see FALSE IMPRISONMENT, § 15.

Taxation, liability, see TAXATION, §§ 143–147.

Taxation, mode of assessment, see TAXATION, §§ 389–391.

Taxation, place of, see TAXATION, §§ 283–286.

§ 14. Incorporation, organization, and existence.

Change of domicile, see CORPORATIONS, § 52.

Collateral attack, see CORPORATIONS, § 29.

Estoppel to deny corporate existence, see CORPORATIONS, § 34.

Prerequisites to incorporation in general, see CORPORATIONS, § 16.

Private acts incorporating railroads, see STATUTES, § 80.

Secondary evidence as to date of filing articles, see EVIDENCE, § 158.

[a] (Sup. 1858)

In an action by a railroad company on a subscription to its stock, the delivery of the articles of association to the officer whose duty it was to record or file may be proved by evidence other than his indorsement.—*Johnson v. Crawfordsville, F. K. & Ft. W. R. Co.*, 11 Ind. 280.

[b] (Sup. 1859)

If, in the organization of a railroad company, all the requirements of the charter are observed, although not in the order prescribed, the organization is sufficient.—*Eakright v. Logansport & N. I. R. Co.*, 13 Ind. 404.

[c] (Sup. 1861)

It was not contemplated by the general railroad law that suits against subscribers for stock should be brought on the articles of association which were not intended to be articles of subscription; but, where the subscribers to the articles of association have set opposite their names certain amounts of subscriptions, the corporation may sue on these articles for the stock, and they constitute the cause of action, and copies of them certified by the secretary of state may be given in evidence to prove the existence of the corporation.—*Heaston v. Cincinnati & Ft. W. R. Co.*, 16 Ind. 275, 79 Am. Dec. 430.

[d] (Sup. 1884)

The failure to state the residence of subscribers to articles of association of a railroad corporation does not vitiate the articles signed and filed by the subscribers; *Rev. St. 1881, § 3885*, not requiring that the residence of subscribers should be stated.—*State ex rel. Padgett v. Foulkes*, 94 Ind. 493.

[e] (Sup. 1886)

Though a statute providing for the organization of a railroad corporation, in case stock to a designated amount shall have been subscribed, does not in terms prescribe that the subscriptions must have been made in good faith, or that the subscribers must have been at the time of making them solvent, and apparently able to pay, it must be implied that, at least between the state and the persons to whom the privilege of erecting themselves into a corporation is granted, good faith and fair dealing should be observed, and merely simulated subscriptions made by persons who are neither actually nor apparently able to pay the amount subscribed cannot answer the purpose of the statute.—*Holman v. State ex rel. Gibson*, 105 Ind. 569, 5 N. E. 702.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 27–30.

See, also, 33 Cyc. pp. 55–61.

§ 15. Capital and stock.

Actions on subscriptions in general, see CORPORATIONS, § 90.

Assessments on stock subscriptions, see CORPORATIONS, § 89.

Cancellation of subscription contract, see CANCELLATION OF INSTRUMENTS, § 18.

Computation of time for paying subscriptions to stock, see TIME, § 5.

Conditional subscriptions, see CORPORATIONS, § 81.

Consolidation as affecting subscriptions to stock, see post, § 144.

Fraud in subscriptions in general, see CORPORATIONS, § 80.

Liability of capital and stock to taxation, see TAXATION, § 147.

Payment of subscriptions in general, see CORPORATIONS, § 88.

Release of liability on subscriptions in general, see CORPORATIONS, § 84.

Right to stock on payment of subscription in aid of railroad, see post, § 38.

Sales by county commissioners, see COUNTIES, § 108.

Subscription to stock by city in aid of railroad company, see MUNICIPAL CORPORATIONS, § 859.

Subscription to stock by public authorities in aid of railroad company, see post, §§ 34–43.

Subscription to stock in general, see CORPORATIONS, §§ 75–78.

[a] (Sup. 1860)

The question as to what is a reasonable time for the sale of lands taken for stock, as

ed by Act 1852, § 2 (1 Rev. St. p. 427), is
h case more a question of fact than of
Taber v. Cincinnati, L. & C. Ry. Co.,
1. 459.

CASES FROM OTHER STATES,
E 41 CENT. DIG. R. R. § 31.
e, also, 33 Cyc. p. 63.

Stockholders.

nt of stockholders to transfer or lease of
l, see post, § 123.

ual liability for corporate debts, see COR-
PORATIONS, § 227.

cts and titles of acts, see STATUTES, § 113.

(Sup. 1851)

here defendant subscribed for stock in a
ad corporation after its location had been
ished, a subsequent change of the route
ed does not of itself constitute a defense
action on the subscription, there being no
ion attached thereto that the route should
e changed from its present location.—
a v. Liberty & A. Turnpike Co., 2 Ind.
Railback v. Same, Id. 656.

(Sup. 1854)

., by an instrument in writing, agreed
e certain shares in a railroad company,
o pay for the same in installments there-
ecified. *Held* that, if the company had
remedies against the subscription,—one by
cture, and the other by suit,—it was not
d to give notice to defendant before suit
hich one the company intended to avail
—New Albany & S. R. Co. v. Pickens, 5
247.

., by an instrument in writing, agreed to
ertain shares in a railroad company, and
y for the same in installments therein spec-
Held that, though the subscription was
ssed to be for the purpose of extending the
an averment, in the declaration in an ac-
n the instrument, that the company was
so to do, was not necessary.—*Id.*

(Sup. 1855)

subscription of stock to a railroad com-
contained a provision that the stock sub-
d should be paid in cash at such times
aces as should thereafter be directed by
directors of the company, and should be
d to the construction of the road. *Held*,
the subscription could not become payable
the directors at a regular meeting had
the time and place of payment.—*Ross v.*
ette & I. R. Co., 6 Ind. 297.

subscribers to the stock of a railroad com-
stipulated to pay the first installment
the work should be commenced, "as shall
ter be directed by the directors of said
ny." There was no stipulation for no-
the subscribers of the calling in of the
ment. *Held*, that no proof of notice or
d, other than an order passed as above,
e directors, and entered on the record

book, was necessary in a suit against a sub-
scriber to recover said installment.—*Id.*

[d] (Sup. 1856)

The subscribers to the stock of a railroad
company promised, by the terms of the subscrip-
tion, to pay their respective shares "in such
manner, and in such proportion, and at such
times" as the company should direct. *Held*,
that a personal notice of a call for stock was
not requisite.—*Fisher v. Evansville & C. R.*
Co., 7 Ind. 407.

A form was prescribed by the charter of a
railroad company in which subscriptions to stock
should be taken, and it was further provided
that the company should have all the powers in-
cident to a corporation at common law. A sub-
scription followed the language of the form,
and contained additional stipulations, not in-
consistent with those prescribed by the form,
which would have been competent at common
law for the parties to make. The subscription
was held valid.—*Id.*

[e] (Sup. 1857)

A subscriber to the stock of a corporation
cannot defend an action on his subscription on
the ground that the agent soliciting the subscrip-
tion told him he would not be called to pay any-
thing thereon until a road to be constructed by
the corporation had been laid out and worked in
a certain county, and that such road had not
yet been laid out in that county; the agent's
statement being merely the expression of his
opinion.—*Clem v. Newcastle & D. R. Co.*, 9 Ind.
488, 68 Am. Dec. 653.

[f] (Sup. 1858)

A subscription for stock on the condition,
expressed in writing, that the road shall be per-
manently located on a specified line, makes that
location, and permanency in it, conditions pre-
cedent.—*Evansville, I. & C. Straight Line R.*
Co. v. Shearer, 10 Ind. 244; *Jewett v. Law-*
renceburgh & U. M. R. Co., Id. 539.

[g] (Sup. 1858)

On acceptance by the railroad company of
conditional subscriptions, they become binding,
and the subscriber a stockholder.—*New Albany*
& S. R. Co. v. McCormick, 10 Ind. 499, 71 Am.
Dec. 337.

Conditional subscriptions of railroad stock
may be valid.—*Id.*

A stock subscription, on condition that the
railroad be located through a certain town, and
cross the river north of B. street in said town,
required the railroad to cross the river where a
northerly line from the street would cross it,
whether within or without the town.—*Id.*

Where the stockholder in a railway com-
pany is a resident of a town or city, the con-
struction and operation of the railroad through
such town or city will ordinarily be sufficient
notice to the stockholder of the location of the
road according to the conditions prescribed in
the contract of subscription for stock.—*Id.*

[h] (Sup. 1853)

Where a subscription for stock in a railway company is made upon a condition that the road should be located within a specified distance of a town, the subscriber is not a stockholder, and consequently not liable upon his agreement, until the condition is performed, and whether it has been performed is a question of fact.—*Jewett v. Lawrenceburgh & U. M. R. Co.*, 10 Ind. 539.

[i] (Sup. 1858)

Where the articles under which a railroad company organized provided that subscribers of stock should have the privilege of taking jobs of grading the road, furnishing ties, etc., at the estimate of the engineer, and lettings of such work were publicly advertised to take place on a certain day, and the subscribers did not before or on that day, offer to take jobs, etc., *held*, that they could not afterwards claim the right to do so.—*Johnson v. Crawfordsville, F., H. & Ft. W. R. Co.*, 11 Ind. 280.

In an action on a subscription to the stock of a railroad corporation, defendant cannot avoid his liability by setting up the representations of the agent soliciting subscriptions to the effect that the proposed road would be aided by another, and their falsity, as such representations are not to be relied upon, since they involve the corporate power of the other corporation, even supposing that the agent had authority to make the representations, and that they were material.—*Id.*

Where, by the terms of subscription, the stock of a railroad company was payable at such times and in such sums as the board of directors should, from time to time, require, but no assessment was to exceed 10 per cent. on the subscription, and assessments were not to be paid oftener than once in 60 days, *held*, that no personal demand of payment of installments was necessary before suit, and that it was no objection that the assessments upon different subscribers were not uniform in amount, so that they did not exceed 10 per cent.—*Id.*

[j] (Sup. 1858)

A stock subscription was on condition that the road be located through A. Upon representations that the company was about so to locate it, notes were given for the stock. *Held*, that the payment of the notes was precedent to building, and that the intent of the company, at the time the note was given, not so to locate, was no defense, so long as they had not located elsewhere, nor otherwise disabled themselves from locating through A.—*Keller v. Johnson*, 11 Ind. 337, 71 Am. Dec. 355.

In an action on notes given for stock in a railroad company, defendant cannot assert in defense that when he purchased the stock plaintiff's agent represented to him that the road would be constructed in a certain place, etc., and that at the time such representations were made the company did not intend to locate said road in said place, where it does not appear that

at the time of the suit the railroad company did not intend to so locate the road.—*Id.*

[k] (Sup. 1859)

Where a subscription to the stock of a railroad company is absolute on its face, so that the entire consideration for the promise is so many shares of the stock, any representations of agents, at the time of subscribing as to the location, are mere expressions of opinion, and form no part of the contract.—*Evansville, I. & C. Straight Line R. Co. v. Posey*, 12 Ind. 363; *Eakright v. Logansport & N. I. R. Co.*, 13 Ind. 404; *Carlisle v. Evansville, I. & C. Straight Line R. Co.*, Id. 477.

[l] (Sup. 1859)

Where a subscription to the stock of a railroad company was conditional upon the line being permanently located within a mile of another line, and such condition was not substantially complied with, the subscriber is not liable on the subscription.—*Shearer v. Evansville, I. & C. Straight Line R. Co.*, 12 Ind. 452.

[m] (Sup. 1859)

The defendant in a suit on a subscription to the original stock of a railroad company cannot show by parol that he would not have subscribed if he had supposed a particular route would be adopted.—*Eakright v. Logansport & N. I. R. Co.*, 13 Ind. 404.

[n] (Sup. 1860)

A false representation by the soliciting agent of a railroad company that the contractors could construct and equip it without any advance from the company cannot vitiate stock subscriptions.—*Andrews v. Ohio & M. R. Co.*, 14 Ind. 169.

[nn] (Sup. 1860)

A stock subscription was conditional on a certain location, and, after that location, was made absolute. The location having been changed, the defendant was allowed to show that it passed his farm, in order to show what induced him to subscribe.—*Vawter v. Ohio & M. R. Co.*, 14 Ind. 174.

[o] (Sup. 1860)

A representation by the soliciting agent that the company had stock enough to complete the road, and would do it in two years, is too vague to be a controlling inducement to subscribe.—*Hardy v. Merriweather*, 14 Ind. 203; *Mace v. Same*, 15 Ind. 80.

[oo] (Sup. 1860)

In an action on a subscription to the stock of a railroad company, it cannot be proved collaterally that the company has not expended 3 per cent. within three years, as required by statute.—*Thornburgh v. President of Newcastle & D. R. Co.*, 14 Ind. 490.

[p] (Sup. 1860)

A subscriber to the stock of a corporation, authorized to construct a railroad with a branch road to a certain point, cannot recover back the amount paid on his subscription, because of the failure of the corporation to construct such

h road, though it had represented to him, at the time of subscribing, that the branch would be built; the representation being merely the expression of an existing intention to build it.—*Waller v. Indianapolis & C. R. Co.*, 15 Ind.

shall not be required to be paid except in equal installments of not more than 10 per cent. a month, has no application to cases where the terms of payment are agreed upon in the contract of subscription, and the contract contemplates immediate payment on those terms.—*Id.*

(Sup. 1860)

A stipulation in a subscription of stock, by an order of the board of directors of the company to be accepted as evidence of a relocation having been made, does not preclude other evidence of the fact; and the actual location of the road is the best evidence of compliance with the condition.—*Moore v. New York & S. R. Co.*, 15 Ind. 78.

(Sup. 1860)

Where a note was given for a subscription to a railroad, conditioned that it should not be levied until work should be commenced on the line of said road south from Indianapolis, and a note was given upon the representation of the directors of the company that such work had been commenced, when in fact it had not, the commitment of the work at the point named was a violation precedent to the right of the company to demand the subscription, and the note, having been obtained upon the false representation that this condition had been complied with, was void.—*Taylor v. Fletcher*, 15 Ind. 80.

(Sup. 1860)

A subscription to the capital stock of a railroad company, payable by the conveyance of a certain tract of land, was conditioned that, if the company declined to take the land at the price named, the subscription should be void. *Held*, that the acceptance of the proposition could only be by the directors of the company, or through an authorized agent.—*Junction R. Co. v. Taylor*, 15 Ind. 236.

The consent of several members of the board of directors of a railroad corporation, acting separately, and not shown to constitute a quorum, is not a subscription to the stock of the company, provided for payment in land to be taken at a certain price, is not a valid acceptance of a subscription.—*Id.*

A subscription for stock, payable by the conveyance of a specific tract of land, and conditioned that, in case the company declined to take the land at the price named, the subscription should be void, is a mere proposition, and, if not accepted by the company, is not binding upon the subscriber.—*Id.*

(Sup. 1860)

A subscriber to the stock of a railroad company cannot avoid his subscription on the ground that he obtained a stipulation which the railroad company were not authorized to make.—*Evans v. I. & C. Straight Line R. Co. v. City of Louisville*, 15 Ind. 395.

Section 8 of the general law for the incorporation of railroad companies (1 Rev. St. p. 100) which provides that the directors may call, etc., provided such subscriptions

[rr] (Sup. 1861)

In suit by a railroad company on a subscription for stock, a declaration which refers to no written contract of subscription, and does not aver any assessment or call made by the directors, though averring that the subscription was payable in such manner and proportion, and at such time, as the directors should appoint, is defective, and a demurrer thereto should be sustained.—*McClasky v. Grand Rapids & I. R. Co.*, 16 Ind. 96.

[s] (Sup. 1861)

Under the general railroad law, suits against subscribers of stock on the preliminary articles, or articles of subscription of stock, and not on the articles of association, were contemplated; but the articles of subscription and association may be combined, and where they are so, and the articles of association contain an express or implied promise to pay the sums annexed to the names of subscribers, suits may be maintained upon the latter.—*Heaston v. Cincinnati & Ft. W. R. Co.*, 16 Ind. 275, 79 Am. Dec. 430.

[ss] (Sup. 1861)

Plaintiff made a cash subscription of \$3,000 to the stock of a railway company, and was induced by an agent of the company to make a further subscription of a certain farm owned by him, upon a promise that his cash subscription would not be demanded until the road was completed. The company, not regarding their obligation to forbear, commenced suit on the cash subscription, and were proceeding to enforce the collection of a judgment recovered thereon. *Held*, that the company, having broken its contract, was liable to the plaintiff for damages.—*Scarce v. Indiana & I. C. Ry. Co.*, 17 Ind. 193.

Plaintiff, having subscribed for the stock of a railroad corporation, was induced by an agent of the company to make a further subscription of a farm owned by him, on the promise that his former subscription would not be demanded until the road was completed. The company, however, brought suit on the cash subscription before the completion of the road, whereupon plaintiff sued to recover the land, and tendered a return of the stock received therefor. *Held* that, since the agreement to forbear would have furnished a sufficient ground for enjoining the collection of the former subscription until after the completion of the road, plaintiff was not entitled to a rescission of the land subscription.—*Id.*

[t] A false representation by an agent of a railroad company soliciting stock subscriptions that the company already had enough subscriptions to finish the road in a specified time, and sought others from persons living on the line of the road only as evidence of friendliness, was held to bear merely on matters of expectation and

opinion, and not to suffice to avoid the subscription.—(Sup. 1861) *Bish v. Bradford*, 17 Ind. 490; (1862) *Brownlee v. Ohio, I. & I. R. Co.*, 18 Ind. 68; (1862) *Parker v. Thomas*, 19 Ind. 213, 81 Am. Dec. 385.

[tt] (Sup. 1861)

The consideration of a subscription for stock in a railroad company must be deemed to be the shares of stock, and not such collateral and incidental advantages as the subscriber may expect to obtain from the building of the road; and if, from the noncompletion of the road, he does not obtain these advantages, he cannot allege a failure of the consideration of his subscription.—*Bish v. Bradford*, 17 Ind. 490.

[u] (Sup. 1862)

A condition, in a subscription to the stock of a railroad company, that the company shall locate its road in a certain place, is waived by giving a note in payment of the subscription before the location of the road of the company in the designated place.—*Evansville, I. & C. Straught Line R. Co. v. Dunn*, 17 Ind. 603.

[uu] (Sup. 1862)

In an action on a written contract of subscription to the stock of a proposed railroad, which is absolute and unconditional, a plea that defendant subscribed in consideration of an alleged lost written agreement, which the soliciting agent made, that, if a certain amount was subscribed, the road would be located on a certain line, and the subscription expended on a certain part thereof, and that it was not performed, is not a good defense, since the agreement pleaded and the subscription do not appear to be a part of an entire contract.—*Brownlee v. Ohio, I. & I. R. Co.*, 18 Ind. 68.

[v] (Sup. 1862)

The law providing for the organization of railroad companies, and for receiving subscriptions to the stock thereof, enters into, forms part, and determines the effect of subscriptions, as fully as if it were written out, and formed in terms a part of the contract of subscription.—*Hoagland v. Cincinnati & Ft. W. R. Co.*, 18 Ind. 452.

Under the act of 1852 for the incorporation of railroad companies, after the subscription of \$50,000 to its stock, the company may call in the subscriptions without waiting for the subscription of the whole capital stock as a condition precedent to their right to collect.—*Id.*

[vv] (Sup. 1862)

A subscriber to the capital stock of a railroad company sought to avoid his subscription on the ground of the false representations of the company's soliciting agent as to the persons who had subscribed. Seven years had elapsed after the subscription before suit was brought, and no excuse was shown for the delay. *Held*, that the presumption was against the subscriber's right to avail himself of these facts until he had accounted for his delay.—*Dynes v. Shaffer*, 19 Ind. 165.

[w] (Sup. 1862)

A subscription to the capital stock of a railroad company was made on condition that it should be located over a certain route, and notes for the subscription were given, payable at such times as the installments fell due. *Held*, that the fact that these notes were unconditional did not amount to a waiver of the maker's right to have the road located as he had stipulated, before payment of the notes could be compelled from him.—*Parker v. Thomas*, 19 Ind. 213, 81 Am. Dec. 385.

[ww] (Sup. 1863)

A city pledged its stock in a railroad company as security for its bonds issued in aid of the road, and the bonds provided that the holders might exchange the same for a like amount of the stock, and be substituted as stockholders in the place of the city. *Held*, that the bondholders had a lien upon the whole of the stock, but that one bond could not bind more than one share of stock.—*City of Aurora v. Cobb*, 21 Ind. 492.

[x] (Sup. 1864)

Where a subscription to the capital stock of a railroad company is made upon condition that the final location shall be along a certain route, such condition is complied with by the company's fixing upon such route, and it is not broken until a different route is afterwards adopted.—*Smith v. Allison*, 23 Ind. 366.

[xx] (Sup. 1864)

Where subscription to the capital stock of a railroad company is made payable in work and materials, and not in installments, the company cannot require payment in installments by resolution of the board of directors.—*Ohio, I. & I. R. Co. v. Cramer*, 23 Ind. 490.

[y] (Sup. 1864)

A person who makes a subscription of land, to the stock of a railroad company, on a condition precedent, waives such condition by delivering an absolute deed of the land to the company, and receiving his stock.—*Parks v. Evansville, I. & C. Straight Line R. Co.*, 23 Ind. 567.

[yy] (Sup. 1867)

It is not necessary, in order to constitute a location of the route of a railroad for the purpose of fixing the liability of subscribers to the stock, that the route should have been staked and marked on the ground in such a manner that its precise line could be found and identified. Location may be completed by resolutions or acts of the directors manifesting a corporate determination to construct the road over a particular route.—*Parker v. Thomas*, 28 Ind. 277.

[z] (Sup. 1871)

Where, in an action on a stock subscription to a railroad company, defendant alleged that it was agreed that, if the railroad was located through his farm, he should be entitled either to pay his subscription in cash, or give the company a right of way, and that he had given a right of way which had been accepted

by the company, such facts constitute payment of the subscription.—*Evansville, T. H. & C. R. Co. v. Wright*, 38 Ind. 64.

[x] (Sup. 1877)

An allegation that a certain track was constructed "upon, or as near as practicable upon, the east line of the lands owned by" C., a subscriber to a railway, "and at all points within fifty feet of said east line," held not to show performance of a condition precedent in the subscription, that the track should "run on said C.'s east line."—*Crane v. Indiana, N. & S. R. Co.*, 59 Ind. 165.

[xx] (Sup. 1877)

Where a subscription to the capital stock of a railroad company is conditional, and the complaint in an action to recover the amount of the subscription avers performance of the conditions, all evidence admissible under answers of failure and want of consideration and nonperformance of such conditions is admissible under the general denial, and, where the latter is pleaded, error in sustaining demurrers to the former is harmless.—*Drover v. Evans*, 59 Ind. 454.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 33-35; 1

CENT. DIG. Action, §§ 53, 56; 11 CENT.

DIG. Contracts, §§ 768, 1026.

See, also, 33 Cyc. pp. 64, 65.

§ 17. Officers and agents.

Compensation in general, see CORPORATIONS, § 308.

Estoppel to deny authority, see CORPORATIONS, § 425.

Extra compensation, see MASTER AND SERVANT, § 72.

[a] (Sup. 1835)

The general superintendent of a railroad can make a binding contract to fence the track.—*New Albany & S. R. Co. v. Haskell*, 11 Ind. 301.

[b] (Sup. 1884)

Where a railway brakeman is injured in the discharge of his duty at a point distant from the chief offices of the company, and stands in need of immediate surgical attendance, the conductor may bind the company by the employment of a surgeon, if there is no superior agent of the company present.—*Terre Haute & I. R. Co. v. McMurray*, 98 Ind. 358, 49 Am. Rep. 752.

[c] (Sup. 1884)

A railway road master, having charge of the repairs of the roadway, has no implied authority to contract for the nursing of a person injured on the line of the road, there being no emergency calling for immediate action, and there being a superior agent within reach; but the corporation will be bound by the ratification of such contract by the general manager.—*Louisville, E. & St. L. Ry. Co. v. McVay*, 98 Ind. 391, 49 Am. Rep. 770.

[d] (Sup. 1886)

Where a railroad has accepted a deed of land for a right of way, stipulating that it shall locate a depot at a certain point in consideration therefor, it cannot question the authority of its agent to make such contract.—*Louisville, New Albany & Chicago Ry. Co. v. Sumner*, 5 N. E. 404, 106 Ind. 55, 55 Am. Rep. 719; *Same v. Moore*, 5 N. E. 413, 106 Ind. 600.

[e] While a railroad company may be liable for medical services of a physician employed by a conductor in an absolute emergency to attend an injured brakeman, it is not liable to an assistant afterwards employed by such physician, even though the conductor had authorized him to secure such assistance as seemed necessary; and especially is this true where it is not shown that the brakeman was himself unable to pay.—(Sup. 1886) *Terre Haute & I. R. Co. v. Brown*, 107 Ind. 336, 8 N. E. 218, followed *Evansville & I. R. Co. v. Spellbring* (App. 1891) 1 Ind. App. 167, 27 N. E. 239.

[f] (Sup. 1889)

A complaint alleged that defendant's train ran into and injured M.; that the injury required immediate attention; that the conductor of the train employed plaintiff, a physician, to render medical aid to M.; that his services and employment were fully made known to defendant immediately after the accident; and that he continued to render such services, without objection from defendant, for several months thereafter. Held, that the complaint stated a good cause of action, a ratification of the conductor's act being fairly inferred.—*Terre Haute & I. R. Co. v. Stockwell*, 118 Ind. 98, 20 N. E. 650.

Evidence that the conductor, immediately after the accident, telegraphed to defendant's general superintendent and general agent the fact of the accident, and that he had left the injured man in charge of plaintiff; that the same evening the conductor personally notified the superintendent of the accident, and that he had "employed a physician to dress his wounds"; and that plaintiff subsequently wrote to defendant, stating the circumstances of his employment, and the services he had rendered, and demanding pay therefor; and that defendant never questioned or repudiated the employment,—justifies a finding that defendant fully ratified the conductor's act.—Id.

[g] (Sup. 1889)

Where a conductor was authorized to employ a surgeon in an emergency, another surgeon who was called in was bound to know that when the conductor who possessed limited special authority had procured the services of a competent surgeon his authority was exhausted, and, if with such knowledge he continued to give the injured person attention, he did it at the expense of some other person and the conductor as principal.—*Louisville, N. A. & C. Ry. Co. v. Smith*, 22 N. E. 775, 121 Ind. 353, 6 L. R. A. 320.

Where a conductor had authority in an emergency to employ surgical aid and a surgeon was summoned to attend an injured brakeman, it was immaterial whether such surgeon was called by the brakeman or by the conductor in person, for if he was called by the direction, express or implied, of the conductor, or if the conductor confirmed what had been done, he could not subsequently employ another surgeon.—*Id.*

[h] (Sup. 1890)

A railroad company having a contract with one of its directors for the construction of a portion of its roadway, and having no knowledge of an unauthorized contract for construction by such director with defendant in the company's name, is not estopped from denying that it owed defendant, in a suit against defendant in which proceedings in garnishment were commenced against the company, though it had been garnished before in a suit against defendant, and the estimates for one month furnished by such director's engineer showed the work to have been done by defendant.—*Allemon v. Simmons*, 124 Ind. 199, 23 N. E. 768.

[i] (Sup. 1890)

Where a railroad right of way contractor agreed to obtain a right of way for the road and construct the roadbed over plaintiff's land, and after such construction the contractor submitted the amount of plaintiff's damages to arbitration and the railroad company ratified his action and agreed to be bound by the submission, it sufficiently appeared that the contractor was authorized by the railroad to procure the right of way.—*Terre Haute & L. R. Co. v. Harris*, 25 N. E. 831, 126 Ind. 7.

[j] (Sup. 1890)

In an action by a physician, against a railroad company, for professional services in attending a man injured by one of defendant's trains, it appeared that plaintiff was employed under authority by telegram from defendant's general superintendent. *Held*, that evidence by defendant that it had in its employ a chief physician and surgeon whose duty it was to employ surgeons to give professional attention to persons injured by its trains was properly excluded. Plaintiff might presume that the general superintendent had authority to employ him for such service. Nor was plaintiff bound to inquire whether the injured man was hurt under such circumstances as to render the company liable for his injuries.—*Cincinnati, I., St. L. & C. Ry. Co. v. Davis*, 126 Ind. 90, 25 N. E. 878, 9 L. R. A. 503.

[k] In an action by a physician against a railroad company for professional services, it appeared that defendant's construction train was wrecked near B., and about 20 of defendant's employes were so injured that they needed immediate medical attention; that defendant had but one surgeon at B., and that he could not render the necessary care to such injured men;

that on the day of the accident, after one of the injured had been taken to B., and before he had received the attention of a physician, the conductor on the train directed plaintiff to attend to him; that defendant's surgeon and plaintiff agreed that his leg should be amputated, and such surgeon directed plaintiff to take care of him, which he did, and performed the necessary operation. Defendant had no office or local agent at B. at the time of the accident. *Held* that, since the emergency required immediate action, the employment of plaintiff by such conductor and the surgeon bound defendant for plaintiff's services rendered in the amputation of the employee's leg.—(App. 1892) *Evansville & R. R. Co. v. Freeland*, 4 Ind. App. 207, 30 N. E. 803, following *Terre Haute & I. R. Co. v. McMurray* (1884) 98 Ind. 358, 49 Am. Rep. 752.

[l] (App. 1893)

In an action against a railroad company to recover for lodging and care given to a brakeman who was injured while making up a train, it appeared that the brakeman was removed to plaintiff's house, where he had been boarding for a week; that he remained, from his injuries, unconscious for four days, and was not able to be removed to his home for 25 days; that he had no relatives in the place where the accident happened, and had no means to pay for necessary attention; that, in addition to medical attendance, he required constant care up to the time of his removal; that the general offices of the company were 100 miles distant; that, within 30 minutes after the accident, the conductor of the train, who was the highest officer of the company at that place, went to the house, and told plaintiff to take care of the brakeman, and the company would be responsible for the expenses. *Held*, that such an emergency existed that the contract of the conductor was binding on the company, and that plaintiff could recover. *Ross, J., dissenting.*—*Toledo, St. L. & K. C. R. Co. v. Mylott*, 6 Ind. App. 438, 33 N. E. 135.

[m] (App. 1894)

A railroad doctor, required to do the medical and surgical work of the company in a prescribed territory, and care for the patients while under his charge, has no implied power to bind the company for board and care of an injured employe whom he has ordered removed from a train to a house, in order to care for and treat him.—*Chicago & E. R. Co. v. Behrens*, 9 Ind. App. 575, 37 N. E. 26.

[n] (App. 1897)

The president, vice president, general manager, secretary, and treasurer of a railroad corporation, selected by it, through its board of directors, under Burns' Rev. St. 1894, §§ 5145, 5147 (Rev. St. 1881, §§ 3895, 3897), and invested with ostensible authority, are general officers, and may make any contract within the scope of the corporation.—*Bedford Belt Ry. Co. v. McDonald*, 46 N. E. 1022, 17 Ind. App. 492, 60 Am. St. Rep. 172.

[c] (Sup. 1904)

Agency of a conductor to contract for medical attendance and care for an injured brakeman is a special agency arising out of necessity, and the persons dealing with such agent must know the extent of his agency at their peril.—*Hunt v. Illinois Cent. R. Co.*, 163 Ind. 106, 71 N. E. 195.

[D] (App. 1905)

The general authority of a railroad conductor will be presumed from his known duties.—*Indianapolis & E. Ry. Co. v. Barnes*, 35 Ind. App. 485, 74 N. E. 583.

[q] (App. 1910)

Twin crews as such can make no contracts for the railroad, except in case of emergency, unless specially authorized.—*Pittsburg, C., C. & St. L. Ry. Co. v. Hall*, 90 N. E. 498.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 36-38.

See, also, 33 Cyc. pp. 65-69.

§ 18. Franchises and powers in general.

Interference with franchise as element of compensation to property not taken, see EMINENT DOMAIN, § 108.

Power to consolidate with other roads, see post, § 141.

Power to enter into contracts of guaranty and suretyship, see post, § 154.

Power to make and indorse negotiable instruments, see post, § 148.

Power to mortgage property, see post, § 163.

Transfer of franchises, see post, §§ 128-144.

[a] (Sup. 1852)

Under a clause in a railroad charter as follows: "That no person, body politic or corporate, shall in any way interfere with, molest, disturb, or injure any of the rights or privileges thereby granted or that would be calculated to detract from or affect the profits of said corporation"—it was held that the state did not relinquish the right to charter any other company whose improvement would be in competition with said railroad corporation, nor the right to take the franchise of said company for the public use; but the clause restrains such other company from committing any unauthorized illegal injuries.—*Newcastle & R. R. Co. v. Peru & I. R. Co.*, 3 Ind. 464.

[b] (Sup. 1858)

Under a power by charter to contract with connecting roads, for their use, etc., a railroad company is authorized to accept bills drawn by a connecting road as a consideration for a change of gauge of that road.—*Smead v. Indianapolis, P. & C. R. Co.*, 11 Ind. 104.

[c] (Sup. 1862)

Loc. Acts 1840-50, p. 30, § 6, provided in the charter of a railroad company that the company might receive payment for stock in the bonds of any railroad company or other corporation; that it might issue its own bonds for the construction and equipment of the road;

that such bond should not be for a less sum than \$100, nor be sold at a greater reduction than 10 per cent. on its principal. *Held*, that the act did not restrain the company from selling other bonds than its own at a greater discount than 10 per cent.—*Board of Com'rs of Bartholomew County v. Bright*, 18 Ind. 93.

[d] (Sup. 1885)

Where a railway company has fully performed all the conditions of a bond or contract for the construction of its road, the other parties to such contract who have therein promised aid to the company cannot invoke the doctrine of ultra vires in defense, on the ground that the company had no power to make such contract.—*Chicago & A. R. Co. v. Derkes*, 103 Ind. 520, 3 N. E. 239.

[e] (Sup. 1887)

A contract entered into by a railroad company, before the completion of its line, for the carriage of freight, is not necessarily ultra vires nor invalid; and, where it has been so far executed that the company has received its benefits, it cannot, while retaining such benefits, assert that it had no power to make the contract.—*Louisville, N. A. & C. R. Co. v. Flanagan*, 113 Ind. 488, 14 N. E. 370, 3 Am. St. Rep. 674.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 39-44.

See, also, 33 Cyc. pp. 69-73; note, 2 L. R. A. (N. S.) 887; note, 75 Am. Dec. 548.

§ 19. Amendment or revocation of charters.

Laws impairing obligation of contracts, see CONSTITUTIONAL LAW, § 125.

[a] (Sup. 1855)

A corporation whose charter authorized it to construct a railroad from Terre Haute through Indianapolis, to Richmond, a distance of 150 miles, procured from the Legislature, and accepted, an alteration of its charter, by which its line of road was limited to the distance between Terre Haute and Indianapolis, a distance of about 75 miles, and the other half of the line was placed under a separate corporation. *Held* that, by the alteration of the charter and acceptance thereof, the corporation became substantially a different corporation.—*Carlisle v. Terre Haute & R. R. Co.*, 6 Ind. 316.

[b] (Sup. 1858)

Laws 1853, p. 105, § 3, enacts that any railroad company organized under general or special laws, and which may have constructed their road so as to connect with any other road in an adjoining state, shall have the power to make such contracts with any such road, constructed in such adjoining state, for the transportation of freight and passengers, etc. *Held*, that a railroad company chartered by private act, by accepting section 3 of said general act, accepted the same as an amendment of their

charter.—*Smead v. Indianapolis, P. & C. R. Co.*, 11 Ind. 104.

[c] (*Sup.* 1865)

Where the legislature, by special act incorporating a railroad company, reserved the right to alter the charter, it may, under such reserved power, properly apply the general law regulating the liability of railroad companies for stock killed.—*Jeffersonville R. Co. v. Gabbert*, 25 Ind. 481.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 62.

See, also, 33 Cyc. p. 73.

§ 20. Actions by or against companies.

Actions against consolidated company, see post, § 144.

Determination as to necessity, place, mode, and expenses of crossing over highway, see post, § 97.

Determination as to necessity, place, mode, and expenses of railroad crossing, see post, § 91. Effect of consolidation of company, see post, § 144.

For injuries at crossings, see post, §§ 341–352.

For injuries from accidents to trains, see post, § 297.

For injuries from failure to operate road, see post, § 221.

For injuries from fires, see post, §§ 471–488. For injuries to animals on or near track, see post, §§ 433–451.

For injuries to licensees or trespassers in general, see post, § 282.

For injuries to persons on or near tracks, see post, §§ 393–402.

For injuries to property from operation of road, see post, § 222.

On obligations of railroad, see post, § 179.

To compel operation of road, see post, § 219.

To enforce liabilities against property in general, see post, §§ 176–178.

To enforce rights in respect to crossing private lands, see post, § 104.

To foreclose liens or mortgages, see post, §§ 180–200.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 45–61.

§ 22. — Jurisdiction and venue.

Action to forfeit charter, see post, § 32.

[a] (*App.* 1891)

Rev. St. 1881, §§ 309–312, providing that suits against railroad companies for injuries to persons or property, or on its liability as a carrier, may be brought in any county through which the road runs, and in any county where it has an agency for the transaction of business, for causes growing out of the business of such office, and that in all other cases the action shall be commenced in the county where defendant has its usual place of residence, does not make it necessary for a suit for medical services to the employé to be brought in the county

of the company's residence, since Rev. St. 1852, § 796, providing that any action against a corporation may be brought in any county where it has an office for the transaction of business, or any person resides on whom process may be served, was not repealed by the Revision of 1881, and is still in force.—*Evansville & I. R. Co. v. Spellbring*, 1 Ind. App. 167, 27 N. E. 239.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 46–50.

§ 24. — Process and appearance.

In action for killing stock, see post, § 438.

Proceedings to compel payment of judgment for value of stock killed, see post, § 450.

[a] (*Sup.* 1856)

Under 2 Rev. St. p. 35, in an action against a railroad company, a service of process on the president is sufficient.—*Branham v. Ft. Wayne & S. R. Co.*, 7 Ind. 524.

[b] (*Sup.* 1857)

Service of process upon a conductor of a railroad company, under 2 Rev. St. p. 35, § 36, is good. He is at least a special agent of the company.—*New Albany & S. R. Co. v. Grooms*, 9 Ind. 243.

[c] (*Sup.* 1858)

Railroad corporations may be regarded as resident in each county in which they have an office or agency, or an officer or agent upon whom process may be served.—*New Albany & S. R. Co. v. Haskell*, 11 Ind. 301.

[d] (*Sup.* 1859)

In an action brought against a railroad company, before a justice of the peace, for the recovery of damages occasioned by the killing of the plaintiff's horse by the cars of the company, service of process upon a conductor on the road 10 days before the day set for trial is sufficient.—*New Albany & S. R. Co. v. McNamara*, 11 Ind. 543.

[e] (*Sup.* 1859)

Service on a railroad conductor binds the company.—*New Albany & S. R. Co. v. Tilton*, 12 Ind. 3, 7+ Am. Dec. 195; *New Albany & S. R. Co. v. Mead*, 13 Ind. 258.

[f] (*Sup.* 1861)

In actions against a railroad company whose principal office is not within the state, the statute requires service to be made 30 days before the term of court to which the process is returnable. Service made after this time is good, but the case must be continued.—*Ohio & M. R. Co. v. Boyd*, 16 Ind. 438.

[g] (*Sup.* 1861)

When the return shows that a summons against a railroad corporation whose principal office is not within the state was served on one of its conductors, it will not be presumed, without a showing to that effect, that the officer went out of his jurisdiction to serve it, or that it was not served, as required, on the

conductor of a train passing through the county where the action was brought.—*Ohio & M. R. Co. v. Quier*, 16 Ind. 440; *Same v. Clement*, Id. 473.

[h] (Sup. 1866)

The law of 1861 (Acts Sp. Sess. 1861, p. 78), which required 15 days' service of process upon railroads, where the principal office of the company was without the state, is repealed by the act of 1863 (Acts 1863, p. 25).—*Toledo, L. & B. Ry. Co. v. Shively*, 26 Ind. 181.

[i] (Sup. 1873)

In an action against a railroad company whose principal office is not in the state, the summons may be served on a local freight agent, since he is a general agent of the company, within the meaning of Act March 4, 1853, as amended by Acts Sp. Sess. 1861, c. 78, regulating the service of summons on such corporations.—*Toledo, W. & W. Ry. Co. v. Owen*, 43 Ind. 405.

In an action against a railroad company to recover the value of stock killed, a return of the summons, "Served by reading to" A., "who is the local freight agent of said defendant, at the city of," etc., does not show good service under section 30 of the Code.—Id.

Under Act March 4, 1853, as amended by Acts Sp. Sess. 1861, p. 78, providing that all writs or other process against the president of any railroad company whose principal office is not within the state may be served on any officer, director, conductor, attorney, or general agent of the company, service on any one of the persons named is good without reference to whether the others could be found within the county or not.—Id.

[j] (Sup. 1881)

Where, in obedience to a writ of garnishment served upon the resident engineer of a railroad company, it appeared by its attorney, and submitted to a rule to answer, and consented to a continuance, it was too late to object to the process or to its service, as such an objection must be taken in limine.—*Baltimore, O. & R. Co. v. Taylor*, 81 Ind. 24.

[k] (Sup. 1886)

Under Rev. St. 1881, § 4027, authorizing summons to be served by copy on any conductor on any train on the road passing into or through the county, it is sufficient that a copy of the summons is delivered to a conductor on any train of the railroad passing through or into the county, and it is not essential that the sheriff shall ascertain and accurately state the full name of the conductor.—*Cincinnati, H. & I. R. Co. v. McDougall*, 8 N. E. 571, 108 Ind. 179.

[l] (Sup. 1892)

Where persons served with process reside within the county of the officer serving it, or, like conductors of railways, are constantly passing through it, and the return is silent as to place of service, it will be presumed that the

officer acted within the limits of his jurisdiction.—*Baltimore & O. R. Co. v. Brant*, 132 Ind. 37, 31 N. E. 464.

[m] (Sup. 1900)

Where a railroad company had no officer or agent in the state except one appointed to receive service of process, a service on him in a county other than that in which the action was brought was sufficient, under Burns' Rev. St. 1894, § 318, authorizing service in any county in the state where an agent of the corporation can be found.—*Eel River R. Co. v. State ex rel. Kistler*, 57 N. E. 388, 155 Ind. 433.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 52-56.

See, also, note, 4 L. R. A. (N. S.) 272.

§ 25. — Pleading and evidence.

[a] (Sup. 1886)

A complaint designating the defendant as "The Cincinnati, Hamilton & Indianapolis Railroad Company" sufficiently indicates that the defendant is a corporation.—*Cincinnati, H. & I. R. Co. v. McDougall*, 8 N. E. 571, 108 Ind. 179.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 57.

§ 27. — Judgment and enforcement thereof.

Res judicata, see JUDGMENT, §§ 540-749.

Right of trustees of mortgage to have judgment set aside, see JUDGMENT, § 382.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 59.

§ 32. Forfeiture of franchise and dissolution.

Forfeiture of rights under grant of public aid, see post, § 35.

[a] (Sup. 1862)

Where the articles of association of a railroad company, defective in not specifying with certainty the terminus of its road, are properly filed in the office of the secretary of state, it is notice to the state of the defect; and its right to take advantage thereof, by quo warranto or otherwise, is lost by eight years' acquiescence without an endeavor to have the same amended.—*State v. Bailey*, 19 Ind. 452.

[b] (Sup. 1875)

An information in the nature of a quo warranto, under Code, § 749, will not lie against a number of persons incorporated as a railroad company, on the grounds that they do not intend to construct the whole of their road according to its description in the articles of association, and that they intend to make use of their organization for the purpose of condemning and appropriating private property over which to construct their railroad.—*State ex rel. Cofer v. Kingan*, 51 Ind. 142.

[c] (Sup. 1883)

Under Rev. St. 1881, §§ 1131, 1132, providing that the mode of procedure to have declared a forfeiture by a railroad company of its rights, privileges, and franchises is by information on the relation of the prosecuting attorney in the circuit court of the proper county, a pleading which seeks to set up an abandonment and forfeiture by a railroad company of such rights, etc., must allege that the forfeiture has been judicially declared in a suit for that purpose.—*Logan v. Vernon, G. & R. R. Co.*, 90 Ind. 552.

[d] (Sup. 1900)

Defendant, a domestic railroad company, had ceased to do business as such, and had no office or agency in any county in the state, all its corporate property and franchises having been surrendered under a lease in perpetuity to another company which operated the same. *Held*, that defendant's legal residence continued in the county where its principal office was located when it ceased to do business, though the annual meetings of its stockholders were held in another county; and hence an action by the state to declare a forfeiture of its franchise was properly brought in the former county, under Burns' Rev. St. 1894, § 314, providing that an action shall be commenced in the county where defendant resides.—*Fel River R. Co. v. State ex rel. Kistler*, 57 N. E. 388, 155 Ind. 433.

The acts of a domestic railroad company in surrendering possession, control, and use of all its corporate property and franchises to a rival company under a lease in perpetuity, and in acquiescing in the destruction of a portion of its railroad and other property by the lessee in order to destroy competition, are sufficient grounds to authorize a forfeiture of its franchises, and a dissolution of the corporation, and a judgment of ouster against the lessee.—*Id.*

Where a railroad company leased and surrendered all its corporate property and franchises to a rival company in order to destroy competition, and afterwards executed a new lease of like character for the same purpose, the second lease merged the first and constituted a violation of the company's duties to the state, for which a forfeiture of its franchises could be declared.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 63-69.

See, also, 33 Cyc. pp. 76-78, 81.

§ 33. Foreign companies.

Consolidation of foreign and domestic companies, see post, § 141.

[a] (Sup. 1863)

A railroad corporation chartered by the state of Indiana, with authority to own and manage property in Ohio, was not given the right to migrate to the latter state as an Indiana corporation, by an act of such state giving it authority to act therein.—*Aspinwall v. Ohio & M. R. Co.*, 20 Ind. 492, 83 Am. Dec. 329; *Mc-*

Cord v. Aspinwall, Id. 498; *Aspinwall v. Somes*, Id.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 70, 71; 12 CENT. DIG. Corp. §§ 2487-2677.

See, also, 19 Cyc. p. 1264; note, 24 L. R. A. 311, 322.

III. PUBLIC AID.

Appeals from decision of county board relating to, see COUNTIES, § 58.

Authority of county board at special session to order election on proposed railroad appropriations, see COUNTIES, § 49.

Authority of county to issue bonds, see COUNTIES, § 173.

Conclusiveness of judgment relating thereto, see JUDGMENT, § 649.

Construction of railroad and laws in favor of rights of property, see TAXATION, § 23.

County aid, see COUNTIES, § 154.

Decisions as to operation of statutes relating to aid to railroads as rules of property, see COURTS, § 100.

Enforcement of railroad aid tax by mandamus, see MANDAMUS, § 6.

Injunction against collection of taxes, see TAXATION, § 608.

Laws relating to as denial of due process of law, see CONSTITUTIONAL LAW, § 278.

Laws relating to as unauthorized delegation of power, see CONSTITUTIONAL LAW, § 66.

Laws relating to as violation of vested rights, see CONSTITUTIONAL LAW, § 93.

Laws relating to town subscriptions as encroachment by legislature on judiciary, see CONSTITUTIONAL LAW, § 52.

Levy of tax by county, see COUNTIES, §§ 190-192.

Levy of taxes therefor, see TAXATION, §§ 301, 302.

Liability of municipality taking railroad stock as stockholder, see CORPORATIONS, § 243.

Limitation on municipal power to grant aid in general, see MUNICIPAL CORPORATIONS, §§ 872-877.

Limitation on municipal power to issue bonds, see MUNICIPAL CORPORATIONS, § 912.

Local and special laws voting aid to railroads, see STATUTES, § 77.

Mandamus to compel issuance of bonds for, see MANDAMUS, § 103.

Mandamus to compel levy of tax for, see MANDAMUS, §§ 96, 113.

Mandamus to compel payment of subscription, see MANDAMUS, §§ 23, 94.

Municipal taxation to aid, see MUNICIPAL CORPORATIONS, § 903.

Operation and effect of decision of county board relating to, see COUNTIES, § 57.

Pleading matters of fact or conclusions in action to restrain collection of tax in aid of railroad, see PLEADING, § 8.

Power of town to incur indebtedness for, see TOWNS, §§ 46, 47.

Powers of county board, see COUNTIES, § 47.
Previous decisions as to operation of statutes relating to aid to railroads, as law of the case, see COURTS, § 99.

Proceeds of taxes in aid of, see TOWNS, § 60.
Record of county board relating to, see COUNTIES, § 53.

Remedies of taxpayers against action of county relating to, see COUNTIES, § 196.

Restraining tax in aid of, see TOWNS, §§ 61, 611.

Sale of property subject to railroad aid tax, see TAXATION, § 511.

Subjects and titles of acts, see STATUTES, §§ 113, 120.

Township taxes in aid of, see TOWNS, §§ 54, 55, 57, 59.

§ 34. Rights under grants of aid in general.

[a] (Sup. 1872)

All the acts of county commissioners and the voters of a county in taking steps to raise money to take stock in an incorporated company are, between themselves, one the principal, and the other the agent. There is no contract with the incorporated company, nor has it any right in, or control over, the matter until the money is raised and the stock taken.—Board of Com'rs of Crawford County v. Louisville, N. A. & St. L. Air Line Ry. Co., 39 Ind. 192.

[b] (Sup. 1879)

Where taxes are levied for the purpose of assisting in the construction of a railroad by purchasing stock therein, the railroad company has no legal right or interest in the tax until it is levied and collected and a legal and valid subscription has been made on behalf of the municipal corporation which levies the tax.—Bittinger v. Bell, 65 Ind. 445.

[c] (Sup. 1881)

There is nothing in the statute requiring that the money appropriated by a township in aid of a railroad shall be expended within the limits of the township.—Brokaw v. Board of Com'rs of Gibson County, 73 Ind. 543.

[d] (Sup. 1888)

Until a railway company occupies a position which will enable it to enforce in some way whatever right or interest it may have in the appropriation voted by a town as aid in the construction of its railroad, such voted appropriation is not a chose in action in its favor which it can assign or mortgage.—Board of Com'rs of Hamilton County v. State ex rel. Cottingham, 4 N. E. 589, 17 N. E. 855, 115 Ind. 64.

[e] (Sup. 1893)

After a donation to aid in the construction of a railroad, the company built a rough track, and ran a train over it. A second donation was then made for the same purpose. Held, that the completion of the road

already laid, the construction of the grade, digging ditches, and furnishing and laying ties and iron, were within the meaning of the second donation.—Barner v. Bayless, 134 Ind. 600, 33 N. E. 907, 34 N. E. 502.

[f] (Sup. 1894)

The object of railroad aid laws is not to benefit the railroad company at the expense of taxpayers. The validity of such laws is based upon the benefit which the taxpayers are believed to derive from the building of the road.—Pittsburgh, C., C. & St. L. Ry. Co. v. Harden, 37 N. E. 324, 137 Ind. 486.

[g] (Sup. 1906)

Acts 1869, p. 96, c. 44, § 17, in relation to railroad aid by counties and townships, provides that, "after" the money authorized to be appropriated shall have been "levied and collected," the company, having fully constructed the road, may demand and have the money paid over according to the intent and meaning of the act, and that any one of the petitioners or any taxpayer may compel the same to be done by mandate against the county commissioners. Section 14 (page 95) provides that the board of commissioners may, "after" the assessment provided for shall have been collected, donate such moneys to the company for the purpose of aiding in the construction of the railroad, and pay the same over from time to time. Acts 1875, p. 121, c. 82, supplementary to the act of 1869, provided for a suspension of the tax until the statutory provisions relative to railroads had been complied with, and for the making of an order for the collection of the tax upon a compliance with such provisions. Acts 1877, p. 111, c. 69, entitled "An act extending the time for the completion of railroads," etc., provides that a railroad shall have five years in which to complete the road, and that, on completion, the company "shall be entitled to the appropriation." Acts (Sp. Sess.) 1875, p. 70, c. 25, amended the act of 1869 by confining its provisions to townships, but was otherwise substantially the same. Held, that though a railroad had constructed its road, and a special tax had been levied against a township to raise money for a donation, the road had no interest in the appropriation as against the township, and could not maintain mandamus to require the collection of the tax.—State ex rel. Western Const. Co. v. Board of Com'rs of Clinton County, 76 N. E. 986, 166 Ind. 162.

Under Acts 1875, p. 121 (Burns' Ann. St. 1901, § 5369), amending Acts 1873, p. 184, § 2, which is supplementary to Acts Sp. Sess. 1869, p. 92, railroad companies have no legal right to subsidies voted, levied, and collected for their aid, till an appropriation thereof by the board of commissioners, since, by the act of 1875, sections 14 and 17 of Acts 1869 were left in full force, and section 17, giving a petitioner or taxpayer of the township the right to mandate such vote in case of refusal, was sub-

stantially re-enacted in Acts 1875, p. 70; there being a strong presumption that supplemental legislation not in necessary conflict does not repeal by implication the prior statute, and the Supreme Court having held prior to the act of 1875 that the act of 1873 gave such companies no legal right in the funds until an appropriation.—Id.

Acts Sp. Sess. 1875, p. 70, being an amendment of Acts Sp. Sess. 1869, p. 92, relating to subsidies to railroads, is governed by the same rules of construction as to the legal rights of railroads to subsidies voted for the aid by townships; the omission of appropriation by counties being ineffective to change the construction.—Id.

Acts 1877, p. 111, providing for the appropriation of money by townships to aid in building railroads, when construed with Acts Sp. Sess. 1875, p. 70, and Acts Sp. Sess. 1869, p. 92, such acts being in *pari materia*, gives a railroad no legal right to money voted, levied, and collected but not appropriated for its aid by the board of commissioners.—Id.

That a railroad company performs all the conditions requisite for receiving a subsidy, required by Acts Sp. Sess. 1869, p. 92, does not constitute a contract, though the county or township has voted, levied, and collected the subsidy.—Id.

By Acts Sp. Sess. 1869, p. 92, the Legislature presumably intended not to give railroad companies any right to money levied and collected by counties for their aid till the boards of commissioners made the appropriation thereof, since Const. art. 10, § 6, forbids the appropriation of money by such boards for said purposes unless it be paid at the time; and, since the same language is used as to townships, the same presumption prevails as to them.—Id.

Under Acts Sp. Sess. 1869, p. 92, as amended by Acts Sp. Sess. 1875, p. 70, the right to compel a board of commissioners, who refused to make a donation voted, levied, and collected, to aid in the building of a railroad, was given to the petitioners therefor or the taxpayers of the township voting the aid.—Id.

Under Acts Sp. Sess. 1869, p. 92, § 14, railroad companies have no right to demand any funds to aid in the building of a railroad till the board has made a donation thereof, which can be done only after it has been collected.—Id.

Acts Sp. Sess. 1869, p. 92, § 17, providing for the payment of money by counties and townships to aid in the building of railroads, applies to donations.—Id.

The word "appropriation," as used in Acts Sp. Sess. 1869, p. 92, and Acts Sp. Sess. 1875, p. 70, includes usually both the taking of stock in and the granting of a bonus to a railroad company.—Id.

The word "subscription," as used in Acts Sp. Sess. 1869, p. 92, § 17, postponing the

rights of railroad companies in appropriations until a subscription is made, means a formal written promise.—Id.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 87.

See, also, 33 Cyc. pp. 83-95.

§ 35. Acceptance and performance of conditions.

Private subscriptions, see SUBSCRIPTIONS, § 15.

[a] (Sup. 1872)

Under the direct provisions of Act May 12, 1869, § 17, authorizing the raising of money by counties for the purchase of stock in railroad companies, the company is not entitled to any of the money until she has fully constructed the road so that cars can pass over the same, and no one but a petitioner or a taxpayer can have a mandate to compel the payment of the money.—Board of Com'rs of Crawford County v. Louisville, N. A. & St. L. Air Line Ry. Co., 39 Ind. 192.

[b] (Sup. 1872)

Under Davis' Rev. St. Supp. 1870, p. 389, § 18, providing that a railroad company to which grants of public aid have been made shall commence the construction of the road within one year from the time of the levy of the tax therefor, unless additional time has been given, the time for commencement begins one year from the time when the order levying the tax is made by the board of county commissioners, and not from the time when the levy is placed on the tax duplicate.—State ex rel. Scobey v. Wheaton, 39 Ind. 520.

By acquiring the right of way or letting contracts for the construction of a railroad, the railroad company does not "commence work upon the railroad" within the meaning of such provision, relating to the time of beginning the work of construction.—Id.

[c] (Sup. 1873)

Where a township voted an appropriation to aid a railroad, and afterwards its boundary line was changed and additional territory annexed to it, and the railroad was then built through the territory so annexed, without touching the territory which constituted the township when the vote was taken, no tax could be levied to pay the appropriation.—Alvis v. Whitney, 43 Ind. 83.

[d] (Sup. 1877)

Where a city, under a statute authorizing it to make a "donation" to aid in the construction of a railroad, has made the donation on the condition that the company shall maintain its shops in the city, and that it shall reimburse the money supplied if such shops are removed, the fact that the company has built its road on the faith of such conditional donation does not entitle it to enforce the engagement against the city.—Indiana N. & S. Ry. Co. v. City of Attica, 56 Ind. 476.

[e] (Sup. 1879)

The fact that a railroad company to which an appropriation had been voted by the county commissioners had not procured a right of way for its road through a township in which the freeholders petitioning for such appropriation lived is not ground for an allegation that the company did not "legally commence work" on the railroad within one year after the levy of the tax, and had never legally done any work. There is no statute authorizing such an assumption.—*Wilson v. Board of Com'rs of Hamilton County*, 68 Ind. 507.

[f] (Sup. 1881)

A condition on the grant of township aid towards the construction of a railroad that a certain portion of the road should be fully constructed and a train of cars be run over the same on or before a certain date does not require the railroad to be perfect in every respect on the date specified, but only that it shall be so far completed as that it may be operated and regularly used to transfer freight and passengers.—*Brokaw v. Board of Com'rs of Gibson County*, 73 Ind. 543.

[g] (Sup. 1883)

Act May 12, 1869 (1 Rev. St. 1876, p. 736), § 18, providing that, if a railroad company for whose benefit a special tax is levied fails to complete its road ready for use within three years after the levy, it shall forfeit all rights to the donation, does not apply to a case of subscription to stock.—*Board of Com'rs of Tip-ton County v. Indianapolis P. & C. Ry. Co.*, 89 Ind. 101.

[h] (Sup. 1883)

Aid voted by a township to a railroad is forfeited by a noncompliance with conditions expressed in the petition that the road should be completed and a depot erected thereon by a certain date, under Rev. St. 1881, §§ 4045, 4062, and thereupon the township may vote aid to another railroad.—*Irwin v. Lowe*, 89 Ind. 540.

[i] (Sup. 1883)

Rev. St. 1881, § 4062, providing that failure on the part of a railroad company to commence work in the county within a year from the levying of a special tax in aid of the road and that failure to complete the road within three years should forfeit the rights of the company has been repealed.—*Caffyn v. State ex rel. Rader*, 91 Ind. 324.

[j] (Sup. 1884)

Acts 1873, p. 184, as amended by Rev. St. 1881, § 4069, relating to the forfeiture of appropriations by counties in aid of railroad companies because of the failure to complete the road within a particular period, was inconsistent with the provisions of Rev. St. 1881, § 4062, providing for the absolute forfeiture of the appropriation by the failure to complete a railroad within a definite period, and hence repealed such provision for the forfeiture of the appropriation by failure to complete the road

within the time limited in such section.—*Sellers v. Beaver*, 97 Ind. 111.

An allegation that a railroad company did not legally commence work is not equivalent to an allegation that it failed to commence work within the statutory two years.—*Id.*

[k] (Sup. 1886)

In 1870 a township voted aid to a railroad company. The tax to pay the donation was collected in 1871, 1872, and 1873, and passed into the county treasury. It did not appear how much of the tax was collected in 1873, nor at what time in the year it was collected. *Held*, that the case was within Act Jan. 30, 1873, relating to forfeiture of donations to railroad companies on their failure to construct their road within the time prescribed by the act.—*Board of Com'rs of Marion County v. Center Tp.*, 2 N. E. 368, 7 N. E. 189, 105 Ind. 422.

Under Act Jan. 30, 1873, relating to the forfeiture of donations given to railroad companies on their failure to construct their road within the time designated in the act, there can be no forfeiture until the order therefor is made by the county board on the application of 25 freeholders, and such order cannot be made until after the expiration of three years from the placing of the tax to pay the donation on the tax duplicate, and, if before that time the railroad company shall have expended in the construction of its road in addition to an amount equal to the amount donated, there can be no forfeiture, and it becomes the duty of the county board to cause the tax to be collected.—*Id.*

Where a railroad is constructed through the same counties, between the same terminal points, and upon the same general line projected, it is not a material departure so as to work a forfeiture of township aid voted, although several towns on the line projected are left from five to twelve miles off the new line.—*Id.*

[l] (Sup. 1886)

Rev. St. § 4060, provides that no donation of money shall be made to any railroad company by the board of commissioners of a town until the railroad shall have been permanently located, and work thereon done and paid for by the company equal to the amount of the donation then made. Act March 11, 1875, § 2, provides that, if a railroad company shall not within five years after the tax has been placed on the duplicate for collection have expended an amount equal to the amount to be donated or stock to be taken in said railroad company by the county or township, the board of commissioners may make an order annulling and canceling the subscription of stock or donation upon the application of 25 freeholders. *Held* that, so far as the latter act was inconsistent with the former in requiring a declaration of forfeiture, it repealed the former.—*Nixon v. Campbell*, 4 N. E. 296, 7 N. E. 258, 106 Ind. 47.

The order of the board of commissioners placing a tax levied to pay the amount donated to a railroad on the tax duplicate is conclusive

as to the fact of the location of the railroad within the limits of a township.—Id.

The failure of a railroad company to commence work within one year after the levying of a special tax does not, in the absence of a declaration of forfeiture by the county board, operate as a forfeiture of the donation voted by the township.—Id.

[m] (Sup. 1887)

A contract contained these provisions: "The said sum of two hundred dollars shall become due and payable when the Louisville, New Albany & Chicago Railway Company shall have built a railroad and run a train of cars from Kirklin, in Clinton county, Indiana, to Carmel, in Hamilton county, Indiana; and if said company shall not construct said railroad from Kirklin, in Clinton county, Indiana, to Carmel, in Hamilton county, Indiana, and run a train of cars to within one-fourth of a mile of the town of Carmel, within one year from this date, to Carmel, Hamilton county, Indiana, and also to Indianapolis, in Marion county, Indiana, then this note shall be void." Held, that there could be no recovery on this contract without showing that the railroad was completed to Indianapolis, and a train of cars run thereon, within one year from the date of the contract.—Moore v. Campbell, 111 Ind. 328, 12 N. E. 495.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 75, 77, 78, 88-93.

See, also, 33 Cyc. pp. 96-104.

§ 36. Agreements in consideration of grant of aid.

In an action for reformation and foreclosure, see MORTGAGES, § 445.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 94.

See, also, 33 Cyc. pp. 104, 105.

§ 38. Right to stock on payment of subscription.

[a] (Sup. 1888)

Where the people of a township have voted to aid by taking stock, the company has no right under the statutes to demand the money as a donation.—Board of Com'rs of Hamilton County v. State ex rel. Cottingham, 115 Ind. 64, 4 N. E. 589, 17 N. E. 855.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 95.

See, also, 33 Cyc. pp. 105, 106.

§ 39. Effect of sale, lease, or consolidation of railroad.

[a] When the state consents to the consolidation of two railroad companies by an act of the legislature, the act of the companies in making it is not void, though, if done without his consent, a stockholder is discharged from his subscription.—(Sup. 1857) McCray v. Junction R.

Co., 9 Ind. 358; (1859) Martin v. Same, 12 Ind. 605.

[b] (Sup. 1858)

The property of one consolidating railroad company may be mortgaged for its own debts, even after the consolidation.—Wright v. Bundy, 11 Ind. 398, 409.

[c] (Sup. 1863)

A railroad corporation was organized under the general railroad law of 1852, which law was by its terms liable to "be amended or repealed at the discretion of the legislature." The defendant subscribed for stock in this company on February 24, 1853. At about the same time an act authorizing the consolidation of companies was passed. The corporation in question consolidated with another, and it also appeared, from its articles of association, that such consolidation was merely carrying out the purpose of its organization. Held, that the defendant was not exonerated from his subscription.—Hanna v. Cincinnati & Ft. W. R. Co., 20 Ind. 30.

[d] (Sup. 1863)

K. recovered judgment against two consolidated railroad companies. After rendition thereof the court dissolved the consolidation. K. then moved for execution, and notified both companies of his motion. Held, that the notice was sufficient, that the validity of K.'s judgment was not impaired by the dissolution, and that he was entitled to his execution.—Ketcham v. Madison, I. & P. R. Co., 20 Ind. 260.

[e] (Sup. 1884)

Where an appropriation has been lawfully made by a township to a railroad corporation to aid in the construction of its road, the company acquires such a right to and interest in the appropriation, and the obligation of the township to pay it, as, upon its subsequent consolidation with another railroad corporation, will pass to and vest in the consolidated company.—Scott v. Hansheer, 94 Ind. 1.

Where an appropriation has been lawfully made by a township to a railroad corporation to aid in the construction of its road, the company acquires such a right to and interest in the appropriation, and the obligation of the township to pay it, as, upon its subsequent consolidation with another railroad corporation, will pass to and vest in the consolidated company.—Id.

[f] (Sup. 1884)

Where a petition by the freeholders of a township to the board of county commissioners asked for an appropriation in aid of a certain railroad or its successor by consolidation, and all the proceedings were had in anticipation of consolidation, and in the event of its consummation in aid of the consolidated company, it was no objection to the petition that the railroad company named in the petition was no longer in existence, and its track in the township was owned and operated by another com-

pany; the latter company being the consolidated company.—*Jussen v. Board of Com'rs of Lake County*, 95 Ind. 567.

[c] (Sup. 1886)

Where a donation is voted to a railroad company, and a trust deed covering such donation is foreclosed, the bondholders buying in all the rights and property of the company, and forming a company which is afterwards consolidated with another under a new name, the last-named company, having completed the work before a forfeiture is declared, is entitled to the money voted the original company, it having been in the county treasury at the time of the foreclosure and sale.—*Board of Com'rs of Marion County v. Center Tp.*, 105 Ind. 422, 2 N. E. 368, 7 N. E. 189.

[h] (Sup. 1888)

Under Acts 1809, Sp. Sess. p. 92, § 14, authorizing townships to aid a railroad company by taking stock therein, and providing that the board of commissioners may, after the assessment, or any part thereof, shall have been collected, take stock in such company, in the name of the proper township, the simple voting of the aid by the township is not a subscription to the stock; and where the property of such company is sold on foreclosure, and bought in by a new company having no power to issue stock of the old company, such new company cannot, by mandamus, compel the levy of a tax for the purpose of paying them the amount voted to be paid for stock in the original company.—*Board of Com'rs of Hamilton County v. State ex rel. Cottingham*, 115 Ind. 64, 4 N. E. 589, 17 N. E. 855.

Rev. St. 1881, § 3945, providing that, on the sale of a railroad under a mortgage, the purchasers may form a corporation to operate the railroad, etc.; and section 3947, providing that such corporations shall possess all the rights in respect to said railroad which were possessed by the corporation formerly owning it, and may assume any liabilities of the former corporation, and make such adjustment and settlement with any stockholder or creditor of the former corporation as may be deemed expedient: provided, that all subscribers to the original stock of the company shall, by the acceptance of this act by the purchasers of any such railroad, be released from all their unpaid subscriptions, etc.—though enacted before any law was in existence authorizing townships to vote aid to railroad companies, apply to a town subscribing to the stock of a railroad, and release such township from liability on its unpaid subscription.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 96-98.

See, also, 33 Cyc. pp. 106-109.

IV. LOCATION OF ROAD, TERMINI, AND STATIONS.

Compliance with conditions attached to grant of public aid, see ante, § 35.

Contracts tending to injure public service as against public policy, see **CONTRACTS**, § 123. Judicial notice as to location of, see **EVIDENCE**, § 10.

Subjects and titles of acts, see **STATUTES**, § 113.

§ 44. In general.

[a] (Sup. 1858)

That a railroad shall be located within a certain distance of a town means that it shall be actually constructed and run within that distance.—*Jewett v. Lawrenceburgh & U. M. R. Co.*, 10 Ind. 539.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 101.

See, also, 33 Cyc. pp. 111, 112.

§ 45. Discretion of company.

[a] (Sup. 1852)

Where the legislature authorized the construction of a railroad between two designated points, no intermediate point being named, and the routes between said points are equally feasible, the most direct will be deemed to have been contemplated; but where there is a difference in the feasibility of routes, a reasonable discretion must be allowed in the selection of that to be followed.—*Newcastle & R. R. Co. v. Peru & I. R. Co.*, 3 Ind. 464.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 102-104.

See, also, 33 Cyc. pp. 113, 114.

§ 46. Contracts as to location of road.

Parol evidence to vary, see **EVIDENCE**, § 441.

Private subscriptions, see **SUBSCRIPTIONS**, § 15.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 105.

See, also, 33 Cyc. pp. 115, 116.

§ 47. Determination as to location.

[a] (Sup. 1852)

The fact that a railway has been located on some part of the tract of 80 acres of land purchased for the use of the institution for educating the deaf and dumb does not alone authorize the conclusion that the uses and purposes for which the institution was placed on that particular tract will be so materially interfered with that the company should be restrained from crossing it.—*Indiana Cent. Ry. Co. v. State*, 3 Ind. 421.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 106-108.

See, also, 33 Cyc. pp. 111-116.

§ 50. Termini.

[a] (Sup. 1859)

The articles of association of a railroad company reciting that the railroad shall commence at the west or such point on the west line of De Kalb county, with a view of connecting with another road at such point as may

be agreed on by the companies so connecting, etc., sufficiently show the name of the place from which the proposed road was to be constructed.—*Eakright v. Logansport & N. I. R. Co.*, 13 Ind. 404.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 113-115.

See, also, 33 Cyc. pp. 121, 122.

§ 51. Connections with other roads.

[a] (Sup. 1908)

Where a railroad commission ordered the construction of a connection of plaintiff's road with another road at a junction point, it was no ground for objection that such connection would greatly increase the danger of handling plaintiff's traffic; it being presumed that the commission on application would so regulate the placing and handling of cars on the connecting track as would safeguard plaintiff's business so far as possible and protect it from unnecessary inconvenience.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Railroad Commission*, 171 Ind. 189, 86 N. E. 328.

Where it is more convenient and economical for shippers along two intersecting railroad lines that facilities be provided at the injunction for an interchange of car load freight, it is not a valid objection to an order requiring such connection that, at the particular point of intersection, the objecting company will be deprived of a small amount of trackage.—*Id.*

Where a railroad commission's order requiring connection between plaintiff's railroad and another road at a junction point, contemplated that the other company should bear part of the expense, the fact that plaintiff owned most of the land to be occupied by the connecting track was a mere fortuitous circumstance; it being presumed that so far as plaintiff would be deprived of its property, either because of the use of the track or by its interfering with the use of its property for other purposes, or in so far as plaintiff might be put to expense, it would be compensated by switching rates or transfer charges.—*Id.*

A railroad commission's order, requiring construction of a connection between plaintiff's railroad and that of another company at a junction point, did not give such other company the use of complainant's track or terminal facilities, within Interstate Commerce Act (Act Feb. 4, 1887, c. 104, § 3, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]), requiring common carriers by railroad to provide reasonable facilities for interchange of traffic, etc., but declaring that such provision should not require any such carrier to give the use of its track or terminal facilities to another carrier engaged in like commerce.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 110-118, 120.

See, also, 33 Cyc. pp. 123, 124.

§ 52. Extensions.

[a] (Sup. 1852)

The legislature amended the charter of the Newcastle & Richmond Railroad Company by authorizing them to extend said road from N. to intersect the Peru & Indianapolis Railroad or the Lafayette & Indianapolis Railroad at such point on said roads as the Newcastle & Richmond Railroad Company might determine upon. *Held*, that the terminus to which the Newcastle & Richmond Railroad may be extended was sufficiently fixed, and that the grant of the right to make such extension was not void for uncertainty.—*Newcastle & R. R. Co. v. Peru & I. R. Co.*, 3 Ind. 464.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 119.

See, also, 33 Cyc. pp. 125-127.

§ 53. Survey and record of location.

[a] (Sup. 1883)

A map and profile filed by a railroad company under Rev. St. 1881, § 3902, and the clerk's indorsement of the filing thereof, are sufficient evidence of the permanent location of the road in a county if it appears that the road has actually been constructed on the lines shown by the map.—*Caffyn v. State ex rel. Rader*, 91 Ind. 324.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 121, 122.

See, also, 33 Cyc. pp. 127-130.

§ 54. Change of location.

[a] (Sup. 1879)

Under 1 Rev. St. 1876, p. 650, relative to railroads, and providing that the articles of association must state the line of the route and the termini, and that the directors shall proceed to locate and lay out the road, etc., and page 664, declaring that, where a certain route is designated, the same may be varied so as to avoid hills or other obstacles, but that nothing shall be so construed as to authorize the change of the terminus of the road, a railroad corporation may change the line and route of its road to avoid obstacles and obtain the best route at its discretion, except as to the general direction and termini of the road, which may not be abandoned.—*Beckner v. Riverside & B. G. Turnpike Co.*, 65 Ind. 408.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 123, 125, 126.

See, also, 33 Cyc. pp. 130-134; note, 36 L. R. A. 510.

§ 55. Conflicting locations.

Rights in and use of road or land of other company, see post, § 80.

[a] (Sup. 1859)

The grant of a charter for a road or bridge, etc., does not estop the Legislature from granting a subsequent charter for a road or bridge which may compete with the former in the

transportation of freight and passengers between given points; and the mere fact that the two run parallel and mutually diminish the business of each other is no ground for a claim by either for damages.—*Lafayette Plankroad Co. v. New Albany & S. R. Co.*, 13 Ind. 90, 74 Am. Dec. 246.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 127-129.

See, also, 33 Cyc. pp. 137-139; note, 12 L. R. A. 220.

V. RIGHT OF WAY AND OTHER INTERESTS IN LAND.

Acquirement of right of way as condition of grant of public aid, see *ante*, § 35.

Acquiring highway by adverse user, see *HIGHWAYS*, §§ 4, 7.

Action relating to right of way as involving title to real estate, effect on jurisdiction of courts, see *COURTS*, § 163.

Adverse possession as against railroad company, see *ADVERSE POSSESSION*, § 8.

Application of statute of frauds to grants of rights of way, see *FRAUDS, STATUTE OF*, § 60. As property subject to execution, see *EXECUTION*, § 28.

Authority of agent to accept deed containing stipulations as to location of depot, see *ante*, § 17.

Breach of condition in deed of land for location of depot, see *DEEDS*, § 160.

Condemnation of property for right of way as taking for public use, see *EMINENT DOMAIN*, § 20.

Condemnation of right of way for other public use, see *EMINENT DOMAIN*, § 47.

Construction of additional tracks on right of way as additional servitude, see *EMINENT DOMAIN*, § 120.

Construction of drain on right of way, see *DRAINS*, § 41.

Conveyances of ward's lands to railroad for right of way, see *GUARDIAN AND WARD*, § 42.

Dedication of street subject to railroad right of way, see *DEDICATION*, §§ 53, 55.

Description of railroad property in assessment for municipal improvements, see *MUNICIPAL CORPORATIONS*, § 479.

Description of railroad right of way in complaint to enforce street assessment, see *MUNICIPAL CORPORATIONS*, § 567.

Discharge of surface water on right of way from adjoining land, see *WATERS AND WATER COURSES*, § 119.

Distinction between power of attorney and deed of right of way, see *DEEDS*, § 5.

Drainage and discharge of surface waters, see *WATERS AND WATER COURSES*, § 150.

Effect of consolidation of company, see *post*, § 144.

Existence of as breach of covenant against incumbrances, see *COVENANTS*, § 96.

Existence of as breach of covenant of warranty, see *COVENANTS*, § 100.

Extent of right acquired by grant of easement for switch to connect land with railroad, see *EASEMENTS*, § 38.

Improvement of drain across right of way, see *DRAINS*, § 1.

Measure and amount of compensation for appropriation of right of way for public use, see *EMINENT DOMAIN*, § 128.

Necessity of signature of grantee to grant of right of way as affecting right to specific performance, see *SPECIFIC PERFORMANCE*, § 32.

Occupancy of land by railroad company as constructive notice to subsequent purchaser, see *VENDOR AND PURCHASER*, § 232.

Parol evidence to show intention of party to contract, see *EVIDENCE*, § 461.

Personal liability of railroad company for assessment against right of way, see *MUNICIPAL CORPORATIONS*, § 586.

Persons entitled to use way for switch to connect land with railroad, see *EASEMENTS*, § 52.

Pleading matters of fact or conclusions relating to license to lay gas main under right of way, see *PLEADING*, § 8.

Prescriptive right of city to use right of way as highway, see *MUNICIPAL CORPORATIONS*, § 648.

Presumptions as to width of right of way granted, see *EVIDENCE*, § 87.

Protection of right of way from surface water flowing from adjoining land, see *WATERS AND WATER COURSES*, § 118.

Repelling flow of surface water to right of way, see *WATERS AND WATER COURSES*, § 118.

Restraining railroad from making excavations, laying tracks and placing switches over land of another, see *INJUNCTION*, § 50.

Revocation of dedication by railway company of portion of right of way, see *DEDICATION*, § 38.

Rights of purchaser at foreclosure sale, see *post*, § 194.

Rights of way as boundaries, see *BOUNDARIES*, § 22.

Right to cut ice from railroad right of way, see *WATERS AND WATER COURSES*, § 205.

Separation of land by railroad right of way as precluding annexation to city, see *MUNICIPAL CORPORATIONS*, § 29.

Special assessments for public improvements, see *MUNICIPAL CORPORATIONS*, § 425.

Taxation of right of way, tracks and other real property, liability, see *TAXATION*, § 145.

Taxation of right of way, tracks, and other real property, mode of assessment, see *TAXATION*, § 391.

Title to maintain ejectment for, see *EJECTMENT*, § 9.

Use of property dedicated by railroad to public use, see *DEDICATION*, § 57.

Use of right of way by another railroad company as additional servitude, see *EMINENT DOMAIN*, § 120.

Use of right of way by telegraph company as additional servitude, see **EMINENT DOMAIN**, § 120.

Use of right of way for highway crossing as additional servitude, see **EMINENT DOMAIN**, § 120.

Waters appurtenant to grant of right of way, see **WATERS AND WATER COURSES**, § 154.

§ 61. Capacity to acquire and hold land.

[a] (Sup. 1886)

Railroad companies under Rev. St. 1881, §§ 3900, 3901, may acquire and hold land other than that occupied by their tracks.—*Pfaff v. Terre Haute & I. R. Co.*, 9 N. E. 93, 108 Ind. 144.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 137, 138.

See, also, 33 Cyc. pp. 146, 147.

§ 62. Purposes for which land may be acquired.

[a] (Sup. 1860)

A railway company, prior to the taking effect of the law of January 20, 1852, authorizing railroad companies to receive lands in payment of subscriptions to stock, had no power primarily to acquire title to lands, other than for the immediate purposes of the road; and, the defendants being estopped to deny that the company did acquire title to the lands, it must be presumed that such title was acquired under section 2 of that act.—*Taber v. Cincinnati, L. & C. Ry. Co.*, 15 Ind. 459.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 139.

See, also, 33 Cyc. pp. 148, 149.

§ 63. Modes of acquiring land or rights therein.

Making of public improvements, see post, § 321.

[a] (Sup. 1888)

The fact that a railroad company took possession of a strip of land for its right of way as a trespasser did not prevent the running of the statute of limitations, and open and adverse use for 20 years established a right of way.—*Sherlock v. Louisville, N. A. & C. Ry. Co.*, 17 N. E. 171, 115 Ind. 22.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 140-143.

See, also, 33 Cyc. pp. 149, 150.

§ 64. Agreements as to right of way or use of land.

By executor of landowner, see **EXECUTORS AND ADMINISTRATORS**, § 129.

[v] (Sup. 1887)

An agreement in open court fixing the amount of damages which plaintiff was entitled to recover for the wrongful appropriation of land at a certain sum, and stipulating that, in

the event that he should recover and such sum was paid, he should convey the land to the railroad company, will be enforced.—*Bloomfield Railroad Co. v. Grace*, 13 N. E. 680, 112 Ind. 128.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 144, 147-152;

11 CENT. DIG. Contracts, § 896.

See, also, 33 Cyc. pp. 152-154, 157-159.

§ 66. Implied grants.

[a] (Sup. 1888)

Where the owner of land permits a railroad, under a parol license, to expend its money and build its road over his land, neither he nor his grantee, after the lapse of 20 years, during which the possession of the company has been open and continuous, can maintain ejectment therefor, even though the owner may have received no compensation.—*Evansville & T. H. R. Co. v. Nye*, 113 Ind. 223, 15 N. E. 261.

[b] (Sup. 1893)

A complaint against a railroad company alleged that its predecessor, which constructed the road, offered to purchase the right of way over plaintiff's land, but that, because he could not estimate the damages until the road was built, he permitted it to build across his land under an agreement that it would afterwards pay the damages when ascertained; that it never paid the damages, and that the road was sold on foreclosure, and finally became the property of defendant, which also refused to pay the damages; that plaintiff then demanded possession, and revoked the license on which defendant was using the right of way. The prayer was for damages, for recovery of possession, and other proper relief. *Held*, that the complaint was not to be construed as seeking to recover for wrongful appropriation of the land, but as stating facts creating an equity to damages for the taking and use of land without compensation, and was therefore not demurrable because it showed that the defendant's predecessor came into possession lawfully.—*Chicago & I. Coal Ry. Co. v. Hall*, 135 Ind. 91, 34 N. E. 704, 23 L. R. A. 231.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 146, 151.

See, also, 33 Cyc. pp. 155, 156.

§ 67. Conveyances to or for railroad company.

Recital in deed to railroad company as constructive notice, see **VENDOR AND PURCHASER**, § 230.

Sufficiency of description of land, see **DEEDS**, § 38.

[a] (Sup. 1888)

Under Acts 1852, § 13 (1 G. & H. p. 508), authorizing the incorporation of railroad companies, with the power to receive grants of real estate and other property in aid of its construction and maintenance, when a grant of right of way to a company has been executed in an-

icipation of and as inducement to its organization, the company may receive such grant, and, after its organization, ratify and make it obligatory on the grantor.—*Bravard v. Cincinnati, H. & I. R. Co.*, 115 Ind. 1, 17 N. E. 183.

[b] (Sup. 1889)

Where a conveyance to a railroad company of a "right of way" over certain land does not specify the width of the land thereby conveyed, and the railroad company, about 18 years thereafter, take possession under claim of title of a strip 6 rods wide, that being the amount it might legally condemn by the law of its organization, in an action to recover all of such strip except 30 feet, which it is alleged the grantee took possession of on the execution of the deed, the grantor retaining possession of the balance, a special finding that it was not intended by the parties to the deed to describe the right of way as 30 feet wide, is not inconsistent with a general verdict for plaintiff.—*Indianapolis & V. R. Co. v. Lewis*, 119 Ind. 218, 21 N. E. 660.

[c] (Sup. 1889)

In an action against a railway corporation for breach of a covenant to fence the right of way conveyed to it by plaintiff it is immaterial that the wrong corporation is named in the deed as the grantee, where the defendant accepted the deed and enjoyed the land, as it cannot claim under the deed and repudiate the covenants.—*Louisville, N. A. & C. Ry. Co. v. Power*, 119 Ind. 269, 21 N. E. 751.

[d] (App. 1904)

The grant of a right of way in consideration of the building and maintenance of fences, cattle guards, and crossings is supported by a valuable consideration.—*Chicago & S. E. Ry. Co. v. McEwen*, 35 Ind. App. 251, 71 N. E. 926.

[e] (App. 1910)

Where a railroad company contracts with a landowner to construct and operate a side track across said landowner's property, the right of the railroad company is measured by the contract formed by the acceptance of the landowner's written grant.—*Barth v. Pittsburg, C., C. & St. L. Ry. Co.*, 90 N. E. 322.

A landowner granted a railroad company the right to construct a side track across certain land, thereby connecting its main track with two manufacturing establishments, and specified the width of the land to be occupied, and the length of the track. *Held*, that the railroad company might be restrained from extending its track beyond the point on a street named, where it is alleged that such addition to the track will greatly increase the traffic over such line and depreciate the value of the landowner's real estate, and that the owner will suffer irreparable damage, unless the railroad company be enjoined.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 153-158.

See, also, 33 Cyc. pp. 160, 161.

§ 68. Extent of way or of land acquired.

[a] (Sup. 1875)

By the original charter of a railroad company granted in 1846 the president and directors thereof were invested with all the rights and powers necessary for the construction and repair of a railroad between certain places named, within this state, "not exceeding sixty feet wide." An amended charter enacted in 1849, before the construction of its road by said company, which did not expressly repeal any portion of the original charter, provided that "for the purpose of constructing said road, with all desirable appendages, and for putting and keeping the same in repair, and for doing all proper business thereon," said company was authorized "to enter upon, take, and hold in fee simple all real estate and materials for that purpose, doing no unnecessary damage"; the qualifying words, "not exceeding sixty feet wide," contained in the original charter, not being inserted in the amended charter, which provided that said company should within 10 years sell and dispose of all lands granted, conveyed, or released to it, "except so much as may be embraced in the width of the road, allowed by the charter," etc., and also provided that, when such real estate and materials necessary for such purpose could not be had by donation or fair purchase, the owner was authorized to have the damages assessed in a mode therein provided, and that all claims for damages should cease unless applied for in two years next after the company had taken possession of such real estate or materials. Said company by its agents entered upon and took possession of certain land, without donation, purchase, condemnation, assessment of damages, or claim therefor made by the owner, but with his acquiescence, and said company constructed its railroad over said land, and erected telegraph poles, with wires thereon, on one side of said railroad at the distance of 19 feet from the center of the track. *Held*, that while said company might have acquired title to 60 feet in width of said land, if it had taken possession thereof and occupied such space, yet, having appropriated and used less than that width, its right being limited by its necessities to the extent that it occupied and used, it became entitled, not merely to the strip of ground on which the railroad track was constructed and the ground actually occupied by said telegraph poles, but also to the amount of land necessary for the purpose of constructing its road, with all necessary appendages, and for putting and keeping the same in repair, and for doing all proper business thereon, including sufficient land for the erection of telegraph poles at a safe distance from the track, together with the right to the exclusive use of the intervening space between said track and the fixture or appendage so erected.—*Prather v. Jeffersonville, M. & I. R. Co.*, 52 Ind. 16.

The company having erected telegraph poles on but one side of its road and made no use of the other side, except for the purpose of

keeping its track in repair, for a period of 18 years from the time of the original appropriation, *held* that said company possessed no right to erect telegraph poles on said other side of its track at the distance of 29 feet from the center thereof, without condemnation and payment of damages in the mode provided by the law or charter by which such railroad was governed at the time of such new appropriation.—*Id.*

[b] (Sup. 1890)

Under a statute authorizing a railroad company to receive from owners of land over which its road was to pass grants of rights of way, not exceeding a specified width, A. made a grant to the company of a right over certain land, and afterwards laid out the rest of his land into an addition to the town, and cut it up into lots abutting upon the right of way, but without infringing upon it, and in his plat of such addition he left a blank space for the strip which he had granted to the company. A part of this strip, between the main track and the boundary lines of such lots, was used for several years by the public as a street, when the company laid down a side track there and destroyed such use. Suit was brought by the owners of some of the lots to enjoin the company from using its side track. *Held*, that the acts of A. subsequent to the grant could not be otherwise construed than as an affirmation thereof, obligatory alike upon him and those claiming under him, and that the owners of such lots could not complain of the building of such side track.—*Indianapolis, P. & C. Ry. Co. v. Rayl*, 69 Ind. 424.

Where a statute provides that a railroad company may receive, from owners of land over which its road is to pass, grants of rights of way, not exceeding a specified width, and one of such owners grants such a right without specifying the width thereof, the company is authorized to appropriate and use an area across the lands of such owner of any width, in its discretion, not exceeding that specified by the statute.—*Id.*

[c] (Sup. 1883)

A railroad company, authorized by its charter to acquire lands in fee to a certain width for its right of way, which constructs its road across the land of a certain owner and maintains it for nearly 20 years without instituting condemnation proceedings, or any objection or claim for damages being ever made by such owner, thereby acquires title to a strip of the full width allowed by its charter, and not merely of the width actually used by it; and the company may consent to or give the right to maintain a telegraph line anywhere within the limits of the full width allowed.—*Prather v. Western Union Tel. Co.*, 89 Ind. 501.

[d] (Sup. 1887)

Rev. St. 1881, § 3903, gives every railroad company organized thereunder the power "to lay out its road, not exceeding six rods wide," etc.; and where a railroad company enters up-

on land with leave and license of the owner, and constructs and runs its road on the faith of such license, it will be presumed, as against one claiming under the licensor, in the absence of any limitation to the contrary, that the right of way thus acquired extended to the full statutory width of six rods.—*Campbell v. Indianapolis & V. R. Co.*, 110 Ind. 490, 11 N. E. 482.

[e] (Sup. 1889)

Where the charter of a railway company authorizes it to acquire a right of way not to exceed 80 feet in width, and, in constructing the road, the company graded its roadbed to the width of 22 feet, and the owner of the land executed a written release to the company of a right of way 25 feet in width across his land at the time the road was about to be constructed, such company could not subsequently occupy to the width of 80 feet, unless such right was predicated either on adverse occupancy for such length of time as to confer title or rest on the doctrine of estoppel or acquiescence.—*Lake Erie & W. Ry. Co. v. Michener*, 20 N. E. 254, 117 Ind. 465.

[f] (Sup. 1890)

A deed to a railroad company conveyed to it "the right of way for its railroad, and the right to construct said railroad agreeably to and in accordance with the laws of the state," referring to certain statutes. *Held*, that the deed did not vest in the grantee title to land six rods in width, that being the quantity which the company could acquire under the statutes, but only the quantity actually taken and used by it.—*Ft. Wayne, C. & L. R. Co. v. Sherry*, 126 Ind. 334, 25 N. E. 898, 10 L. R. A. 48.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 159, 160.

See, also, 33 Cyc. pp. 164, 165.

§ 69. Title, estate, or interest acquired.

[a] (Sup. 1890)

Under a statute providing that a railroad company may receive from owners of land conveyances of a right of way, and that, when so acquired, the same shall be held by the company in fee simple, whatever title the owner has to the land covered by such right of way inures to the benefit of the company.—*Indianapolis, P. & C. Ry. Co. v. Rayl*, 69 Ind. 424.

[b] (Sup. 1883)

The charter of the Indianapolis & Bellefontaine Railroad Company, providing (section 21) that, when the company shall have procured the right of way "as hereinbefore provided, they shall be seised in fee simple of the right of said land," is not in effect a conveyance of the land in fee simple.—*Cleveland, C., C. & I. Ry. Co. v. Coburn*, 91 Ind. 557.

[c] (Sup. 1883)

An owner granted to a railway company a right of way for the use of a railway over his land. The deed stipulated that the company

was to keep a good fence on each side of the road through the premises, and to hold the right of way so long as it would be used for the purposes of the company. *Held*, that the deed merely conveyed an easement to the railway company for a particular purpose.—*Ingalls v. Byers*, 94 Ind. 134.

[d] A deed conveying "the right of way," of an undefined width, over a certain lot, to a railroad company, and containing a stipulation that such company shall "have and hold the said rights and privileges to the use of said company so long as the same shall be needed for the uses and purposes of said road," conveys a mere easement, and not the title in fee.—(Sup. 1885) *Douglass v. Thomas*, 103 Ind. 187, 2 N. E. 562; (1889) *Cincinnati, I., St. L. & C. Ry. Co. v. Geisel*, 119 Ind. 77, 21 N. E. 470.

[e] (Sup. 1889)

It does not follow that because a railroad company may take an estate in fee, or a right of way of a defined width, it does take such an estate, or such a right of way, for parties may by their contract create a less estate than a fee, or a right less in extent than that which the law authorizes the grantee to acquire.—*Cincinnati, I., St. L. & C. Ry. Co. v. Geisel*, 21 N. E. 470, 119 Ind. 77.

[f] (Sup. 1890)

The land held by a railroad corporation for a right of way and for the purposes of depots, when in actual use as such, is dedicated to the public use.—*City of Valparaiso v. Chicago & G. T. Ry. Co.*, 24 N. E. 249, 123 Ind. 467.

[g] (Sup. 1890)

The grant of a right of way to a railroad company, being merely the conveyance of an easement, does not affect the right of the grantor to the use of a stream of water flowing over the land.—*Smith v. Holloway*, 124 Ind. 329, 24 N. E. 886.

[h] (Sup. 1903)

A railroad which enters on property without color of title, and occupies it as a right of way, acquires merely an easement in the property for purposes of a right of way.—*Consumers' Gas Trust Co. v. American Plate Glass Co.*, 68 N. E. 1020, 162 Ind. 393.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 161-165.

See, also, 33 Cyc. pp. 166, 167; note, 1 L. R. A. (N. S.) 806.

§ 70. Priority of right.

[a] (Sup. 1906)

The filing by a railroad company of the map and profile of a right of way sought to be acquired by condemnation, in the absence of unnecessary delay, precludes a rival company from appropriating the same land for a similar purpose.—*Southern Indiana R. Co. v. Indianapolis & L. R. Co.*, 168 Ind. 360, 81 N. E. 65, 13 L. R. A. (N. S.) 197.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 166.

See, also, 33 Cyc. pp. 171, 172.

§ 71. Exceptions and reservations in grants.

[a] (App. 1897)

A deed of land to a railroad company reserved a right to possession for one year of all the tract except a right of way, and, for two years, of "all that portion lying south of said right of way, unless the grantee shall desire all or any portion thereof, except that portion occupied by said brickyard, for railroad purposes." On the south part of the land there was a brickyard and clay bed already open. *Held*, that the grantor's possession for two years of the south part of the land was conditioned on the grantee not taking it for railroad purposes, but that the land occupied by the brickyard was reserved absolutely for two years, with the right to dig the clay from the opened bed.—*Elkhart & W. R. Co. v. Waldorf*, 46 N. E. 88, 17 Ind. App. 29.

[b] (App. 1903)

Where a deed conveying a right of way to a railroad company described a strip "forty feet in width from the center line of the road, measured on the north of said railroad," the grantor to have the privilege of fencing within 20 feet of the center line of said railroad after the same is finished, for the purpose of cultivation, the deed conveyed a right of way 40 feet in width from the center line, with the reservation of a license to cultivate the outside 20 feet thereof.—*Chicago & S. E. Ry. Co. v. Wood*, 66 N. E. 923, 30 Ind. App. 650.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 167.

See, also, 33 Cyc. pp. 172, 173.

§ 72. Covenants and conditions in grants.

Abandonment or forfeiture of land or rights, see post, § 82.

Acceptance of deed with covenants as constituting written contract by grantee within statute of limitations, see LIMITATION OF ACTIONS, § 24.

Affecting liability of railroad company for killing stock at private crossing, see post, § 413. Agreements as to fencing, as affecting liability for killing stock, see post, § 411.

Liability of purchaser of railroad, see post, § 129.

Liability of purchasers of road at foreclosure sale, see post, § 194.

Reversion to grantor on breach of condition, see post, § 82.

Scope of cross-examination in action for breach of covenant, see WITNESSES, § 268.

[a] (Sup. 1877)

A deed to a railroad company of a right of way contained the provision that the company should make a good fence along its roadway on such premises within a reasonable time after

the completion of its road. *Held*, that the word "completion" referred to that part of the road extending across the owner's land, and not to the whole line of railroad.—*Baltimore, P. & C. Ry. Co. v. McClellan*, 59 Ind. 440.

[b] (Sup. 1878)

A conveyance of a right to construct a railroad across the grantor's land, in consideration that the company would fence the road "in six months' time," does not oblige the company to fence until six months after completion of the road.—*Cincinnati, W. & M. R. Co. v. Harris*, 61 Ind. 290.

[c] (Sup. 1883)

A conveyance of a right of way for a railroad, the consideration of which is its maintenance and the maintenance of a depot on land adjoining, is a conveyance on condition subsequent.—*Cleveland, C., C. & I. R. Co. v. Coburn*, 91 Ind. 557.

[d] (Sup. 1885)

That a railroad company is in possession of a part of certain land, under a deed conveying to it a "right of way to have and to hold said rights and privileges to the use of said company so long as the same shall be required for the uses and purposes of said road," constitutes no breach of the covenant of title in a deed conveying the land, as the railroad company's deed conveys only an easement.—*Douglass v. Thomas*, 103 Ind. 187, 2 N. E. 562.

[e] (Sup. 1886)

Where a railroad company, in consideration of the grant of a right of way, contracts to build and maintain fences and crossings, it is its duty to comply with such contract within a reasonable time after it takes possession; and if it fails to do so, an action will lie against it for a breach thereof, in which the reasonable cost of erecting the fences and constructing the crossings may be recovered, although the plaintiff has not first done such work.—*Indiana, B. & W. Ry. Co. v. Koons*, 105 Ind. 507, 5 N. E. 549.

[f] (Sup. 1886)

The damages recoverable for the breach of a contract by a railroad to locate a depot at a certain place, in consideration for a conveyance of a right of way, have no relation to the value of the land conveyed. They are to be determined by the injury actually sustained by the failure of the railroad company to perform its contract. The damages which the law rewards when ascertainable with reasonable certainty is the value of the consideration withheld, and evidence tending to show the increase in value of the plaintiff's remaining land which the location of a station at the point agreed upon would have produced is admissible.—*Louisville, N. A. & C. Ry. Co. v. Sumner*, 5 N. E. 404, 106 Ind. 55, 55 Am. Rep. 719; *Same v. Moore*, 5 N. E. 413, 106 Ind. 600.

Where the right of way over land is granted to a railway company, by the owner, in con-

sideration of a covenant by the company to fence the same, the company is liable for special damages on the covenant, such as the value of cattle killed and the like, as well as for the cost of fencing, where there is a breach of such covenant on its part.—*Id.*

Where, in consideration of the grant of a right of way over land, a railroad company covenants to erect a depot at a particular place, the covenant is valid, and the company is liable for breach of it.—*Id.*

[g] (Sup. 1889)

The measure of damages for the breach of a covenant to fence the right of way conveyed to defendant by plaintiff is the cost of erecting the fence, and special damages for animals killed, injuries by trespassing animals, and loss of pasture, may also be recovered.—*Louisville, N. A. & C. Ry. Co. v. Power*, 119 Ind. 269, 21 N. E. 751.

[h] (Sup. 1890)

A conveyance of a railroad right of way recited, as the consideration thereof, the promise of the grantee to fence the grant. *Held*, that this promise ran with the land, so as to bind a subsequent grantee of the property and franchises of the company, in favor of a subsequent grantee of the farm through which the way was granted.—*Midland R. Co. v. Fisher*, 125 Ind. 19, 24 N. E. 756, 21 Am. St. Rep. 189, 8 L. R. A. 604.

[i] An agreement by a railroad company, in consideration of a grant to it of a right of way through a farm, to fence the right of way and build a crossing thereon, runs with the land.—(Sup. 1892) *Lake Erie & W. R. Co. v. Priest*, 131 Ind. 413, 31 N. E. 777; (1893) *Toledo, St. L. & K. C. R. Co. v. Cosand*, 6 Ind. App. 222, 33 N. E. 251; (1894) *Same v. Burgan*, 9 Ind. App. 604, 37 N. E. 31.

[j] (Sup. 1893)

Where a landowner and a railroad company stipulate that the latter may build its road across his land, and, when completed, that it will pay him the damages occasioned, the parties thereby dispense with the writ of *ad quod damnum*, and agree that the damages shall be ascertained by mutual stipulation; and the landowner may enforce payment by the company in an action to recover damages.—*Chicago & I. Coal Ry. Co. v. Hall*, 135 Ind. 91, 34 N. E. 704, 23 L. R. A. 231.

[k] (Sup. 1893)

Where a landowner conveys to a stone company a tract of land, together with a right of way over another tract, on which to construct a railway switch to connect the land granted with a certain railroad, in an action by such grantor against the railroad company for damages for using such switch for its own purposes the difference between the rental value of plaintiff's land with the right of way used only in connection with the land granted to the stone company, and the rental value

with the right of way used by defendant for its own purposes also, is the proper measure of damages.—*Louisville, N. A. & C. Ry. Co. v. Malott* (Ind. Sup.) 34 N. E. 709, 135 Ind. 113.

[I] (App. 1893)

In an action for breach of covenants to fence a railroad track, it is not error to admit evidence to show that plaintiff was deprived of the use of a pasture by defendant's failure to maintain fences and crossings.—*Toledo, St. L. & K. C. R. Co. v. Cosand*, 6 Ind. App. 222, 33 N. E. 251.

Where a deed to a railroad company is executed by several tenants in common, one of the grantors, who has become the sole owner of the fee by conveyances from his cotenants, may maintain an action for the breach of covenants to fence the track and maintain farm crossings.—*Id.*

[m] (App. 1893)

Plaintiff's father, in 1870, executed to defendant railroad company's predecessor, for a nominal consideration, a right of way 100 feet wide; the deed providing that "the estate granted hereby is upon condition that the strip of land aforesaid shall be used for said railroad purposes only, and when the same shall, after the road is constructed, cease to be used for such purpose, then the same shall revert" to the grantor. *Held*, that the company did not take a fee in the strip, but a mere floating easement, which only operated as a conveyance of title by the actual location of the road over the tract described.—*Lake Erie & W. R. Co. v. Ziebarth*, 6 Ind. App. 228, 33 N. E. 256.

[n] (App. 1894)

Where, on a conveyance of a right of way to a railroad company, it agreed to construct a crossing, it was not the duty of the landowner to maintain and keep the cattle guards and wing fences in repair.—*Toledo, St. L. & K. C. R. Co. v. Burgan*, 37 N. E. 31, 9 Ind. App. 604.

[o] (App. 1895)

In an action for violation by a railroad company of covenants, in a deed of a right of way, to provide the grantor with private ways over and under the railroad, evidence of what his land was worth without the crossings and what it would have been worth with them is admissible.—*Lake Erie & W. R. Co. v. Lee*, 14 Ind. App. 328, 41 N. E. 1058.

A deed of a right of way to a railroad company having provided for a private way on the grantor's farm under the railroad, and the grantor having, with the consent of the company, elected to accept such way over and on a public highway, the company cannot close it without liability for damages.—*Id.*

[p] (App. 1896)

Where a right of way is granted to a railroad company, in consideration of an agreement by the grantee, contained in the grant, "to build and maintain a good fence on the right of way

herein conveyed, immediately on the completion of the railroad," the duty of the company to build and maintain the fence is in the interest of the possessory title to the land; and where a tenant from year to year was in possession, when the grant was made, and so continued till a breach occurred, whereby he sustained damages, he may sue to recover the loss.—*Lake Erie & W. R. Co. v. Power*, 15 Ind. App. 179, 43 N. E. 959.

Where a right of way is granted to a railroad company, in consideration of an agreement by the grantee, contained in the grant, "to build and maintain a good fence on the right of way herein conveyed, immediately on the completion of the railroad," the duty of the company to build and maintain the fence is a continuing one, running with the land; and, if a failure to do so results in the loss of crops by the owner, he may recover damages.—*Id.*

[q] (App. 1899)

A covenant by a railroad company to build and maintain a good and sufficient fence inclosing the right of way, in consideration of a grant of the right of way, runs with the land.—*Lake Erie & W. R. Co. v. Griffin*, 53 N. E. 1042, 25 Ind. App. 138, 57 N. E. 722.

The actual loss in rental value, resulting from the breach of an agreement by a railroad company, in consideration of a grant of a right of way, to build and maintain a sufficient stock fence, though the only damage shown, is recoverable.—*Id.*

[r] (App. 1904)

A covenant by a railroad to erect and maintain a farm crossing, contained in a conveyance of a right of way to it, runs with the land, and is available for the protection of the grantor or his remote grantee against a railroad claiming under the conveyance.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Wilson*, 72 N. E. 666, 34 Ind. App. 324.

A covenant in a conveyance of land for a right of way in which the railroad agreed to make a farm crossing for the grantor imposed on the railroad the duty of erecting approaches to the crossing.—*Id.*

In determining whether a covenant by a railroad contemplated the maintenance as well as the making of a crossing, and whether the railroad accepted the conveyance, the nature of the subject-matter of the contract and the construction placed thereon by the parties may be considered.—*Id.*

A covenant in a conveyance of land for a right of way that the railroad would "make and maintain" a wire fence on both sides of the land conveyed, "and also make" a farm crossing, in pursuance of which the railroad did supply, maintain, and keep in repair a crossing for a number of years, obligated the railroad not only to make, but also to maintain, the crossing.—*Id.*

Evidence held sufficient to show the acceptance by a railroad of a conveyance of land for a right of way which contained a covenant on its part to erect and maintain a farm crossing.—*Id.*

Where a railroad covenanted in a deed for a right of way to erect a farm crossing, thereby impliedly covenanting to erect approaches thereto, the persons in whose favor the covenant existed were not bound to construct the approaches, on default of the railroad so to do, before resorting to their action against it.—*Id.*

In an action for breach by a railroad of a covenant in a deed for a right of way, whereby it agreed to erect a farm crossing, the measure of damages was the cost of the completion of the crossing, which the railroad had begun to make, but to which it had failed to build approaches, together with such sum as would compensate the covenantees for the loss of the use of their land by reason of the railroad's default during the period of such loss and down to the time of trial.—*Id.*

[s] (App. 1904)

The obligation under a contract by a railroad company to construct and maintain particularly described fences, cattle guards, etc., on its purchase of a right of way cannot be defeated on the ground that there was no consideration for the promises because the promisor was already bound in law to perform those acts.—*Chicago & S. E. Ry. Co. v. McEwen*, 71 N. E. 926, 35 Ind. App. 251.

[t] (App. 1906)

A covenant in a contract for the sale of land to a railroad for a right of way, by which the railroad agreed, before taking possession of the land, to construct a sufficient fence along the same as a condition precedent, operated as a covenant running with the land, for the failure to perform which the railroad was liable in damages to a tenant of a subsequent grantee of the adjoining land.—*Indianapolis Northern Traction Co. v. Harbaugh*, 38 Ind. App. 115, 78 N. E. 80; *Same v. Spurgeon*, 38 Ind. App. 702, 78 N. E. 1115.

It was immaterial that such covenant was not carried forward into a deed conveying such right of way to the railroad company.—*Id.*

[u] (App. 1909)

Where a landowner executed a deed of release to land to certain persons for a railroad right of way, the deed providing that it should be void if the grantees failed to construct and operate a railroad over the right of way within a certain time, such provision was for the sole benefit of the grantor, and the deed would become void on the failure of the grantees to perform such provision only at the election of the grantor.—*Polk v. Givens*, 90 N. E. 19.

A deed of release to certain persons for a railroad right of way, providing that the grantees should construct a railroad thereon within a certain time, and that the conveyance "is to

be assigned only to an incorporated company now in contemplation for the construction, ownership, and operation of said road, the same to be known by" a certain name, was made in trust for no one, but conveyed the right of way to the grantees, the provision for assignment imposing no obligation upon the grantees to assign it to such company, but being merely a limitation upon their right to make an assignment at all, and they were personally bound by the covenants contained in the deed.—*Id.*

The grantees being the legal owners of the right of way and in possession under their deed, they would be liable for a breach of its covenants, though a railroad company built the grade for a railroad thereon.—*Id.*

[v] (App. 1910)

Where a right of way contract required a railroad company to make a farm crossing together with all legal and equitable rights therein, if it afterwards raised its grade so as to render it impossible to construct a grade crossing and failed to provide an underground crossing, or, if it was practicable to make a grade crossing it failed to do so, the company was liable for damages resulting to the farm.—*Pittsburg, C., C. & St. L. Ry. Co. v. Wilson*, 91 N. E. 725.

Where defendant railroad company as the successor of another company to which a right of way was granted by deed binding it to provide a farm crossing used the right of way under the grant, it was bound by the covenant requiring the construction and maintenance of a crossing.—*Id.*

In an action against a railroad company for breach of a covenant to construct a farm crossing, the court instructed that plaintiff's measure of damages would be the cost of constructing a crossing, together with such an amount as would compensate him for loss of the use of the land, by failure to construct the crossing down to the time of trial and that, if it was necessary in constructing the crossing to extend the approaches thereto onto plaintiff's land, so as to damage it, such damages might also be recovered. *Held*, that the instruction was not erroneous as allowing double damages.—*Id.*

Under a covenant in a right of way deed requiring the railroad company to make a farm crossing, together with all legal and equitable rights claimed, etc., the railroad company was bound to make the crossing without any expense or loss to the landowner, so that, in an action for breach of such covenant, the taking of the landowner's land for approaches to a grade crossing was a proper element in consideration of assessing his damages.—*Id.*

A covenant in a right of way deed to a railroad company, requiring it to maintain a farm crossing, runs with the land.—*Id.*

In an action against a railroad company for breach of its covenant in its right of way deed to construct and maintain a farm crossing,

evidence was admissible to show the value of the farm with a crossing consisting of approaches extending onto plaintiff's land, and without such approaches; plaintiff being entitled to recover damages for the taking of his land for approaches.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 168-178.

See, also, 33 Cyc. pp. 173-184.

§ 73. Use of lands or rights acquired.

[a] A railroad company, after having obtained the right of way for its road, is entitled to the exclusive possession of such way, and stands to adjoining proprietors (where no statute has changed the relation) in the common relation existing between proprietors of lands bordering on each other.—(Sup. 1854) *Williams v. New-Albany & S. R. Co.*, 5 Ind. 111; (1856) *Smith v. Terre Haute & R. R. Co.*, 7 Ind. 553; (1856) *Terre Haute & R. R. Co. v. Jones*, 8 Ind. 183; (1882) *Pittsburgh, C. & St. L. Ry. Co. v. Jones*, 86 Ind. 496, 44 Am. Rep. 334.

[b] (Sup. 1882)

A railroad company has no right to cut ice from its right of way, since the ice belongs to the owner of the fee.—*Julien v. Woodsmall*, 82 Ind. 568.

[c] (Sup. 1883)

A railroad company, authorized by its charter to acquire lands in fee to a certain width for its right of way, which constructs its road across the land of a certain owner, and maintains it for nearly 20 years without instituting condemnation proceedings, or any objection or claim for damages being ever made by such owner, thereby acquires title to a strip of the full width allowed by its charter, and not merely of the width actually used by it; and the company may consent to or give the right to maintain a telegraph line anywhere within the limits of the full width allowed.—*Prather v. Western Union Tel. Co.*, 89 Ind. 501.

[d] (Sup. 1895)

A landowner granted a railroad a track right of way across a corner of his land, as far from his foundry as the track could be placed with due regard to the alignment of the road, in consideration of a transfer track by his foundry to the track of another road, or a spur track to such foundry. The company built its road and a spur track, and, at the grantor's request, changed the spur to a transfer track. As so built, the tracks were maintained for 10 years, during which time the transfer track was used specially for the foundry. *Held*, that a company which obtained control of both roads connected by the transfer track had no right to alter the location of such track and the main line on the grantor's land so as to make a main line between the two roads, though at times the company, with the grantor's acquiescence, transferred its cars across the transfer track, and stored its cars thereon.—*Wysor v. Lake Erie & W. R. Co.*, 143 Ind. 6, 42 N. E. 353.

[e] (Sup. 1903)

An injunction against the construction of a pipe line within the limits of the right of way of a railroad over demised land was properly denied the lessee, when at the time it was asked the line was nearly connected, about \$5,000 having been spent thereon, and the damage to the lessee was inconsiderable, since it could not use the right of way itself, and its right therein was merely a dry and technical one, not being the owner of the fee, so that damages would be an adequate remedy.—*Consumers' Gas Trust Co. v. American Plate Glass Co.*, 68 N. E. 1020, 162 Ind. 393.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 179-182.

See, also, 33 Cyc. pp. 185-190.

§ 74. Rights in and use of highways and public places.

Crossing highways, see post, §§ 92-99.

Liability of city for acts of railroad company operating under franchise from city, see **MUNICIPAL CORPORATIONS**, § 748.

Obstruction to access to property as ground for compensation to abutting owners, see **EMINENT DOMAIN**, § 106.

Occupation of highway as ground for compensation to abutting owners, see **EMINENT DOMAIN**, §§ 100, 119.

Power of city to change grade of street occupied by railroad, see **MUNICIPAL CORPORATIONS**, § 656.

Power of city to grant exclusive right, see **MUNICIPAL CORPORATIONS**, § 682.

Power of municipality to grant right to use streets, see **MUNICIPAL CORPORATIONS**, §§ 680, 681.

Railroad in street or highway as additional servitude, see **EMINENT DOMAIN**, § 119.

Special assessments for public improvements, see **MUNICIPAL CORPORATIONS**, §§ 413, 425.

Subjects and titles of acts, see **STATUTES**, § 123.

Vacation of street for benefit of railroad company, see **MUNICIPAL CORPORATIONS**, § 657.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 183-203.

See, also, 33 Cyc. pp. 191-212.

§ 75. — Grant in general.

[a] (Sup. 1852)

Where the legislature has authorized a company to construct a railroad between two designated points, it has a right to occupy any land, purchased by the state for the use of a deaf and dumb educational institution, between those points on the authorized route, which may be necessary for their purpose.—*Indiana Cent. Ry. Co. v. State*, 3 Ind. 421.

[b] (Sup. 1890)

Though an abutting owner has a proprietary right in the street of which he cannot be deprived without compensation, a grant by a municipal corporation to a railroad company

permitting the latter to construct its track on the street transfers no proprietary rights of the abutter, and in granting such a privilege a city exercises a power delegated to it by the sovereign, and it is not liable for exercising such power.—*Burkam v. Ohio & M. Ry. Co.*, 23 N. E. 799, 122 Ind. 844.

[c] (Sup. 1900)

A railway company's construction of its tracks in a street, and their continued and peaceable use for 30 years with the knowledge and acquiescence of the municipality, raise a conclusive presumption of a grant.—*Town of Newcastle v. Lake Erie & W. R. Co.*, 57 N. E. 516, 155 Ind. 18.

Rev. St. 1881, § 3903 (Horner's Rev. St. 1897, § 3903; Burns' Rev. St. 1894, § 5153), authorizing any railroad company to construct its road upon or across any highway which it intersects, but requiring it to restore any highway so intersected, does not give a railway company the right to construct its road longitudinally on streets without the consent of the municipality.—*Id.*

[d] (Sup. 1907)

Acts 1879, p. 175, empowering a street railroad or other company organized for similar purpose to extend its railway on highways, without any mention of railway crossings, is sufficiently broad to cover an interurban railroad, and authorize it to build on a public highway, though in doing so a railroad crossing must be made.—*South East & St. L. R. Co. v. Evansville & M. V. Electric R. Co.*, 169 Ind. 339, 82 N. E. 765, 13 L. R. A. (N. S.) 916.

[e] (Sup. 1909)

The grant to a railroad of the right to lay its tracks in a street is justifiable only upon the theory that a railroad is, in a sense, a public highway.—*Grand Trunk & W. Ry. Co. v. City of South Bend*, 89 N. E. 885.

[f] (Sup. 1910)

The fact that a railroad company acting under a city ordinance laid a double track along a portion of a street, and used the same for nearly 30 years without complaint or inconvenience, will not prevent the city, in the exercise of its police power, from prohibiting the laying of a double track along another portion of the same street.—*Grand Trunk Western Ry. Co. v. City of South Bend*, 91 N. E. 809, denying rehearing, *Grand Trunk & W. Ry. Co. v. Same* (1909) 89 N. E. 885.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 183-191.

See, also, 33 Cyc. pp. 191-204.

§ 76. — Nature and extent of right.

[a] (Sup. 1882)

A grant to a railroad company of the use of a street for receiving and discharging freight and passengers impliedly authorized the company to construct the side tracks and switches

in the street as well as its main track.—*State v. Louisville, N. A. & C. Ry. Co.*, 86 Ind. 114.

[b] (Sup. 1891)

An ordinance granting a railroad company the right to build its road in a street provided that the company should grade the street, and that "the line of the railroad shall be located so as not to approach the sidewalk curbstone nearer than 15 feet." *Held*, that the words, "line of the railroad," did not mean the extreme limit, including ties and grade, or the center or thread of the track, but referred to the rails, they being the only part of the road raised above the grade of the street.—*Chicago, St. L. & P. R. Co. v. Eisert*, 127 Ind. 156, 26 N. E. 759.

A railroad company, which has located a single track along a city street under an ordinance granting it the right to construct its railroad along the street within certain limits, and under general proceedings of appropriation in which damages were assessed to adjacent landowners, is not restricted to one track, but has the right to construct additional tracks if required by its business, if there is sufficient room to do so within the prescribed limits, without paying additional damages.—*Id.*

[c] (App. 1897)

The public is not deprived of its easement in a public highway by the admission of a railroad company to the use of such highway.—*Louisville, N. A. & C. Ry. Co. v. Downey*, 47 N. E. 494, 18 Ind. App. 140.

[d] (App. 1902)

A railroad company, in accepting an easement from a city council to construct its track along a street, takes it subject to the limitation of the law not to construct or maintain anything which would permanently interfere with the rights of private persons, as well as subject to the express limitations of the ordinance authorizing the construction, which required sufficient culverts.—*Kelly v. Pittsburgh, C., C. & St. L. Ry. Co.*, 63 N. E. 233, 28 Ind. App. 457, 91 Am. St. Rep. 134.

[e] (App. 1910)

Occupancy by a railroad of so much of a street as is covered by its tracks for more than 20 years raises the presumption of a grant confined to the land actually held.—*Chicago, I. & L. Ry. Co. v. Johnson*, 90 N. E. 507.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 195, 196, 199, 201.

See, also, 33 Cyc. pp. 204, 205.

§ 77. — Interference with use.

[a] (Sup. 1856)

By city ordinance a railroad was authorized to be constructed through the corporate limits on either of two streets, under various restrictions as to grade, etc., to be subsequently regulated. *Held*, that by this ordinance the city vested, so far as it could, the right in the

corporation to run the road along the street, but so to do it as not to obstruct the street for the adjoining proprietors.—*Tate v. Ohio & M. R. Co.*, 7 Ind. 479, 485; *Hutton v. Indiana Cent. Ry. Co.* Id. 522.

[b] (App. 1910)

Though a city may not remove a railroad track which has remained in a street for more than 20 years, it may, under *Burns' Ann. St.* 1908, § 8655, defining the powers of cities, require the track to be straightened and put on the center of the street, where the track, as maintained, interferes with the general use of the street by the public.—*Chicago, I. & L. Ry. Co. v. Johnson*, 90 N. E. 507.

[c] (Sup. 1910)

The court cannot say that an ordinance is unreasonable which would restrict the number of railroad tracks on a street for a distance of three or four squares to one track, when more than one might tend to interfere with the free use of the street by the general public, or affect the security of life or property.—*Grand Trunk Western Ry. Co. v. City of South Bend*, 91 N. E. 809, denying rehearing, *Grand Trunk & W. Ry. Co. v. Same* (1909) 89 N. E. 885.

FOR CASES FROM OTHER STATES.

SEE 41 CENT. DIG. R. R. §§ 197, 198.

See, also, 33 Cyc. pp. 206–208.

§ 79. — Remedies by and against companies.

[a] (Sup. 1882)

A railroad company, having the right to use streets in a town, cannot be charged with maintaining a public nuisance, where the obstruction caused by their tracks, switches, cars, etc., is no greater than is required by a reasonable use.—*State v. Louisville, N. A. & C. Ry. Co.*, 86 Ind. 114.

[b] (Sup. 1900)

In an action by a city to compel a railway company to remove its tracks from its streets, an answer is not demurrable, as not meeting the complaint, because it does not deny the use of the tracks for switching and storage purposes, where defendant claimed a lawful right to use the streets, and the complaint did not show any use of the street that would be unlawful, except on the basis that defendant had no right to the street.—*Town of Newcastle v. Lake Erie & W. R. Co.*, 57 N. E. 516, 155 Ind. 18.

[c] (App. 1909)

Where a decree declared certain parts of a railroad's right of way to be public streets, and that the title to the remainder of the right of way should be quieted in the company, a provision that neither party should erect any barriers between O. and I. streets to prevent free access to the railroad's depot or to the streets, did not open the whole of the right of way between O. and I. streets to the public as a street,

nor prevent the railroad company from inclosing it as private property so as not to prevent free access to the streets of the town or to the depot, though the public would be confined to the town's established streets.—*Pittsburg, C., C. & St. L. Ry. Co. v. Town of Remington*, 89 N. E. 614.

[d] (Sup. 1909)

An allegation of the complaint, in an action to enjoin a city from preventing plaintiff railroad company from constructing a second track in a street, that the street was of a certain width, included the sidewalks in the width stated.—*Grand Trunk & W. Ry. Co. v. City of South Bend*, 89 N. E. 885.

An allegation of the complaint, in an action to enjoin a city from preventing a railroad company from constructing a second track in a street, that the obstruction to public travel will be less with two tracks in the street than with one, alleged an obvious untruth, and hence was ineffectual.—Id.

[e] (Sup. 1910)

In an action to restrain a city from interfering with a railroad company in its attempt to lay a second track upon a street, the complaint alleged that on January 1, 1881, a double track was laid on D. street between the river and M. street, and has ever since been used by plaintiff, that by ordinance of October 14, 1901, it was attempted to repeal so much of the ordinance under which the tracks were laid as gives the right to a second track in said D. street, and that upon an attempt being made by plaintiff on October 6, 1902, to lay a track west on D. street to T. street, it was prevented. *Held*, that the only question involved was that of the laying of an additional track, and that the right of plaintiff to use the portion of the street already occupied by it with double tracks was not involved.—*Grand Trunk Western Ry. Co. v. City of South Bend*, 91 N. E. 809, denying rehearing, *Grand Trunk & W. Ry. Co. v. Same* (1909) 89 N. E. 885.

[f] (App. 1910)

In a suit to prevent a railroad company from erecting a fence on its right of way, a complaint alleging that the fence which defendant wished to erect would prevent free access to defendant's depot and to the streets, and that by erecting the fence defendant would commit a great and lasting injury to plaintiff town that could not be compensated in damages was not demurrable for want of facts. Rehearing (1909) 89 N. E. 614, denied.—*Pittsburg, C., C. & St. L. Ry. Co. v. Town of Remington*, 91 N. E. 249.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 192, 193, 202, 203.

See, also, 33 Cyc. pp. 202–204.

§ 80. Rights in and use of road or land of other railroad.

Conflicting locations, *see ante*, § 55.

[a] (Sup. 1891)

A railroad company which has allowed another company to cross its land which was neither acquired nor used by it for any public use cannot afterwards enjoin the latter company from laying a side track on said land within the limits of its right of way.—*Chicago, St. L. & P. R. Co. v. Cincinnati, W. & M. Ry. Co.*, 126 Ind. 513, 26 N. E. 204.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 204-208.

See, also, 33 Cyc. pp. 213-218.

§ 82. Abandonment and forfeiture of land or rights.

[a] (Sup. 1871)

The Columbus & Shelby Railroad Company procured a right of way to run from the track of the Madison and Indianapolis Railroad company through the streets of the city of Columbus toward Shelbyville, and subsequently, under a running arrangement with said Madison and Indianapolis Railroad Company, gave the control of its road to that company, and by that company, and with the consent of the Columbus & Shelby Company (the track through the street still remaining), the road superstructure of the Columbus & Shelby Company adjoining the city was removed for the distance of a mile beyond the city, and the remaining track to Shelbyville was connected with the road of the Madison & Indianapolis Railroad Company around said city through lands, with the owner of which the latter company contracted to procure a release for him from the Columbus & Shelby Company of the right of way over the land where the superstructure was removed. *Held*, that this did not constitute an abandonment of the right of the Columbus & Shelby Railroad Company to maintain a track through the streets of Columbus.—*City of Columbus v. Columbus & Shelby R. Co.*, 37 Ind. 294.

[b] (Sup. 1879)

On the removal of a depot from a lot conveyed to the company "in consideration of the permanent location and construction of the depot" thereon, the lot reverts to the grantor.—*Indianapolis, P. & C. R. Co. v. Hood*, 66 Ind. 580.

[c] (Sup. 1883)

In a conveyance reciting that it was made "expressly for the use and purpose of depot grounds," a condition that the land should revert if there should be a failure to erect buildings and occupy the land for that purpose will be deemed performed, and a forfeiture not enforced, where, after the erection of buildings and the use of the land for the purpose specified for 33 years, a new location is selected, and the land no longer used for depot grounds.—*Jeffersonville, M. & I. R. Co. v. Barbour*, 89 Ind. 375.

[d] (App. 1893)

Plaintiff's father, in 1870, executed to defendant railroad company's predecessor, for a nominal consideration, a right of way 100 feet wide; the deed providing that "the estate granted hereby is upon condition that the strip of land aforesaid shall be used for said railroad purposes only, and when the same shall, after the road is constructed, cease to be used for such purpose, then the same shall revert" to the grantor. Defendant procured a right of way over adjoining land, and put its road there, and the grantor and his heirs were left in absolute control and possession of all the land until in 1889, when defendant assumed to take a portion of the land, under the deed of 1870, for the construction of a switch. *Held*, that defendant was estopped from asserting any easement under its deed against a bona fide purchaser.—*Lake Erie & W. R. Co. v. Ziebarth*, 6 Ind. App. 228, 33 N. E. 256.

An instruction that, "where there has been a conveyance of real estate upon conditions stated in the instrument of conveyance, there can be no forfeiture of the grant or conveyance until a proceeding has been brought in some court of competent jurisdiction, and a decree entered of such court, declaring a forfeiture," was properly refused, when there was no grant of a fee, but only a right of way.—*Id.*

[e] (App. 1903)

Where a deed to a railroad of a right of way reserved to the grantor a license to cultivate the outside 20 feet of the land conveyed, the fact that the railroad company erected a fence excluding such 20 feet did not constitute an abandonment of such strip.—*Chicago & S. E. Ry. Co. v. Wood*, 66 N. E. 923, 30 Ind. App. 650.

[f] (Sup. 1909)

An ordinance, enacted by a city, the common council of which was given exclusive power over its streets by Rev. St. 1881, § 3161, authorizing a railroad company to lay two tracks in a street, the right to do which was not attempted to be exercised for more than 35 years thereafter, did not relate to the administrative functions of the city, but was legislative in character, and made subject to the future exercise of the city's police power, so that it could revoke such right any time it decided that the public interest demanded it, unless it acted fraudulently, arbitrarily, or unreasonably in doing so.—*Grand Trunk & W. Ry. Co. v. City of South Bend*, 89 N. E. 885.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 213-219.

See, also, 33 Cyc. pp. 221-227; note, 42 C. C. A. 576; note, 1 L. R. A. (N. S.) 806.

VI. CONSTRUCTION, MAINTENANCE AND EQUIPMENT.

Compliance with conditions of grant of public aid, *see ante*, § 35.

Construction on Sunday as work of necessity, see **SUNDAY**, § 7.

Criminal responsibility for creating public nuisance, see *ante*, § 12.

Estoppel by permitting instruction, see **ESTOPPEL**, § 93.

Liability of railroad company for injuries to employes from defects in cars, locomotives, tracks, or roadbed, see **MASTER AND SERVANT**, §§ 105, 106, 111, 112, 129, 210, 217, 219, 220, 233-236.

Restraining construction of railroad, see **INJUNCTION**, § 67.

Restraining railroad from making excavations, laying tracks and placing switches over land of another, see **INJUNCTION**, § 50.

§ 86. Plan and mode of construction in general.

Mandamus to compel certain mode of construction, see **MANDAMUS**, § 132.

Mandamus to compel performance of contract relating to, see **MANDAMUS**, § 138.

Special assessments against abutting property for improvement of street occupied by railroad track, see **MUNICIPAL CORPORATIONS**, § 413.

[a] (*Sup.* 1856)

By a city ordinance a railroad was authorized to be constructed through the corporate limits under various restrictions as to grade, to be subsequently regulated. *Held*, that the road should be constructed on the grade of the street unless some alteration was made by municipal regulation.—*Tate v. Ohio & M. R. Co.*, 7 Ind. 479, 485; *Hutton v. Indiana Cent. Ry. Co.*, Id. 522.

[b] (*Sup.* 1870)

A city granted to a railroad company the right to construct its railroad upon the streets by an ordinance containing a provision that, where the grade of said railroad should be higher than the street, said company should "fill up each side of their said road, to form a convenient passage over the same." The company erected an embankment upon which it placed its track; and the city caused the remainder of the width of said street to be filled up and graded level with the embankment and the railroad, the company having refused to do so. *Held*, in an action by the city against said railroad company to recover the expense of the work, that it was no defense to say that said street at the time of the construction of said railroad was unimproved, and had neither sidewalks nor gutters and had never been graded or paved, or to say that, after the building of the railroad and before the filling up of the street by the city, the part of the street so filled up was in as good condition for passage or travel as before the building of the railroad.—*Indianapolis & C. R. Co. v. City of Lawrenceburg*, 34 Ind. 304.

[c] (*App.* 1906)

The obstruction of a stream, water course, road, railroad, or canal, by the construction of

a railroad upon or across it so as to interfere with its free use, is beyond the power of any railroad corporation.—*Graham v. Chicago, I. & L. Ry. Co.*, 39 Ind. App. 294, 77 N. E. 57, 1055.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 227-231, 233.

See, also, 33 Cyc. pp. 234-237.

§ 87. Roadbed and tracks.

Defects causing injuries, see *post*, §§ 289, 362. Special assessments against abutting property for improvement of street occupied by railroad track, see **MUNICIPAL CORPORATIONS**, § 413.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 232.

See, also, 33 Cyc. pp. 237, 238.

§ 88. Crossing other railroads.

Connections with other roads, see *ante*, § 51. Construction of special or local laws, see **STATUTES**, § 246.

Injunction to restrain crossing, see **INJUNCTION**, § 137.

Proceedings of railroad commission, see *ante*, § 9.

Right of street railroad company to cross railroad, see **STREET RAILROADS**, § 41.

Subjects and titles of acts, see **STATUTES**, § 123.

Use of right of way, see *ante*, § 80.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 234-259.

See, also, 33 Cyc. pp. 240-257.

§ 89. — Right to cross.

[a] (*Sup.* 1877)

The act of June 18, 1852 (1 Rev. St. 1876, p. 711), supplemental to the act of May 11, 1852 (1 Rev. St. 1876, p. 696), providing "for the incorporation of railroad companies," in so far as it forbids railroad companies organized under the latter act from crossing or intersecting railroads terminating in cities of the class specified in its first section, at certain points, is special in its character and against public policy, and should be construed so as not to apply to a railroad of the latter class, which, under the provisions of the act of February 21, 1863 (1 Rev. St. 1876, p. 723), authorizing "railroads to make extensions," etc., has since so extended its road as to carry its terminus beyond the corporate limits of the city within which it had theretofore been, and, where such railroad company has so extended its road, it may not only consent to, but aid in, the construction of a railroad by another company, crossing or intersecting the road of the former, at a point prohibited by such supplemental act.—*Aurora & C. R. Co. v. City of Lawrenceburg*, 56 Ind. 80.

[b] (*Sup.* 1900)

A railway company, having become the owner of a canal, and laid its track along the

towpath of same, brought an action to enjoin certain other railway companies, that had maintained a bridge over the canal, from appropriating the towpath below the bridge, alleging that it was the owner and in possession of the ground below the bridge, and that defendants were forcibly and without right attempting to appropriate the same. *Held*, that the action did not involve the question of plaintiff's right to a railroad crossing.—*Peoria & E. Ry. Co. v. Attica, C. & S. Ry. Co.*, 56 N. E. 210, 154 Ind. 218.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 234-239.

See, also, 33 Cyc. pp. 240-244.

§ 90. — Place, mode, and expense of crossing.

[a] (*App.* 1903)

Burns' Rev. St. 1901, § 5153, subds. 5, 6, confer on railroad companies the right to cross the tracks and rights of way of other companies. Section 5158a (*Acts* 1897, p. 237) provides that, where it becomes necessary for the tracks of one railroad to cross the track of another, "unless the manner of making such crossing shall be agreed to between such companies," it shall be the duty of the Circuit Court to ascertain and define by its decree the mode of such crossing which will inflict the least practicable injury to the road intended to be crossed, etc. *Held*, that under the statutes the railroads have a right to agree as to the manner of making a crossing without going into court at all, and the mere commencement of an action by one road to condemn a crossing over another would not prevent them from afterwards entering into such an agreement fixing their rights.—*Baltimore & O. R. Co. v. Wabash R. Co.*, 67 N. E. 544, 31 Ind. App. 201.

Plaintiff railroad commenced proceedings to acquire the right to build its tracks across those of defendants. An agreement was entered into by the parties for the submission to commissioners of the question whether an overhead crossing, or one at grade, should be made. *Held*, that a crossing by carrying the tracks of plaintiff company under those of defendant companies was not within the meaning of the agreement.—*Id.*

When a railroad in process of building commences proceedings to acquire the right to cross tracks of an operating railroad, the crossing over grade or under grade or at grade refers to the crossing by the new road of the old.—*Id.*

[b] (*App.* 1907)

A railroad company, in consideration of the privilege of crossing the tracks of another company, bound itself to put in and maintain sufficient frogs and crossings, so that the latter could "operate its road at that point with convenience and safety," and to erect and maintain semaphores at the crossing. *Held*, that the contract did not contemplate the construction of interlocking switches and signals erected at far

distant points from the intersection.—*Grand Trunk Western Ry. Co. v. Railroad Commission of Indiana*, 40 Ind. App. 168, 81 N. E. 524.

Private contracts between railroad companies as to the maintenance of crossings cannot preclude the right of the state to enact and enforce laws regulating the location, erection, and maintenance of interlocking switches at railroad crossings.—*Id.*

A contract between railroad companies, by which one company agrees to construct a crossing over the other's track in a good and substantial manner so that the other company can operate its road with convenience and safety, relates to the manner in which the crossings should be constructed, and not to the manner of guarding it.—*Id.*

[c] (*Sup.* 1908)

Acts 1903, p. 125, c. 59, § 5, provides that, if any street railroad, interurban or suburban railroad, and a railroad company shall fail to agree to a change of any existing grade crossing to a crossing above or below grade, either company may carry the subject to a Circuit or the Superior Court, "and, if the court shall find it is practicable" to change the grade crossing to one above or below grade, it shall order that the change be made. *Held*, that the phrase "if the court shall find it is practicable" implies a legal discretion and the exercise of judgment based upon the whole evidence of all the facts that affect the question of practicability within the usual and ordinary sense of the word.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Indianapolis, C. & S. Traction Co.*, 169 Ind. 634, 81 N. E. 487.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 240-248.

See, also, 33 Cyc. pp. 245-252.

§ 91. — Determination as to necessity, place, mode, and expenses of crossing.

Appellate jurisdiction as between particular state courts, see *COURTS*, § 220 (2).

Appellate jurisdiction as dependent on whether constitutional question is involved, see *COURTS*, § 220 (7).

Appeal from decision of railroad commissioners, see *ante*, § 9.

Decisions reviewable, see *APPEAL AND ERROR*, § 73.

[a] (*Sup.* 1888)

Rev. St. 1881, § 3903, subd. 6, grants to a railroad company power to cross, intersect, join, and unite its railroad with any other railroad before constructed, and provides that, if the two corporations cannot agree upon the amount of compensation or the points or manner of such crossings and connections, the same shall be ascertained and determined by commissioners, etc. In a proceeding by a railroad under such section the complaint or instrument of appropria-

tion recited: "Having located the line and route of its said proposed extension of road over the lands and premises hereinafter described and having attempted and failed, and being unable to agree with respondent in regard to the terms of, or in regard to the compensation therefor," the plaintiff did take and appropriate said way. *Held*, that the effort to agree must be made on three points: Compensation, points of crossing, and manner of crossing and the connections, and that the word "terms" as used in such instrument of appropriation was not broad enough to cover such three points.—*Lake Shore & M. S. Ry. Co. v. Cincinnati, W. & M. Ry. Co.*, 19 N. E. 440, 116 Ind. 578.

[b] (Sup. 1903)

Since *Burns' Rev. St.* 1901, §§ 5458a, 5458b, fixes the liability on a railroad company last constructed to pay the expense of establishing a crossing over the line of another railroad, the railroad commissioners, in a proceeding to establish such crossing, are not authorized to determine which of the corporations in question shall pay such expense.—*Wabash R. Co. v. Ft. Wayne, etc., Traction Co.*, 67 N. E. 674, 161 Ind. 295.

[c] (Sup. 1904)

Burns' Rev. St. 1901, § 5160, provides that on the filing of papers by one railroad company seeking to appropriate a right of way across the line of another company the Circuit Court shall appoint appraisers, and on payment of the award by the company seeking the right "it shall be lawful for such corporations to hold the interests in such lands for the uses aforesaid," but the award may be reviewed, and that pending such appeal such company may take possession of the property, and the subsequent proceedings on appeal shall only affect the amount of compensation. A complaint by a railroad company against another demanded a crossing at grade, and the court ordered the defendant to make its road straight for 100 feet on each side of the crossing, which involved the elimination of a curve and the lowering of the outside rails $2\frac{1}{2}$ inches. *Held* that, if the complaint did not imply a demand for such an order, it was at most voidable only, and the complainant was entitled to possession pending a review, and could not be enjoined from constructing the crossing.—*Cincinnati, R. & M. R. Co. v. Wabash R. Co.*, 70 N. E. 256, 162 Ind. 303.

One railroad company filed an instrument of appropriation to secure a right of way across another railroad, on which commissioners were appointed and an award made, which the defendant company sought to review by filing exceptions in the Circuit Court. *Held*, that the propriety of the rulings to be reviewed could not be raised on a bill by the defendant company to enjoin the construction of the crossing pending the review.—*Id.*

[d] (Sup. 1905)

The General Assembly has the power to require such interlocking works at railroad cross-

ings as will preserve the safety of the public.—*Chicago, I. & L. R. Co. v. Indianapolis & N. W. Traction Co.*, 165 Ind. 453, 74 N. E. 513.

[e] (App. 1907)

The railroad commission, in apportioning the expense of an interlocking system between two railroads, is bound by the same rules of law and justice that would govern a court in deciding the same question, and cannot ignore a contract between the companies fixing their respective duties as to the crossing.—*Grand Trunk Western Ry. Co. v. Railroad Commission of Indiana*, 40 Ind. App. 168, 81 N. E. 524.

[f] (Sup. 1908)

In a proceeding by a steam railroad to compel an interurban railroad to change a grade crossing to one above or below grade, evidence examined, and *held* sufficient to sustain a judgment for the defendant.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Indianapolis, C. & S. Traction Co.*, 169 Ind. 634, 81 N. E. 487.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 249-259.

See, also, 33 Cyc. pp. 252-257.

§ 92. Crossing highways.

Judicial notice of history of, see EVIDENCE, § 11.

Liability of railroad company for injuries from defects in crossings, see post, § 303.

Mandamus to compel, see MANDAMUS, § 3.

Mandamus to compel construction in certain manner, see MANDAMUS, § 132.

Motion to make pleading more definite and certain in action to compel railway company to construct highway crossing, see PLEADING, § 367.

Requiring railroad companies to light tracks, see post, § 238.

Statutory and municipal regulations as to movement of trains over crossings, see post, §§ 242, 243.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 260-304.

See, also, 33 Cyc. pp. 258-290.

§ 94. — Place, mode, and expense of crossing.

[a] (Sup. 1884)

Under *Rev. St.* 1881, § 3915, providing that whenever the track of a railroad shall cross a road or highway, the latter may be carried under or over the track as may be most expedient, and that where a change in the road is desirable additional lands may be taken, the old highway may be filled up and a new one made.—*Clawson v. Chicago & G. S. Ry. Co.*, 95 Ind. 152.

[b] (App. 1896)

A prescriptive right to maintain a culvert through the embankment of a highway cannot be based on the failure of the public authorities to object to its maintenance, where it in no way interfered with the use of such highway.—

Terre Haute & I. R. Co. v. Zehner, 15 Ind. App. 273, 42 N. E. 736.

[c] (Sup. 1902)

Railroad companies at all times must keep the highways where they are crossed by the railroad in such condition and repair as not to impair their usefulness, and, if it cannot be done by a grade crossing, the company must do it by carrying its tracks either over or under the highway or the highway over or under its tracks, and the duty of restoring and maintaining the free and safe use of the highway includes whatever is necessary to accomplish that object, which is rendered necessary by reason of the construction of the railroad.—*Chicago, I. & L. Ry. Co. v. State ex rel. Zimmerman*, 63 N. E. 224, 158 Ind. 189.

[d] (Sup. 1903)

Under Burns' Rev. St. § 3794 (Indianapolis City Charter, § 23), providing that the common council shall have power to declare what shall constitute a nuisance, require its abatement, secure the safety of citizens in the running of trains in and through the city, require corporations operating railroads to construct street crossings and viaducts and provide protection against injury to persons from the operation of railroads, require railroad companies to change the location, grade, and crossings of their roads, and to raise or lower their tracks to conform to any grade which may be established, etc., the city has no power to pass an ordinance requiring all railroads operating within the corporate limits to construct elevated tracks over all crossings within a prescribed district, without regard to the conditions or circumstances of any particular crossing.—*State ex rel. City of Indianapolis v. Indianapolis Union Ry. Co.*, 66 N. E. 163, 160 Ind. 45, 60 L. R. A. 831.

[e] (Sup. 1908)

Under Burns' Ann. St. 1901, § 5153, requiring, as interpreted by the Supreme Court, a railroad company, at its own expense, to do whatever the conditions present at each particular place require to be done to render a highway crossing suitable and reasonably safe, a railroad company will be required when necessary to carry its railroad over or under the highway, as the case may be.—*Cincinnati, I. & W. Ry. Co. v. City of Connersville*, 170 Ind. 316, 83 N. E. 503.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 266-273.

See, also, 33 Cyc. pp. 260-268.

§ 95. — Restoring and maintaining highway.

Highway laid out after construction of railroad, see post, § 96.

Liability for injuries from failure to maintain, see post, § 303.

[a] (Sup. 1871)

A writ of mandate will lie to compel a railroad company, having its track along or

across the streets or alleys of a city, so to construct, level, and grade the embankments, side tracks, and switches and street and alley crossings to their whole width, as to render the use of the streets and alleys and the crossings of the track easy and convenient to the public.—*Indianapolis & C. R. Co. v. State ex rel. City of Lawrenceburg*, 37 Ind. 489.

[b] (Sup. 1888)

Under Rev. St. 1881, § 3903, providing that a railroad corporation may construct its road across any highway, but it shall restore the highway to its former state or in a sufficient manner not to unnecessarily impair its usefulness, a railroad company is authorized to build and maintain its track over a highway, but it becomes its duty to restore the highway to its former state or in a sufficient manner not to unnecessarily impair its usefulness, and the performance of such duty by the railroad company may be compelled by mandate.—*Cummins v. Evansville & T. H. R. Co.*, 18 N. E. 6, 115 Ind. 417.

[c] (Sup. 1895)

It is the duty of a railroad company which constructs its lines across a highway to restore it to its former state, so far as possible.—*Lake Shore & M. S. Ry. Co. v. McIntosh*, 140 Ind. 261, 38 N. E. 476.

[d] (App. 1897)

Noncompliance with *Horner's Rev. St. 1897, § 3903 (Rev. St. 1894, § 5153)*, requiring a railroad company constructing its road over a highway to restore it to its former condition, and not impair its usefulness or safety, is shown by a special verdict finding that the tracks intersected the highway at right angles, and that the filling at the crossing was about 7 feet above the original surface of the ground; that the highway, as elevated by defendant, was only 12 to 15 feet wide, and had sloping sides, without guards, and a ridge in the center between the wagon ruts; and that the surface sloped to one side, and at the time of the injury was covered with snow and ice, causing plaintiff's wagon to slip down the embankment.—*Seybold v. Terre Haute & I. R. Co.*, 46 N. E. 1054, 18 Ind. App. 367.

[e] (Sup. 1898)

Failure by an incorporated town to enact an ordinance for the improvement of its streets, and to fix the grade thereof, does not relieve a railroad company of the duty imposed by law to properly construct street crossings over its tracks.—*Evansville & T. H. R. Co. v. State ex rel. Town of Ft. Branch*, 49 N. E. 2, 149 Ind. 276.

In a proceeding to compel a railroad company to construct crossings at streets, where the complaint alleged that respondent built, operated, and maintained its tracks along and across certain streets, it was sufficient to prove that it either built or operated and maintained its tracks across such streets, or either of them,

and it was immaterial when or how they became such streets.—Id.

[C] (Sup. 1906)

A railroad which acquired a right of way for a switch track some 25 or 30 years since, and has maintained and always claimed ownership of the track, and has used the same almost daily for many years, and which cannot show that any one else owned the track, will be deemed to own the track in such sense as to require it to maintain in repair a sidewalk crossing the track.—*Cleveland, C., C. & St. L. Ry. Co. v. Miller*, 74 N. E. 509, 163 Ind. 381.

[g] (Sup. 1906)

A municipal ordinance granting a railroad a right of way to streets, but requiring it to grade the crossings and maintain them in a safe and convenient manner, is declaratory of the law (*Burns' Ann. St. 1901, § 5172a; Acts 1895, p. 233, § 1*), and such company's duty therein is not wholly contractual.—*Vandalia R. Co. v. State ex rel. City of South Bend*, 166 Ind. 219, 76 N. E. 980, 117 Am. St. Rep. 370. Writ of error dismissed (1907) 207 U. S. 359, 28 S. Ct. 130, 52 L. Ed. 246.

[h] (App. 1906)

Under Rev. St. 1881, § 3903 (*Burns' Ann. St. 1901, § 5153*), it becomes the duty of a railroad company intersecting an established highway to restore the highway to its former state or in a manner sufficient to afford security for life and property.—*Southern Indiana Ry. Co. v. Corps*, 37 Ind. App. 586, 76 N. E. 902.

[i] (Sup. 1908)

The duty of a railroad company under *Burns' Ann. St. 1901, § 5153*, to construct and keep in repair highway crossings, implies the obligation to defray the expenses and costs of such construction and repairs.—*Cincinnati, I. & W. Ry. Co. v. City of Connersville*, 170 Ind. 316, 83 N. E. 503.

[j] (Sup. 1909)

Burns' Ann. St. 1901, § 5153, cl. 5 (*Burns' Ann. St. 1908, § 5195, cl. 5*), imposing certain duties on railroad companies relative to highway crossings, does not depend for its validity on the police power, but is valid because the state has the power to provide the conditions on which railroads acquire their right of way.—*New York, C. & St. L. R. Co. v. Rhodes*, 171 Ind. 521, 86 N. E. 840, 24 L. R. A. (N. S.) 1225.

[k] (Sup. 1910)

It is the duty of railroads which cross a highway to restore the same to its former condition of usefulness and safety, even in the absence of an express statutory requirement.—*Chicago & E. R. Co. v. Luddington*, 91 N. E. 939.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 274-283.

See, also, 33 Cyc. pp. 270-281; note, 19 L. R. A. 510.

§ 96. — Highway laid out after construction of railroad.

[a] *Burns' Rev. St. 1901, § 5153, cl. 5* (*Rev. St. 1881, § 3903*), providing that a railway company may construct its road across a highway so as not to interfere with the free use of the same, and shall restore the same to its former state, or place it in such condition as not to unnecessarily impair its usefulness, imposes on a railway company the duty not only to maintain its crossings over existing highways in a reasonably safe and good condition for travel, but also to maintain such crossings over highways established after the construction of the road.—(Sup. 1883) *Louisville, N. A. & C. Ry. Co. v. Smith*, 91 Ind. 119; (1898) *Peterson v. New Pittsburg Coal & Coke Co.*, 49 N. E. 8, 149 Ind. 260, 63 Am. St. Rep. 289; (1902) *Baltimore & O. S. W. R. Co. v. State ex rel. Greenwood*, 159 Ind. 510, 65 N. E. 508; (1906) *Vandalia R. Co. v. State ex rel. City of South Bend*, 166 Ind. 219, 79 N. E. 980, 117 Am. St. Rep. 370, writ of error dismissed (1907) 28 S. Ct. 130, 207 U. S. 359, 52 L. Ed. 246; (1908) *Cincinnati, I. & W. Ry. Co. v. City of Connersville*, 170 Ind. 316, 83 N. E. 503.

[b] (Sup. 1892)

Where it is shown that the extension of a city street so as to cross the track and yards of a railroad company would render them useless to the railroad company, the city will be enjoined, in the absence of an express statute conferring the right, from so extending the street.—*City of Fort Wayne v. Lake Shore & M. S. Ry. Co.*, 132 Ind. 558, 32 N. E. 215, 18 L. R. A. 367, 32 Am. St. Rep. 277.

[c] (Sup. 1898)

Where, in a mandamus proceeding to compel a railroad to construct street crossings, it was alleged that respondent built, operated, and maintained its tracks, etc., along specified streets in question, it was not material whether such streets or either of them became such before or after the railroad was built, nor was it material how they became streets, whether by dedications or otherwise, or whether before or after the town was incorporated, since, if the streets or either of them or any part thereof were dedicated to the public before the town was incorporated, no change in the form of government or its territorial boundaries would defeat such dedication.—*Evansville & T. H. R. Co. v. State ex rel. Town of Ft. Branch*, 49 N. E. 2, 149 Ind. 276.

[d] (Sup. 1899)

Under *Burns' Rev. St. 1894, §§ 6742-6746* (*Horner's Rev. St. 1897, §§ 5015-5019*), vesting the board of county commissioners with jurisdiction to establish or change public highways, and providing that they shall appoint viewers of the proposed location or change, and, if they deem it of public utility, lay out and mark the same, and report to the board of county commissioners, who shall then order it to be opened, a highway may be located across the tracks and right of way of a railroad company.—*Gold v.*

Pittsburg, C., C. & St. L. Ry. Co., 53 N. E. 285, 153 Ind. 232.

[e] (Sup. 1904)

Under Burns' Ann. St. 1901, § 5153, cl. 5 (Horner's Ann. St. 1901, § 3903), providing that railroad companies constructing their tracks across a highway shall restore the highway crossed to its former state, in a manner not to unnecessarily impair its usefulness, a railroad company cannot, on the establishment of a highway across its tracks, recover as compensation the expenses it must incur in constructing and maintaining necessary crossings and approaches.—*Lake Erie & W. R. Co. v. Shelley*, 71 N. E. 151, 163 Ind. 36.

[f] (Sup. 1909)

Under Burns' Ann. St. 1901, § 5153, cl. 5 (Burns' Ann. St. 1908, § 5195, cl. 5), requiring railroad companies to put and keep in safe condition all highway crossings, a railroad company acquires its right of way subject to the right of the state to extend highways and streets across the same, and to the condition that it must put and keep all crossings in safe and useful condition, without reference to whether the company owns the right of way in fee, or merely an easement therein.—*New York. C. & St. L. R. Co. v. Rhodes*, 171 Ind. 521, 86 N. E. 840, 24 L. R. A. (N. S.) 1225.

Laws requiring railroad companies to keep in safe repair highway crossings by the maintenance of gates and men to operate the same, plank crossing, construct cattle guards, etc., are passed in the exercise of police power and are constitutional, though enacted after the railroad is built.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 284-290; 25

CENT. DIG. High. §§ 30, 145, 165.

See, also, 33 Cyc. pp. 283-285.

§ 97. — Determination as to necessity, place, mode, and expenses of crossing.

[a] (Sup. 1899)

Where the construction of a crossing under a railroad would require the removal of a fill and construction of a bridge for the tracks, the crossing is at grade unless the petition ask for an undercrossing, and the order establishing the crossing provide therefor; and hence, in the absence of such request, it is error to charge that the jury, in determining the utility of a proposed change of location of a crossing, may consider the feasibility of making an undercrossing, and that it cannot be judicially determined just what kind of crossing will be put in, but that it is presumed that it will be done in a proper manner.—*Anderson v. Johnson*, 53 N. E. 167, 152 Ind. 249.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 297-304.

See, also, 33 Cyc. p. 294.

§ 98. — Change after construction of railroad.

[a] (Sup. 1902)

Burns' Rev. St. 1901, § 5153, subd. 5, provides that a railroad company may construct its road across a highway only on condition that it restore such highway "to its former state," or place it in such condition "as not to unnecessarily impair its usefulness," and that such road shall be constructed across the highway "so as not to interfere with the free use of the same." Section 5172a provides that a railroad company whose road crosses any public street in any incorporated city shall grade its road at such street crossing in accordance with the grade of the street, so as to afford security for life and property. A railroad intersected three streets of a city on a grade higher than that of the streets. Such elevation was a serious obstruction to the heavy travel on such streets, and rendered it dangerous, and subjected the city to danger of damage suits, for which it would have no recourse, owing to the insolvency of the company. *Held*, that the facts furnished grounds for an action by such city to compel by mandamus the lowering of the railroad grade.—*Chicago & S. E. Ry. Co. v. State ex rel. City of Noblesville*, 64 N. E. 800, 159 Ind. 237.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 291, 292, 296.

See, also, 33 Cyc. pp. 288-293; note, 70 L. R. A. 850.

§ 99. — Abolition and removal of grade crossings.

Mode of original construction of railroad, see ante, § 94.

[a] (Sup. 1906)

Acts 1901, p. 235, c. 118 (Burns' Ann. St. 1901, § 4190n8), authorizing the board of public works of a city to contract for the erection of any viaduct within the city, or to contract with any company for the joint erection and maintenance by the company and city of any viaduct, provided the contract shall be submitted to the council of the city and approved by them by ordinance before it shall take effect, does not authorize a city to enter into a contract with a railway company for the erection of a viaduct over the railroad track by the company and the erection of approaches thereto by the city, the viaduct to be maintained solely by the city for all time.—*Vandalia R. Co. v. State ex rel. City of South Bend*, 70 N. E. 980, 166 Ind. 219, 117 Am. St. Rep. 370. Writ of error dismissed (1907) 28 S. Ct. 130, 207 U. S. 359, 52 L. Ed. 246.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 293-295, 297-304.

See, also, 33 Cyc. pp. 295-299; note, 26 L. R. A. 92.

§ 100. Crossing private lands.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 805-314, 762, 763, 767, 769.

See, also, 33 Cyc. pp. 300-324.

§ 102. — Private crossings.

Covenants and conditions in grant of right of way, see ante, § 72.

Estoppel by contract, see ESTOPPEL, § 78.

Injuries to animals at private crossings, see post, § 413.

Rights of purchaser of railroad, see post, § 129.

Statutory and municipal regulations as to movement of trains across private roads, see post, § 247.

[a] (App. 1894)

In an action against a railroad company for damages because of its failure to maintain a private crossing as it had contracted to do, it was no defense that plaintiff might have himself performed the duty, and thus prevented or lessened the damages.—Toledo, St. L. & K. C. R. Co. v. Burgan, 37 N. E. 31, 9 Ind. App. 604.

[b] (App. 1900)

A complaint is sufficient, in an action against a railroad company to recover damages for closing a passageway under its road, which alleges ownership of lands to which the way is appurtenant, and a continuous adverse use under a claim of title for 21 years.—Lake Erie & W. R. Co. v. Hoff, 56 N. E. 925, 25 Ind. App. 239.

[c] (App. 1906)

A notice by the owner of land of his intention to enter on a railroad right of way at a point named, and describing his land, addressed to the Terre Haute & Indianapolis Railroad Company, but served on an agent of the Terre Haute & Logansport Railroad Company, which owned the road in question and to which the agent forwarded the notice, was sufficient, notwithstanding the mistake in the name of the company.—Vandalia R. Co. v. Kanarr, 77 N. E. 1135, 38 Ind. App. 146.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 306-314, 769.

See, also, 33 Cyc. pp. 301-311.

§ 103. Fences and cattle guards.

Authority of general superintendent to make contract for fencing, see ante, § 17.

Construction of remedial statutes relating to fencing of railroads, see STATUTES, § 236.

Construction of statute with reference to other statutes, see STATUTES, § 224.

Covenants as to maintenance as covenants running with the land, see COVENANTS, § 68.

Effect of fence and stock laws as to care required of railroad companies in respect to animals on or near tracks, see post, § 406.

Fence laws as denial of due process of law, see CONSTITUTIONAL LAW, § 297.

Fence laws as impairing obligation of contract, see CONSTITUTIONAL LAW, § 133.

Fence laws as violation of vested rights, see CONSTITUTIONAL LAW, § 101.

Injuries to animals from defects, see post, § 412.

Injuries to animals from failure to fence road, see post, § 411.

Injuries to persons on or near tracks from failure to fence, see post, § 361.

Jurisdiction of justice of the peace in action for failure of railroad company to fence tracks, see JUSTICES OF THE PEACE, § 32.

Liabilities of purchaser of railroad, see post, § 129.

Liability for killing stock, see post, § 413.

Liability of purchaser at foreclosure sale, see post, § 194.

Subjects and titles of acts relating to closing of gates at farm crossings, see STATUTES, § 113.

[a] (App. 1906)

Burns' Ann. St. 1901, § 5323, requiring railroads to construct and maintain fences along their right of way sufficient and suitable to turn and prevent cattle, etc., from going on the track, is a valid exercise of the state's police power to provide against accidents to life or property in any business or employment.—Chicago, I. & L. Ry. Co. v. Irons, 78 N. E. 207, 38 Ind. App. 196.

[b] (App. 1910)

Burns' Ann. St. 1901, §§ 5323-5325, are to be construed together, and furnish a complete statutory scheme to secure and maintain the fencing of railroads.—Vandalia R. Co. v. Miller, 90 N. E. 907.

[c] (App. 1910)

The primary object of the law requiring railroads to fence their rights of way, and maintain the fences, is for the protection of life and property.—Vandalia R. Co. v. Walker, 91 N. E. 607.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 315-319, 762, 763, 767, 769, 772.

See, also, 33 Cyc. pp. 311-317; note, 49 L. R. A. 625; note, 7 Am. Rep. 47.

§ 104. — Actions and proceedings for enforcement of rights.

Appellate jurisdiction as dependent on whether construction of statute is involved, see COURTS, § 220 (9).

Filing copy of account alleged in pleading, see PLEADING, § 330.

Filing written instruments with pleading, see PLEADING, § 308.

Right of action by husband or wife, or both, see HUSBAND AND WIFE, § 207.

Specific performance to compel maintenance of cattle guards, see SPECIFIC PERFORMANCE, § 5.

[a] (Supp. 1864)

Where a railway company failed to construct cow pits as it had agreed to do, and the owner of the land built them and kept them in repair, he might recover the cost of the construction and repair.—*Indiana Cent. R. Co. v. Moore*, 23 Ind. 14.

[b] (Supp. 1876)

Where a railroad company, in part consideration for the right of way over land, promises the landowner to erect fences on each side of its railroad through the land, and to make cattle guards and farm crossings, the company is liable, upon its failure to perform such promise, for the cost of constructing such fences, etc.; and it is not necessary, in order to recover such damages, that the fences, etc., should have been constructed by the plaintiff before bringing suit.—*Logansport, C. & S. W. Ry. Co. v. Wray*, 52 Ind. 578.

[c] (App. 1891)

The act of April 13, 1885, provides that if a railroad company does not fence its road in 12 months from the passage of the act, or within 12 months after the construction of its road, the landowner may give notice of his intention to build the fence, and, if the company does not build it in 30 days, the landowner may do so, and sue the company for the cost. *Held*, that a complaint under the statute must aver that the railroad had been constructed for 12 months prior to the notice, and that it had not then been fenced.—*Lake Erie & W. Ry. Co. v. Lannert*, 1 Ind. App. 102, 27 N. E. 324.

[d] (App. 1893)

In an action by landowners against a railroad company to recover the expense of fencing its right of way, which defendant had failed to fence as provided by Act April 13, 1885, a complaint which alleges that plaintiffs gave written notice to defendant of their intention to enter on said lands to fence the same is sufficient on demurrer, under section 2 of such act, (Elliott's Supp. § 1078,) which provides that such notice shall be served on "the nearest freight receiving and shipping agent employed by the company or person controlling and operating said railroad."—*Midland Ry. Co. v. Gascho*, 7 Ind. App. 407, 34 N. E. 643.

Act April 13, 1885, § 1, (Elliott's Supp. § 1077,) requires railroad companies to fence their tracks within certain specified times, "provided" that they need not fence such tracks through unimproved lands, etc. *Held* that, in an action by landowners against a railroad company to recover the expense of fencing its tracks where it had failed to fence, the complaint need not negative the proviso which relieves defendant from fencing, as it is a matter of defense for the company.—*Id.*

Where such complaint avers that defendant had owned and operated its line of railroad through the county in which the land is situated for several years past, it sufficiently shows the completion of the road more than 12

months prior to the service of the notice as required by such act.—*Id.*

An allegation that the road was not fenced when such act requiring railroad companies to fence their tracks was passed, and that after the act was passed defendant failed to fence its track, sufficiently shows that the road was not fenced at the time notice was served on the company.—*Id.*

[e] (App. 1894)

In an action against a railroad company, under Rev. St. 1894, § 5323 et seq. (Elliott's Supp. § 1077 et seq.), to recover the expense of constructing a fence along plaintiff's land abutting on the railroad, evidence that the notice required by the statute was given 30 days before the action was brought, and that the road was in operation 12 months before the notice was given, is essential to a recovery.—*Chicago & S. E. Ry. Co. v. Abbott*, 10 Ind. App. 99, 37 N. E. 557.

The fact that a copy of the notice was made a part of the complaint is not sufficient evidence that the notice was given.—*Id.*

In an action against a railway company to recover the expense of constructing a certain fence along the railroad, the complaint set out a copy of the notice that was given by the plaintiff to the company to construct the fence, but the notice was not offered in evidence. Plaintiff merely testified that he gave a copy "of the notice" to the agent of the company, but did not indicate to what notice he referred. *Held*, that the notice was not sufficiently identified with that required to be given.—*Id.*

[f] (App. 1895)

Where plaintiff identified the bill of particulars introduced in evidence as a copy of the itemized statement of the costs to him of the erection of a fence on defendant's right of way served by him "on the company," giving the agent's name, the service was sufficiently shown, in the absence of any proof to the contrary by defendant.—*Chicago & S. E. Ry. Co. v. Woodard*, 13 Ind. App. 296, 41 N. E. 544.

Where plaintiff testified that he served a notice in writing of his intention to construct a fence on defendant's right of way on one of defendant's agents, whose name he did not remember, but who claimed to be defendant's agent at the place of service, and there was no contradictory testimony for defendant, a finding that the notice was served is sufficiently supported.—*Id.*

[g] (App. 1896)

Laws 1885, c. 91, requiring a railroad company to fence its right of way, cannot impair the obligation of a prior fence contract by providing a more meager remedy than was provided by the contract.—*Lake Erie & W. R. Co. v. Griffin*, 53 N. E. 1042, 57 N. E. 722, 25 Ind. App. 138.

[h] (App. 1900)

Horner's Rev. St. 1897, §§ 4098a, 4098b, require, as a condition precedent to a landowner's right to recover for the erection of a fence along a railroad's right of way, that he shall give the company 30 days' written notice to erect such fence. *Held*, that a complaint which alleged that the plaintiff gave defendant a 30-days notice, but which did not allege that the notice was in writing, was insufficient.—*Chicago & S. E. Ry. Co. v. Vert*, 56 N. E. 139, 24 Ind. App. 78.

Under Horner's Rev. St. 1897, §§ 4098a, 4098b, requiring railroads to fence their rights of way except at crossings of public roads and highways, and within certain portions of cities, etc., and giving a landowner the right to build such fence, so far as his land abuts on the railroad's right of way, on railroad's failure to erect the same, and recover the cost of its construction, a complaint to recover for a fence so erected by an owner, failing to negative the exceptions of the statute, was demurrable.—*Id.*

Under Horner's Rev. St. §§ 4098a, 4098b, requiring a railroad, in operation for 12 months before the giving of a notice, to fence its right of way, and, on its failure to build the fence, authorizing the owner of land abutting on such right of way to erect a fence, after giving 30 days' notice, etc., and recover therefor from the railroad, a complaint to enforce such liability, alleging that defendant was operating a railroad across H. county, which had been completed and in operation for 20 years, and that plaintiff was the owner of land abutting on such railroad which had been inclosed on three sides for more than a year prior to giving notice to defendant to fence under such act, and that defendant neglected to fence such right of way for more than 6 months after the operation of the railroad, or after the act took effect, was not demurrable for failure to allege that the railroad, at the point abutting plaintiff's land, had been completed 12 months before the notice to fence was served.—*Id.*

[i] (App. 1901)

Under Horner's Rev. St. 1897, §§ 4098a, 4098b (Burns' Rev. St. 1894, §§ 5323, 5324), a complaint in an action by a landowner to recover the cost of building a fence does not state a cause of action if it fails to specifically state that the land fenced is not a highway crossing, or within a town or city, even though it is apparent from the facts pleaded that the place where the fence was erected could not fall within the exceptions of the statute.—*Evansville & I. R. Co. v. Butts*, 59 N. E. 1070, 26 Ind. App. 418.

[j] (Sup. 1908)

Burns' Rev. St. 1901, §§ 5323-5325, require railway companies to fence their tracks where possible, and, on failure to do so, authorize the owner of the adjoining real estate, after 30 days' notice, to build and repair such fences, and collect the expense thereof, together with reasonable attorney's fees. *Held*, that

such sections were a valid exercise of the police power to provide for public safety.—*Terre Haute & L. Ry. Co. v. Salmon*, 67 N. E. 918, 161 Ind. 131.

[k] (App. 1903)

Under Burns' Rev. St. 1901, §§ 5323, 5324, authorizing an owner of land to recover for the construction of a railroad fence erected on the side of the railroad after demand and refusal by the railroad company to build same, the landowner is not entitled to recover for building such fence unless it is placed as near as practicable on the line dividing the right of way from the land of the abutting owner.—*Chicago & S. E. Ry. Co. v. Wood*, 66 N. E. 923, 30 Ind. App. 650.

[l] (Sup. 1904)

Burns' Ann. St. 1901, §§ 5323, 5324, require railroads to fence their tracks within a certain time after completion of the road, and provide that, if a company fails for more than a year to erect such fence, the abutting landowner may, after notice, construct a fence and recover the cost and attorney's fees. Section 5325 declares that, when such original fence has been completed, the corporation or person operating the road shall keep the same in good repair, and, on failure to commence or make repairs within 30 days after notice, the abutting landowner may make them and recover the cost from the corporation. *Held*, that where a railroad company erected a sufficient original fence, but permitted it to fall into decay, so that the materials were not fit for use in the erection of a proper fence, the landowner, after notice, was entitled to construct a fence from all new and suitable materials, under section 5325, and recover the cost thereof from the railroad company.—*Terre Haute & L. Ry. Co. v. Erdel*, 71 N. E. 960, 163 Ind. 348.

[m] (App. 1904)

In an action against a railroad to recover the expense of erecting a fence pursuant to Burns' Rev. St. 1901, § 5324, a complaint which does not allege that the fence was built on the side of the defendant's railroad or right of way, nor give any excuse for not so doing, is insufficient.—*Evansville & I. R. Co. v. Huffman*, 70 N. E. 173, 32 Ind. App. 425.

In an action against a railroad to recover the expense of erecting a fence pursuant to Burns' Rev. St. § 5324, providing that the owner of any lands abutting on the right of way of any railroad shall have the right, after giving a certain notice, to enter on the right of way and build a fence on failure of the railroad to comply with the law regarding the fencing of the right of way, and that, "when he has completed the same," he may present for payment an itemized statement of the expenses thereof, a complaint which omits to allege the date the plaintiff entered on the defendant's right of way and built the fence, and the day on which it was completed, is insufficient.—*Id.*

[n] (App. 1904)

In an action, under Burns' Ann. St. § 5324, to recover from a railroad company for the building of a fence along a right of way, evidence held to authorize a finding that a statement of the expense of constructing the fence was presented to the company more than 60 days before suit was brought, as required by the statute.—Chicago, I. & L. Ry. Co. v. Croy, 71 N. E. 671, 33 Ind. App. 461.

Burns' Ann. St. 1901, § 5323, makes it the duty of railroad companies to construct a stock-proof fence and maintain it; and section 5324 provides that, if the company fails to build the fence, the adjoining landowner may build it, after giving the company 30 days' notice, and may recover the value of the work, if the company fails to pay it within 60 days after a verified, itemized statement of the expense thereof has been given. Held that, where the fence erected by the company is insufficient to turn stock, there is a failure to build a fence, within the contemplation of the statute, and the landowner is entitled to make the one built sufficient, and recover the cost from the company.—Id.

[o] (App. 1905)

Burns' Ann. St. 1901, § 5323, requires railroads to erect right of way fences. Section 5324 provides that, when the company fails to build fences as required by such section, the abutting landowner may build them on notice, and recover from the company the cost, with attorney's fees; and section 5325 requires the company to keep such fences in good repair, and, on failure after 30 days' notice to make repairs, authorizes the abutting landowner to make the same, and recover from the company the cost, with attorney's fees. Held, that where a right of way fence had been built by a railroad as required by section 5323, but was permitted to remain out of repair, the landowner's notice was properly given to the company to repair, under section 5325, and not to build, under section 5324.—Terre Haute & L. Ry. Co. v. Salmon, 73 N. E. 268, 34 Ind. App. 564.

Where a railroad company permitted its right of way fence to fall into disrepair, and the adjoining landowner served notice on the company to repair the same within 30 days, as authorized by Burns' Ann. St. 1901, § 5325, the landowner, on the railroad's failure to repair the fence, was entitled, under such section, to repair such part of the fence as could be repaired, or to rebuild the same from new materials, if incapable of repair, and charge the cost thereof to the railroad.—Id.

[p] (App. 1906)

Burns' Ann. St. 1901, § 5325, provides that, if a railroad permits its right of way fence to get out of repair, the owner of abutting land may notify the nearest station agent of the fact, and, if the railroad fails for 30 days to make or commence repairs, the abutting owner may enter upon the right of way

and make the same, and furnish an itemized account of the cost to the agent, and recover the same from the railroad. Plaintiff notified defendant railroad of the defective condition of a fence, which was so far gone that a new one was needed. Defendant did nothing in response to the notice, and, after the expiration of two years, plaintiff rebuilt the fence himself, and sued defendant for the cost thereof. Held that, under the circumstances, plaintiff's failure to repair the fence for two years after giving the statutory notice, worked no injury to defendant, and did not preclude plaintiff from recovering the cost thereof.—Terre Haute & L. Ry. Co. v. Earhart, 73 N. E. 711, 35 Ind. App. 56.

[q] (App. 1906)

Where, in an action by an adjoining landowner to recover the cost of rebuilding a railroad fence, evidence was introduced that a reasonable attorney's fee would be \$30, and it appeared that plaintiff gave the statutory notice to defendant and that defendant failed to build the fence; that plaintiff built it, and, on defendant's failure to pay the expenses, plaintiff brought suit to recover the amount; and that plaintiff's complaint was signed by an attorney who represented plaintiff throughout subsequent proceedings—the record sufficiently showed that plaintiff had employed an attorney, and was therefore entitled to attorney's fees, as authorized by Burns' Ann. St. §§ 5323-5325.—Terre Haute & L. R. Co. v. Salisbury, 77 N. E. 1097, 38 Ind. App. 100.

Burns' Ann. St. 1901, §§ 5323-5325, authorizing an adjoining landowner to recover attorney's fees in an action to recover the cost of rebuilding a right of way fence after notice and a failure of the railroad company to rebuild the same, is valid.—Id.

Burns' Ann. St. 1901, §§ 5323-5325, require railway companies to fence their tracks where they can be fenced, which fence may be constructed of barbed wire sufficient and suitable to turn and prevent cattle, horses, mules, sheep, or other stock from getting on such road, and that on neglect or failure of the company to build or repair the fence the adjoining landowner may rebuild or repair the same and collect the expense, including material and labor, from the railroad company. Held, that the statute did not provide the kind of fence to be built by the adjoining landowner, provided it was sufficient to turn cattle, etc., so that the railroad company was liable for woven wire fence constructed by a landowner under such section, though it was more expensive than the barbed wire fence referred to in the statute.—Id.

[r] (App. 1906)

Burns' Ann. St. 1901, § 5325, relates to the method of proceeding where a railroad neglects to keep in good repair the fence along its right of way, and requires notice to an agent of the company of the probable cost of repairs. Section 5324 relates to the proceeding where the railroad neglects to construct a fence, but

makes no provision as to notice of the probable cost. *Held* that, where a fence erected by a railroad company had become so decayed that it would not turn cattle at any part of its course, a notice to the railroad company of intention to erect a new fence need not state its probable cost.—*Vandalia R. Co. v. Kanarr*, 77 N. E. 1135, 38 Ind. App. 146.

[s] (App. 1906)

Where a railroad right of way fence, after being repaired by the railroad company pursuant to notice, was insufficient to turn stock, as required by Burns' Ann. St. 1901, § 5323, the landowner was entitled to repair or rebuild the same and recover the cost and a reasonable attorney's fee from the railroad company.—*Chicago, I. & L. Ry. Co. v. Irons*, 78 N. E. 207, 38 Ind. App. 196.

[t] (App. 1906)

In an action by an adjoining owner against a railroad to recover the expense of erecting a fence along the right of way, he was entitled to recover an attorney's fee without proof that he had employed an attorney to enforce the collection of the cost of the fence.—*Vandalia R. Co. v. Stephens*, 39 Ind. App. 11, 78 N. E. 1055.

An action by a landowner for the value of a fence erected along a railroad right of way by virtue of Burns' Ann. St. 1901, § 5324, is based primarily upon defendant's failure to perform a statutory duty.—*Id.*

Under Burns' Ann. St. 1901, § 5324, relating to the building of railroad fences, and providing that, if the company neglects or refuses for 60 days to pay said "account," the landowner may bring suit and recover the value of such fence, the purpose of the statement as meant by the "account" is to notify the company that the landowner has built the fence and of the expense that has been incurred in building it.—*Id.*

Under such statute, a fence which is built by an abutter exactly on the dividing line, the posts extending half on one side and half on the other, belongs to the railroad company.—*Id.*

Under Burns' Ann. St. 1901, §§ 5323, 5324, providing for the building of fences along railroad rights of way, the fence should be built on the margin, edge, or border of the right of way as near as practicable to the line between the right of way and the abutting owner.—*Id.*

The erection of a fence on the line between a railroad right of way and land of an adjoining owner is a substantial compliance with Burns' Ann. St. 1901, §§ 5323, 5324, requiring the fence to be built on the margin or border of the right of way as near as practicable to the line between the right of way and the abutting owner, and entitles the owner to recover from the railroad the expense of erecting the fence.—*Id.*

[u] (App. 1907)

Under Burns' Ann. St. 1901, §§ 5323–5325, declaring that when a railroad fails to repair

its right of way fence within 30 days after notice, the abutting owner may make the repairs and recover the cost thereof after furnishing to the railroad an itemized statement of the expense, a complaint in an action by an abutting owner for the cost of repairing a railway right of way fence, which alleges the reasonable value of the fence, followed by an itemized statement of the materials used and labor performed, and that after the completion of the fence an itemized statement of the expense was furnished, sufficiently embodies the itemized statement.—*Vandalia R. Co. v. Feters*, 40 Ind. App. 615, 82 N. E. 978.

Under Burns' Ann. St. 1901, §§ 5323–5325, requiring a railroad to fence its right of way except where the same runs over unimproved and unclosed lands, and to maintain the same in repair, and authorizing an abutting owner to repair after 30 days' notice, an abutting owner may rebuild a right of way fence on giving the 30 days' notice, though the fence between his land and his neighbor's is out of repair.—*Id.*

[v] (App. 1907)

Under Burns' Ann. St. 1901, §§ 5324, 5325, requiring railroads to fence their tracks and keep the same in repair, and declaring that on the failure to make repairs within 30 days after notice the abutting owner may make repairs and recover the cost from the company, an abutting owner has the right, on giving the statutory notice, to build a new fence on finding that the materials of which the original fence was constructed were rotten, and to cast aside materials which might have been used in repairing the original fence.—*Vandalia R. Co. v. Seldenright*, 40 Ind. App. 659, 82 N. E. 980.

An abutting owner building a new railroad right of way fence on the railroad failing to repair the same within 30 days after notice prescribed by Burns' Ann. St. 1901, § 5325, may recover the cost of the same though he built the fence on the right of way from six to eight inches within the line of the original fence and on a line designated by a representative of the railroad.—*Id.*

[w] (App. 1907)

An action against a railroad, in which the complaint showed that defendant's fence on the line between its right of way and plaintiff's land had long been out of repair, so that it would not keep stock from off the right of way, that plaintiff properly requested defendant to rebuild the fence, which it failed to do, and that then plaintiff made such repairs and furnished defendant's agent with an itemized statement of the cost thereof, which defendant refused to pay, was based on Burns' Ann. St. 1901, § 5325, which provides that an owner of land adjoining a railroad's right of way, after the latter's refusal, upon notice, to properly repair its fence between the right of way and such land, may rebuild such fence and charge the railroad with the expense thereof, and not upon section 5323, which requires a railroad to maintain

fences along its right of way, except in certain specified places; and hence the complaint was not defective in failing to negative the exceptions provided for in the latter section.—*Vandalia R. Co. v. Shadle*, 40 Ind. App. 682, 82 N. E. 999.

[x] (App. 1909)

Under *Burns' Ann. St. 1908, §§ 5447, 5448*, requiring railroads to build fences along their right of way, within a year, and providing for service of notice to construct, an owner of property abutting a railroad, who constructs a fence after failure of the railroad to comply with a notice given, may recover the cost of the fence from the railroad, though it appears that there was at one time a fence, but that for three years prior to the notice there had been none.—*Vandalia R. Co. v. McAninch*, 43 Ind. App. 221, 86 N. E. 1031; *Same v. Cox*, 43 Ind. App. 736, 86 N. E. 1032.

[y] (App. 1910)

Burns' Ann. St. 1901, § 5324, prescribes a time within which a railroad must construct a fence on its right of way, and defines the landowner's right where the railroad fails to build. Section 5325 relates to the railroad's duty to maintain a fence already constructed, and defines the landowner's right on the railroad's failure to maintain. *Held* that, where a complaint counted separately on the two sections, it was no defense that the complaint was for the recovery on the same fence, and that the notice served on the defendant, as alleged in the complaint, to the effect that the defendant had failed to fence its right of way, related to the same fence, as the railroad was bound to know whether it had built and maintained the required fence, and the service of notice could not alter these facts.—*Vandalia R. Co. v. Miller*, 90 N. E. 907.

[z] (App. 1910)

Where a fence had been built by a railroad company along its right of way 35 or 36 years before, and for a long time there had been practically no fence along the right of way, it being in such condition that a new fence would have to be built instead of having the old one repaired, proceedings were properly taken by an abutting owner under *Burns' Ann. St. 1908, § 5448*, providing that, if a railroad company neglect to construct a right of way fence, an abutting owner, after giving 30 days' notice of his intention, may enter upon the right of way and build such fence and recover therefor from the railroad company, and not under section 5449, permitting such an owner, where the railroad company fails to repair such a fence after 30 days' notice stating that the fence is out of repair, where it is out of repair, and the probable cost of fixing it, to make the repairs himself, and recover therefor from the railroad company.—*Vandalia R. Co. v. Blum*, 91 N. E. 607; *Same v. Smith*, *Id.*

[ss] (App. 1910)

Where a railroad fence had practically rusted and rotted away so that the remaining

few posts and rusty wire were of no value and of no use in repairing a fence, the landowners, on 30 days' notice to the railroad, could, as authorized by *Burns' Ann. St. 1908, § 5448*, erect a fence and present an itemized statement to the railroad therefor, and they need not proceed under section 5449, relating to the repair of fences.—*Vandalia R. Co. v. Muhn*, 91 N. E. 612.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 320-332, 767, 769, 772.

See, also, 33 Cyc. pp. 317-321.

§ 106. Waters and water courses.

Damages to adjoining lands, see *WATERS AND WATER COURSES*, § 125.

Drainage and discharge of surface waters, see *WATERS AND WATER COURSES*, § 150.

Duty to preserve and restore former estate, see *WATERS AND WATER COURSES*, § 162.

Flowage of adjoining land, see *WATERS AND WATER COURSES*, § 164.

Injuries to adjoining land caused by flowage, see *WATERS AND WATER COURSES*, § 176.

Liability for flowing adjoining land, see *WATERS AND WATER COURSES*, § 171.

Liability for injuries, see post, § 113.

Restraining flooding of adjoining land, see *WATERS AND WATER COURSES*, § 177.

Rights and liabilities of purchaser of railroad, see post, § 129.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 333-336.

See, also, 33 Cyc. pp. 325-329; note, 130 Am. St. Rep. 33.

§ 107. — Mode of construction in general.

[a] (Sup. 1897)

Rev. St. 1894, § 5153, cl. 5 (*Rev. St. 1881, § 3903*), empowers a railroad company to construct its road upon or across any stream or highway "in such manner as to afford security for life and property"; but it requires the company to restore the intersected stream or highway to its former state, "or in a sufficient manner not to unnecessarily impair its usefulness or injure its franchisees." *Held*, that the "life and property" and the "franchisees" referred to are not those of the railroad company, but those connected with the intersected stream or highway.—*New York, C. & St. L. R. Co. v. Hamlet Hay Co.*, 47 N. E. 1060, 49 N. E. 269, 149 Ind. 344.

[b] (Sup. 1903)

A railroad company in the exercise of its right to construct its road on or across any stream or water course, as authorized by *Burns' Rev. St. § 5153*, must do so in such a manner as not thereby to injure the property of other persons, and, after the crossing is made, the railroad company is bound to restore the stream or water course to its former state at least so far as is necessary to preserve its use and

franchise.—*Cleveland, C. & St. Louis Ry. Co. v. Wischert*, 67 N. E. 993, 161 Ind. 208.

[c] (App. 1906)

Burns' Ann. St. § 5153, authorizing a railroad company to construct its road across "any stream of water or water course," etc., in a manner to afford security for property, etc., does not apply merely to navigable streams.—*Graham v. Chicago, I. & L. Ry. Co.*, 77 N. E. 57, 1055, 39 Ind. App. 294.

Under Burns' Ann. St. 1901, § 5153, a railroad corporation may construct its road across a water course if it restores the water course to its former state.—Id.

Under said statute, the duty of the railroad to restore the water course is a continuing one.—Id.

A railroad company exercising the power conferred on it by Burns' Ann. St. 1901, § 5153, empowering a railroad to construct its road across any stream, etc., in a manner to afford security for property, etc., can only exercise the power subject to the limitation prescribed.—Id.

[d] (Sup. 1907)

Under Burns' Ann. St. 1901, § 5153, authorizing railroads to construct roads across any stream of water, water course, etc., a drainage ditch fed by no spring or water course, and used and constructed solely for expediting surface drainage, is not a "water course" which the railroad is obliged to preserve and restore to its former state.—*New Jersey, I. & I. R. Co. v. Tutt*, 168 Ind. 205, 80 N. E. 420.

[e] (App. 1908)

Under Burns' Ann. St. 1908, § 5195, subd. 5, railroad companies crossing public drains must restore the drain to its former state, or in a sufficient manner not to impair its usefulness.—*Kelsay v. Chicago, C. & L. R. R.*, 41 Ind. App. 128, 81 N. E. 522.

[f] (Sup. 1910)

It is the duty of railroads which cross a water course to restore the same to its former condition of usefulness and safety, even in the absence of an express statutory requirement.—*Chicago & E. R. Co. v. Luddington*, 91 N. E. 939.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 333-336.

See 33 Cyc. p. 326.

§ 108. — Ditches, culverts, and bridges. Covenants and conditions in grant of right of way, see ante, § 72.

[a] (Sup. 1910)

Burns' Ann. St. 1908, §§ 5195 and 7683, authorizes a railroad to construct its road across any stream, road, highway, or canal so as not to interfere with the free use of the same, and provides that the company shall restore the highway, etc., thus intersected to its former state. *Held*, that a railroad acquires its right

of way subject to the right of the state to extend drains across the same and subject to the condition that it must maintain the road across the drain so as not to interfere with the use thereof, and the company is not entitled to damages for the expense of so doing.—*Chicago & E. R. Co. v. Luddington*, 91 N. E. 939.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 333-336.

See, also, 33 Cyc. pp. 329-330.

§ 110. Contracts for construction or repair.

Abandonment of contract and performance under new contract as questions for jury, see CONTRACTS, § 248.

Acts constituting rescission of contract, see CONTRACTS, § 272.

Approval or decision of engineer as to performance of work, see CONTRACTS, §§ 284, 292.

Consent to do extra work under contract, see CONTRACTS, § 238.

Construction of contract as to conditions precedent, see CONTRACTS, § 221.

Construction of contracts as to subject-matter in general, see CONTRACTS, § 198.

Time as essence of contract, see CONTRACTS, § 211.

Time of payment of compensation, see CONTRACTS, § 214.

[a] (Sup. 1909)

Where a railroad construction contract required the contractors to complete the work within a fixed period, the company was bound to give them reasonable opportunity to do the work, and to have the required material, secure the right of way, and have the grade ready, and the company is liable for the contractors' damages arising from a breach of such duty.—*Indianapolis Northern Traction Co. v. Brennan*, 87 N. E. 215.

A provision of a railway construction contract that the company's engineer shall determine the classification of excavated matter, etc., and that his decision shall be conclusive, contemplates an honest judgment by the engineer, and does not prevent resort to the courts to obtain a correct construction of the agreement, though his decision is *prima facie* correct and binding, in the absence of a showing of fraud or gross mistake by him.—Id.

A railway construction contract provided that "loose rock," as distinguished from "earth," for the purpose of computing compensation for excavation, should include hard shale or soapstone, coarse boulders in gravel, cemented gravel, hardpan, or any other material, requiring, in the company's engineer's judgment, the use of pick and bar, or which could not be plowed with a specified plow. It was further provided that the plowing test should apply to all the materials, and that only such material should be loose rock as in the engineer's judgment could not be plowed with such plow. *Held*, that the

provision for a plowing test did not apply to the particular material specified as hardpan, etc., and that the clause relating to "other material which could not be plowed," etc., meant such as could not be plowed with reasonable facility; a mere "rooting-up" of material, or a cutting of a very shallow furrow, or such plowing as would require men to ride on the plow beam, etc., not being "plowing" within the contract.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 339-341.

See, also, 33 Cyc. pp. 331-345.

§ 111. Liabilities for work, labor, or materials.

Liens for labor and supplies, see post, § 159.

[a] (Sup. 1871)

Act Dec. 20, 1865, amending section 38 of the general railroad law, making stockholders individually liable to laborers for construction work unpaid for after the corporate assets have been exhausted, does not entitle a laborer to recover against a railroad company for construction work performed under a contract with a subcontractor of the company.—*Indianapolis, B. & W. Ry. Co. v. O'Reilly*, 38 Ind. 140; *Marks v. Indianapolis, B. & W. Ry. Co.*, *Id.* 140.

[b] (App. 1893)

A railroad company is not liable personally to a foreman of subcontractors constructing its road for board, groceries, or other supplies furnished by him to the employes of such subcontractors.—*Ferguson v. Despo*, 8 Ind. App. 523, 34 N. E. 575.

A railroad company is liable to the foreman of subcontractors for his services while in the employ of the subcontractors.—*Id.*

[c] (Sup. 1909)

A railroad construction contract, requiring the work to be delivered free of labor or other liens, and a bond securing compliance with the contractor's covenants, gave laborers and materialmen and their assignees no rights. Judgment, 87 N. E. 719, modified.—*Fleming v. Greener*, 90 N. E. 73.

A railroad contracting company, which received money from railway companies under the provision of a contract, whereby a construction contract was assigned to it, that all amounts due the original contractor should be paid to such company, does not hold such money in trust for persons who furnished material, etc., to the original contractor.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 342-350.

See, also, 33 Cyc. pp. 346-350.

§ 112. Injuries from construction or maintenance.

Danger from fire as ground for compensation under laws of eminent domain, see EMINENT DOMAIN, § 111.

Danger of injury to animals as ground for compensation under laws of eminent domain, see EMINENT DOMAIN, § 110.

Danger of personal injury as ground for compensation under laws of eminent domain, see EMINENT DOMAIN, § 109.

Injuries to persons on or near track by failure to fence, see post, § 361.

Injuries to property from operation of road, see post, § 222.

Liabilities on consolidation of railroads, see post, § 144.

Liabilities on lease of franchise or property, see post, § 134.

Liabilities on sale of franchise or property, see post, § 129.

Liability for injuring or killing stock by failure to fence railroad, see post, § 411.

Liability for personal injuries from defects in highway crossing, see post, § 303.

Liability of city for acts of railroad company under permission of city, see MUNICIPAL CORPORATIONS, § 748.

Liability of city for damages caused by construction of railroad in street, see MUNICIPAL CORPORATIONS, § 400.

Liability of city for injuries resulting from defect in sewer built by railroad company under authority of city, see MUNICIPAL CORPORATIONS, § 748.

Liability of purchaser of railroad, see post, § 129.

Liability of railroad company for injury to horse caused by defect in highway crossing, see post, § 410.

Obstruction of access to property as ground for compensation to owners under laws of eminent domain, see EMINENT DOMAIN, § 106.

Occupation or use of street as ground for compensation to abutting owners, see EMINENT DOMAIN, §§ 100, 119.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 230, 351-371.

See, also, 33 Cyc. pp. 351-379; note, 1 L. R. A. (N. S.) 62.

§ 113. — Nature and extent of liability.

Life tenants, see LIFE ESTATES, § 22.

[a] (Sup. 1857)

Where a railroad company has voluntarily and for its own profit so constructed its road as necessarily to injure a person's property, there being no remedy given by its charter, though it constructed its road in a proper manner and place, it is liable in damages for such injury.—*Evansville & C. R. Co. v. Dick*, 9 Ind. 433.

[b] (Sup. 1870)

In an action against a railroad company for unnecessarily overflowing the plaintiff's land by the building of bridges and embankments, the jury should have been instructed that, if they found, from the evidence, that the embankments and abutments were necessary to the safety of passengers and property passing over

the road, and that it was built, constructed, and erected with care, skill, and prudence, not only as to safety of persons and property passing over the road, but also for the protection and safety of the property holder, then their verdict should be for the defendant.—*Terre Haute & I. R. Co. v. McKinley*, 33 Ind. 274.

[c] (*Sup.* 1888)

In an action against a railway company for injuries sustained by reason of its constructing its right of way over plaintiff's land, all injuries that may naturally and proximately result from the construction and operation of the railway may be recovered. Such damages accrue to, and must be recovered by, the person who owned the land at the time the road was constructed. The claim for such damages is a chose in action which does not pass to the grantee of such owner by deed or otherwise unless by a special stipulation.—*Sherlock v. Louisville, N. A. & C. Ry. Co.*, 17 N. E. 171, 115 Ind. 22.

[d] (*Sup.* 1888)

A railroad company, which has bought and paid for its right of way, must still pay for an upheaval of adjoining land caused by its subsequent construction in a marshy place of a fill which has spread beyond the limits of the right of way.—*Roushlang v. Chicago & A. Ry. Co.*, 115 Ind. 106, 17 N. E. 198.

[e] (*Sup.* 1891)

A complaint alleged that defendant railroad company was proceeding to lay a track within eight feet of the curbstone in the street in front of plaintiff's premises, while the ordinance authorizing the use of the street directed the road to be located 15 feet from the curbstone, and to raise the grade of the street above the established grade, which it had no right to do, obstructing the street, and entirely cutting off plaintiff's only means of ingress and egress by wheeled vehicles, endangering her property by fire, and the lives of her family, obstructing the natural flow of the water, and turning it upon her premises. *Held*, that it stated a case of special damage not suffered by the public in general, and showed the right to an injunction.—*Chicago, St. L. & P. R. Co. v. Eisert*, 127 Ind. 156, 26 N. E. 739.

[f] (*Sup.* 1906)

Under *Burns'* Rev. St. 1901, § 5153, subd. 5, authorizing a railroad company to construct its road across any stream of water, "so as not to interfere with the free use of the same, which the route of its road shall intersect, in such a manner as to afford security for life and property, but the corporation shall restore such stream * * * to its former state or in a sufficient manner not to unnecessarily impair its usefulness," etc., a railroad company constructing its road across a stream so as to completely fill it up, and digging a ditch to carry off the water, is not liable, in the absence of willfulness or negligence, for damages arising

from the water overflowing the adjoining land because in the construction of its embankment it permitted dirt to fall into the ditch and obstruct it so as to prevent the water from flowing therein.—*Cleveland, C., C. & St. L. Ry. Co. v. Wischart*, 67 N. E. 993, 161 Ind. 208.

[g] (*App.* 1905)

Burns' Ann. St. 1901, § 5153, cl. 5, provides that a railroad company may construct its road upon or across any water course or canal so as not to interfere with the free use of the same, in such manner as to afford security for life and property, but that it shall restore the water course so intersected to its former state, or in a sufficient manner not to unnecessarily impair its usefulness or injure its franchises. *Held*, that where a railroad company crossed a public drainage ditch it was not authorized to place an iron pipe of smaller dimensions than the ditch therein, and to negligently fill up the ditch, except as to the capacity of the pipe, and build an embankment over and around the same in such a manner that the water was caused to back up and flood plaintiff's land.—*Pittsburg, C., C. & St. L. Ry. Co. v. Greb*, 73 N. E. 620, 34 Ind. App. 625.

Where a railroad company crossing a public drainage ditch placed an iron pipe smaller than the ditch therein, so that the outlet was higher than the inlet, and filled up the ditch except as to the capacity of the pipe, causing the water of the ditch to back up and flood plaintiff's land, such acts constituted a nuisance.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 230, 351-364.
See, also, 33 Cyc. pp. 351-366.

§ 114. — Actions.

Accrual of right of action, as affecting limitations, see LIMITATION OF ACTIONS, § 55.
Action sounding in tort or contract, see ACTION, § 27.

Application of general statutes of limitation, see LIMITATION OF ACTIONS, § 32.

By life tenants, see LIFE ESTATES, § 28.

Damages from surface waters, see WATERS AND WATER COURSES, § 125.

Evidence admissible by reason of admission of similar evidence, see EVIDENCE, § 155.

For injuries from surface waters, see WATERS AND WATER COURSES, § 126.

Necessity of instructions as to amount of recovery, see TRIAL, § 216.

Opinion evidence as to damages, see EVIDENCE, § 497.

Pleading matters of fact or conclusions, see PLEADING, § 8.

Right of vendee to sue, see VENDOR AND PURCHASER, § 218.

Statutory new trial, see NEW TRIAL, § 178.

[a] (*Sup.* 1864)

In trespass against a railroad company, if the record does not show that the injuries were

This Digest is compiled on the Key-Number System. For explanation, see page iii.

done by the company, when acting under their charter, or in the construction of their road, it will not be presumed that they were not so committed. Such defense must be pleaded.—*Crawfordsville & W. R. Co. v. Wright*, 5 Ind. 252.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 365-371.

See, also, 33 Cyc. pp. 367-379; note, 44 L. R. A. 565.

§ 115. Motive power.

Of street railroads, see **STREET RAILROADS**, § 45.

[a] (Sup. 1910)

A city may prohibit the use of steam in propelling cars along its streets.—*Grand Trunk Western Ry. Co. v. City of South Bend*, 91 N. E. 809, denying rehearing *Grand Trunk & W. Ry. Co. v. Same*, 89 N. E. 885.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 372.

See, also, 33 Cyc. p. 380.

§ 116. Rolling stock.

Liability to taxation, see **TAXATION**, § 146.

Place of taxation of rolling stock and equipment, see **TAXATION**, § 286.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 373.

See, also, 33 Cyc. p. 380.

VII. SALES, LEASES, TRAFFIC CONTRACTS, AND CONSOLIDATION.

Acts of railroad company ground for forfeiture of charter, see ante, § 32.

Effect on right to public aid, see ante, § 30.

Ownership, possession, and control of railroad as affecting liability for injuries from operation, see post, §§ 256-273.

§ 118. Power to transfer franchises or property in general.

[a] (Sup. 1875)

A railroad company has no power to transfer one division of its road to the injury of another division of the same road, or to sell the exclusive right to convey passengers and freight over a portion of its road, unless authorized by statute; and such power is not conferred by Act Feb. 23, 1853 (1 Gav. & H. St. p. 526), entitled "An act to authorize railroad companies to consolidate their stock with the stock of railroad companies in this or in an adjoining state, and to connect their roads with the roads of said companies," etc., and providing (section 3) that a railroad company "shall have the power to make such contracts and agreement with any such railroad constructed in an adjoining state for the transportation of freight and passengers or for the use of its said road as to the board of directors may seem proper."—*Board of Com'rs of Tippecanoe County v. Lafayette, M. & B. R. Co.*, 50 Ind. 85.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 375.

See, also, 33 Cyc. p. 381.

§ 121. Powers of parallel or competing lines.

[a] (Sup. 1900)

A railroad company has no right to lease and surrender the control and use of all its corporate property and franchises to another company operating a competing line, in order to destroy competition.—*Eel River R. Co. v. State ex rel. Kistler*, 57 N. E. 388, 155 Ind. 433.

Burns. Rev. St. 1894, §§ 5209-5215, authorizing railroad companies to lease intersecting and continuous lines, does not permit a railroad company to surrender the control and use of all its corporate property and franchises under a lease to a rival company operating a parallel road, in order to destroy competition.—*Id.*

[b] (App. 1904)

An agreement by a common carrier not to furnish sidings to stone quarries near its line is, like an agreement not to locate stations or depots within prescribed limits, against public policy and void.—*Chicago, I. & L. Ry. Co. v. Southern Indiana Ry. Co.*, 70 N. E. 843, 38 Ind. App. 234.

A contract between competing railroad companies, whereby one of them agrees not to run any tracks to or from quarries connected with the road of the other company by switches, nor to make any demands for the use of the tracks of the latter company leading to the quarries for the shipment of stone therefrom, nor to interfere with or divert the benefits derived to the latter company from its connection and business with such quarries, the purpose of the contract as expressed therein being to preserve to the latter company the benefits acquired in the quarry business, is void, as creating a monopoly and destroying competition.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 381-385.

See, also, 10 Cyc. pp. 291, 292, 33 Cyc. p. 384.

§ 123. Consent of stockholders.

[a] (Sup. 1875)

A railroad company organized to maintain a railroad in the direction of Bloomington, Ill., by written agreement with another railroad company, organized to construct a railroad from Bloomington, Ill., to the eastern shore of that state, conveyed to the latter company for 99 years, the exclusive right to transport passengers and freight over that part of the road of the former company lying between Lafayette, Ind., and the western state line, such agreement being made by the direction of the officers of the companies without the consent of the stockholders. The latter company assigned the agreement to another railroad company operating a railroad from Ohio to Illinois by way of Lafayette, Ind. *Held*, that an action would lie

on behalf of a stockholder of the first-named railroad company without previous demand by him for redress on the directors of the company and refusal by them against all the companies for an injunction, and to declare void the agreement and assignment, and the fact that after the commencement of the action such railroad company filed a cross-complaint therein seeking the same relief was not a sufficient answer on behalf of the other two companies to the original complaint.—*Board of Com'rs of Tippecanoe County v. Lafayette, M. & B. R. Co.*, 50 Ind. 85.

[b] (*Sup.* 1895)

Where, in a suit to set aside a railroad consolidation, there was no issue as to the voting of the necessary stock to effect the consolidation by the corporations, it would be presumed that such stock was, in fact, voted in view of the fact that directors of railway companies are given power to enact by-laws covering the disposition of the stock, property and business of their companies by Rev. St. 1881, § 3897 (Rev. St. 1894, § 5147).—*Bradford v. Frankfort, St. L. & T. R. Co.*, 40 N. E. 741, 41 N. E. 819, 142 Ind. 383.

Rev. St. 1894, § 5257 (Rev. St. 1881, § 3971), providing that any railroad corporation in the state may consolidate its stock with that of a railroad corporation in an adjoining state, "upon such terms as may be by them mutually agreed upon, in accordance with the laws of the adjoining state," does not require that a meeting of the stockholders of a corporation in the state, called to act on a proposition to consolidate with a corporation in an adjoining state, shall be called and conducted in accordance with the laws of such adjoining state, but only that the terms of consolidation shall not conflict with those laws.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 389.

See, also, 33 Cyc. p. 386.

§ 125. Sales.

Necessity of sale of lands taken for stock, see ante, § 15.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 391-403.

See, also, 33 Cyc. pp. 382-390.

§ 129. — Rights and liabilities of purchasers.

[a] (*Sup.* 1888)

Where, in an action against a railroad company for damages for entering on land and using it as a track for a railroad, it appears that the railroad company acquired no rights from its predecessor, but that its predecessor was a trespasser, it must pay all the damages it had inflicted.—*Indiana, B. & W. Ry. Co. v. Allen*, 15 N. E. 451, 113 Ind. 308, 3 Am. St. Rep. 650.

[b] (*App.* 1891)

The rule that a person who is about to purchase land on which a gate for a railroad is being constructed is thereby warned that there is some claim of right connected therewith, and, if he fails to make proper inquiry as to the nature of the claim, he buys at his peril, is applicable to the purchase of a railroad.—*Toledo, St. Louis & K. C. R. Co. v. Fenstemaker*, 29 N. E. 440, 3 Ind. App. 151.

Where, at the time of the purchase of a railroad, the purchaser's predecessor had, in compliance with its contract, constructed the proper and necessary cattle guards and wing fences and was maintaining the same, the purchaser must be presumed to have had notice of the existence of the crossing, cattle guards, and wing fences; the same being on and in a sense part of the railway or route itself.—*Id.*

[c] (*App.* 1893)

The successor of a railroad company by purchase is liable for damages for breach of a covenant of the right of way deed to its predecessor, providing that the grantee should fence the road and forever maintain the same, put in cattle guards and wagon crossings whenever demanded, and make a wagon and stock passageway under the road.—*Toledo, St. L. & K. C. R. Co. v. Cosand*, 6 Ind. App. 222, 33 N. E. 251.

[d] (*App.* 1895)

Where a railroad company which received a deed for a right of way agreed that the grantor should have the under crossing at the place where the road crossed a highway on the grantor's lands and agreed that the company should fence the railroad, such duties were continuing duties under the contract and binding on the railroad company's successor.—*Lake Erie & W. R. Co. v. Lee*, 41 N. E. 1058, 14 Ind. App. 328.

[e] (*Sup.* 1896)

A stipulation in a deed of the property of a railroad company to another railroad company "subject to a certain liability in no event to exceed \$6,000, growing out of a specified suit," constitutes an assumption only of the \$6,000 of the claim if the liability exceeds such amount and not of the full liability of the grantor in such suit.—*Citizens' St. Railroad Co. v. Robbins*, 42 N. E. 916, 43 N. E. 649, 144 Ind. 671.

[f] (*App.* 1900)

A complaint stated that plaintiff's remote grantor conveyed a railroad right of way over certain land to defendant company's grantor; that, by mutual mistake, the deed, which was recorded, did not convey a part of the right of way; that defendant's grantor agreed to construct and maintain an underground crossing on the right of way conveyed, as part of the consideration for such conveyance, and such crossing was constructed and maintained on the part of the premises not included in the deed by mistake, until closed by defendant. *Held*, that the complaint did not state suffi-

cient facts to support an action for damages for closing such way, as the recorded deed was not notice to defendant of its liability to maintain a crossing on lands not included therein.—*Lake Erie & W. R. Co. v. Hoff*, 56 N. E. 925, 25 Ind. App. 239.

[g] (App. 1904)

A railroad company bought a right of way from plaintiff, and agreed as part of the consideration to construct and maintain fences, cattle guards, and farm crossings. The deed and contract were duly recorded. Thereafter the company built its railroad on the right of way, and partly performed the contract, when it sold all of its property to defendant. *Held*, that the promises constituted covenants which passed with the land, and the purchaser became bound to perform the contract.—*Chicago & S. E. Ry. Co. v. McEwen*, 71 N. E. 926, 35 Ind. App. 251.

[h] (App. 1906)

A railroad company constructing its road without reference to the restriction imposed by Burns' Ann. St. 1901, § 5153, requiring a railroad crossing a stream to do so in a manner to afford security for property, etc., cannot by a conveyance to another railroad company convey a greater right than it possessed, nor can it thereby relieve the grantee from the performance of the statutory duty.—*Graham v. Chicago, I. & L. Ry. Co.*, 77 N. E. 57, 1055, 39 Ind. App. 294.

Under Burns' Ann. St. 1901, § 5153, a railroad company is liable for damages for the continuance of an obstruction of a water course though its predecessor created the obstruction.—*Id.*

FOR CASES FROM OTHER STATES.

SEE 41 CENT. DIG. R. R. §§ 392, 393, 399-403.

See, also, 33 Cyc. pp. 388-390.

§ 130. Leases.

Condemnation by lessee, see EMINENT DOMAIN, § 10.

Power of parallel and competing lines, see ante, § 121.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 404-433.

See, also, 33 Cyc. pp. 391-409; note, 58 Am. St. Rep. 147.

§ 134. — Rights and liabilities of lessors and lessees.

Liability for injuries incident to operation of roads, see post, § 259.

[a] (Sup. 1885)

Where a lease of property by a railroad company for a year contains collateral stipulations which might have been performed after the expiration of the first term and the lessee was permitted to hold over, such stipulations were made continuous by the implied consent

of the parties.—*New York, C. & St. L. Ry. Co. v. Randall*, 26 N. E. 122, 102 Ind. 453.

[b] (Sup. 1893)

Elliott's Supp. § 1088, provides a penalty against "every corporation, company, or person operating a railroad within this state" for failure to give blackboard notices of the time for the arrival of passenger trains at certain stations. *Held*, that penalties incurred by the lessee of a railroad in operating the same do not attach to the lessor railway company.—*State v. Pittsburgh, C., C. & St. L. Ry. Co.*, 135 Ind. 578, 35 N. E. 700.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 423-433.

See, also, 33 Cyc. pp. 405-409; note, 48 Am. Rep. 580.

§ 140. Consolidation.

Affecting right to appeal, see APPEAL AND ERROR, § 150.

Combinations to control transportation in violation of anti-trust laws, see MONOPOLIES, § 16.

Consent of stockholders, see ante, § 123.

Effect as to grant of public aid, see ante, § 39.

Right of consolidated company to exercise power of eminent domain, see EMINENT DOMAIN, § 10.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 392, 393, 443-455.

See, also, 33 Cyc. pp. 422-441; note, 45 L. R. A. 271.

§ 141. — Power to consolidate.

[a] (Sup. 1907)

Under the express provisions of Acts 1853, p. 107, c. 86 (Burns' Ann. St. 1901, § 5262), the right of consolidation so provided applies to railroads organized after, as well as before, the enactment of the statute.—*Smith v. Cleveland, C., C. & St. L. Ry. Co.*, 170 Ind. 382, 81 N. E. 501.

Under the express provisions of Acts 1853, p. 105, c. 85 (Rev. St. 1881, § 3971), a railroad company organized in this state may consolidate with another organized in an adjoining state.—*Id.*

The fact that Acts 1853, p. 105, c. 85 (Rev. St. 1881, § 3971), speaks of the making of one joint-stock company of the "two" roads thus connected, does not prevent the consolidation of more than two roads, since, as a consolidated company may reconsolidate, it would make no substantial difference whether the consolidation was accomplished by successive acts or by one concurrent agreement.—*Id.*

The purpose of Burns' Ann. St. 1901, § 5215, providing that a railroad may not consolidate with any railroad built, equipped, or operated within the state which may cross or intersect its line, was to prevent the absorption of competing lines, and it does not apply where

the contiguity or intersection is at a terminal point of the road consolidated.—Id.

A railroad company is not precluded from consolidating with another company under Acts 1853, p. 105, c. 85 (Rev. St. 1881, § 3971), providing for the consolidation of a railroad company with another company organized in an adjoining state, by the fact that it was the product of a prior consolidation, since the power of consolidation conferred is not exhausted by a single exercise.—Id.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 443.

See, also, 33 Cyc. pp. 423-428.

§ 142. — Agreements and proceedings.

[a] (Sup. 1895)

Where a stockholder and the corporation which voluntarily became incorporated with another participated in all the necessary proceedings in such consolidation, and permitted the de facto corporation so formed to control the corporate business and property, and third persons to purchase the mortgage bonds of the new company, and to acquire other rights and interests based on the existence of the de facto corporation, the fact that the stockholder, at a foreclosure sale under the mortgage bonds issued by the de facto company, notified purchasers that he would contest the consolidation, does not prevent the stockholder and the corporation from being estopped to attack such consolidation.—Bradford v. Frankfort, St. L. & T. R. Co., 142 Ind. 383, 40 N. E. 741, 41 N. E. 819.

[b] (Sup. 1896)

In an action by the state to recover fees from railroad companies for the filing of articles of consolidation (Acts 1891, p. 84, §§ 1, 2), it appeared that an agent of the companies applied to the secretary of state to file and record articles of consolidation, but that, on being informed of the amount of the fees required, he refused to pay the same, and left the office, carrying the papers with him, with the consent of the deputy secretary of state. *Held*, that the articles were not filed.—State v. Chicago & E. I. R. Co., 145 Ind. 229, 43 N. E. 226.

Under Acts 1891, p. 84, §§ 1, 2, providing that the secretary of state shall charge certain fees for filing and recording an agreement of railroad companies to consolidate, and providing that he shall "neither file nor record any of the articles * * * unless all the fees for filing are first paid," the payment of the fees is a condition precedent.—Id.

[c] (Sup. 1907)

Irregularities in the proceedings for the consolidation of railroads have no greater effect than to render the consolidated company a merely de facto corporation.—Smith v. Cleveland, C., C. & St. L. R. Co., 170 Ind. 382, 81 N. E. 501.

Burns' Ann. St. 1901, § 5252, providing that, whenever two or more railroad companies

unite under a common name, they shall, upon its adoption, cause a copy of the resolutions of their boards of directors to be recorded in the recorders' offices of the different counties through which the road may run, relates only to the union of two roads under a common name for the purpose of operation within the state, and not to a consolidation and merger of the capital stock of companies.—Id.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 441-447.

See, also, 33 Cyc. pp. 428-430.

§ 143. — Operation and effect.

Rights and remedies of dissenting stockholders, see CORPORATIONS, § 584.

[a] (Sup. 1895)

A notice given by one of the stockholders of a corporation which was consolidated with others at the time of a foreclosure sale of certain of its assets that he held paid-up stock of the company; that he had paid taxes voted in aid of the construction of the road; that the consolidation was illegal; and that he would contest its validity, but pointing out no defects except those which both he and the corporation were already estopped to assert—was ineffective to establish the invalidity of the bonds as against the mortgage bondholders and purchasers.—Bradford v. Frankfort, St. Louis & T. R. Co., 40 N. E. 741, 41 N. E. 819, 142 Ind. 383.

[b] (Sup. 1907)

The consolidation of two or more railroad corporations pursuant to the laws of different states results in the formation of one corporation, which is regarded as a domestic corporation in each of the states whose laws are followed in effecting the consolidation.—Smith v. Cleveland, C., C. & St. L. Ry. Co., 170 Ind. 382, 81 N. E. 501.

In the absence of restrictions, authority to consolidate confers upon the resultant corporation all the powers, franchises, rights, obligations, and duties of the constituent companies.—Id.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 392, 448-450.

See, also, 33 Cyc. pp. 431-437.

§ 144. — Rights and liabilities of parties.

Effect of consolidation on liability for injuries from operation of road, see post, § 263.

[a] (Sup. 1856)

The legislature passed an act authorizing the consolidation of two railroad companies under their charters. After the act took effect, A. subscribed to the stock of one of them. After the consolidation, A. was sued by the new company for the amount of his stock. *Held*, that he was liable, and this whether the consolidation took place with his knowledge and consent, or not.—Sparrow v. Evansville & C. R. Co., 7 Ind. 369.

[b] When the state consents to the consolidation of two railroad companies by an act of the legislature, the act of the companies in making it is not void, though, if done without his consent, a stockholder is discharged from his subscription.—(Sup. 1857) *McCray v. Junction R. Co.*, 9 Ind. 358; (1859) *Martin v. Same*, 12 Ind. 605.

[c] Consolidation of corporations, without consent of the stockholders, releases nonconsenting stockholders from subscriptions.—(Sup. 1858) *Booe v. Junction R. Co.*, 10 Ind. 93; (1859) *Martin v. Same*, 12 Ind. 605.

[d] (Sup. 1858)

The property of one consolidating railroad company may be mortgaged for its own debts, even after the consolidation.—*Wright v. Bundy*, 11 Ind. 398, 409.

[e] (Sup. 1863)

A railroad corporation was organized under the general railroad law of 1852, which law was by its terms liable to "be amended or repealed at the discretion of the legislature." The defendant subscribed for stock in this company on February 24, 1853. At about the same time an act authorizing the consolidation of companies was passed. The corporation in question consolidated with another, and it also appeared, from its articles of association, that such consolidation was merely carrying out the purpose of its organization. *Held*, that the defendant was not exonerated from his subscription.—*Hanna v. Cincinnati & Ft. W. R. Co.*, 20 Ind. 30.

[f] (Sup. 1863)

K. recovered judgment against two consolidated railroad companies. After rendition thereof the court dissolved the consolidation. K. then moved for execution, and notified both companies of his motion. *Held*, that the notice was sufficient, that the validity of K.'s judgment was not impaired by the dissolution, and that he was entitled to his execution.—*Ketcham v. Madison, I. & P. R. Co.*, 20 Ind. 260.

[g] (Sup. 1863)

Respective railroad companies of Indiana and Ohio were consolidated under the name of the Ohio company. The consolidation was effected under the laws of these states, neither of which directly gave to the other jurisdiction over the property of the companies. The Indiana company had already issued first mortgage bonds, which were afterwards guaranteed by the Ohio company. By the articles of consolidation the companies agreed that the corporate name and franchises of the Ohio company should be kept, except so far as modified by the enlarged interest of the company and by the laws of Indiana; that the property and franchises of the Indiana company were passed to the Ohio company; that its organization and name should cease; and that its debts should be paid by the Ohio company. Before the consoli-

date, the original Ohio company had issued bonds, for the payment of which a lien existed on its road, and after the consolidation it issued other bonds, securing them by a lien on the whole road. The first bondholders of the original Indiana company sought to foreclose their mortgage by a suit against the Ohio company. *Held*, that the consolidation effected at least a transfer of the property of the Indiana company to the Ohio company, and hence the suit was properly brought.—*Eaton & H. R. Co. v. Hunt*, 20 Ind. 457; *Varnum v. Same*, Id. 468.

[h] (Sup. 1863)

The R. Railroad Company of Indiana issued bonds secured by mortgage to a trustee which were guaranteed by the E. Railroad Company of Ohio. The former company issued other bonds secured by a second mortgage on its road to the same trustee. Afterwards such railroads which met at the state line, were consolidated as the E. Railroad Company. Under the respective laws of such states, neither one directly gave to the other jurisdiction over the property of the companies. The articles of consolidation provided that the corporate name and franchises of the E. Company should be kept except so far as modified by the enlarged interest of the company and by the laws of Indiana, and that it should have all the property and franchises of the R. Company, whose organization and name should cease, and whose debts should be paid by the E. Company. Before the consolidation the original E. Company issued bonds, for the payment of which liens were made on its road, and after the consolidation issued other bonds securing them by lien on the entire road. An action was commenced by the first mortgage bondholders of the R. Company to foreclose their mortgage against the consolidated company. *Held*, that the transfer of the bonds to the plaintiffs by the E. Railroad Company, to which they had been transferred with the other property of the R. Railroad Company, was not illegal because they had before maturity been put into circulation by the latter company, into whose control they had returned before the consolidation.—*Eaton & H. R. Co. v. Hunt*, 20 Ind. 457.

[i] (Sup. 1863)

Subscription to the capital stock of railroad companies, made since the taking effect of Act Feb. 23, 1853, authorizing the consolidation of such companies, will not be discharged or invalidated by the subsequent consolidation of the company in which they are made, but they will be held to have been made with reference to said law.—*Bish v. Johnson*, 21 Ind. 299.

[j] A consolidated corporation, formed out of several independent railroad corporations, is liable for the debts of each absorbed corporation.—(Sup. 1868) *Indianapolis, C. & L. R. Co. v. Jones*, 29 Ind. 465, 95 Am. Dec. 654; (1872) *Columbus, C. & I. C. R. Co. v. Powell*, 40 Ind. 37.

[k] (Sup. 1889)

A railroad company formed by the consolidation of two companies succeeds to all the rights of each of the corporations of which it is composed, and may compromise and settle a claim against one of them, and maintain an action to enforce the settlement.—*Paine v. Lake Erie & L. R. Co.*, 31 Ind. 283.

[l] (Sup. 1889)

Where one railroad company goes entirely out of existence by being consolidated with another, if no arrangements are made respecting the property and liabilities of the first company, the new company will succeed to all the property and be answerable for all the liabilities.—*Louisville, N. A. & C. Ry. Co. v. Boney*, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435.

[m] (Sup. 1891)

Where a railroad company is consolidated with another, its land vests in the latter.—*Cashman v. Brownlee*, 128 Ind. 266, 27 N. E. 560.

[n] (Sup. 1894)

A consolidated railroad company composed of a company organized under the Indiana laws and a company organized under the laws of another state has all the rights held by the company organized in Indiana.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Harden*, 37 N. E. 324, 137 Ind. 486.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 392, 393, 451-455.

See, also, 33 Cyc. pp. 437-441.

VIII. INDEBTEDNESS, SECURITIES, LIENS, AND MORTGAGES.

Effect of consolidation of companies, see ante, § 144.

Personal judgment against railroad company in action to enforce assessment for public improvements, see MUNICIPAL CORPORATIONS, § 56.

(A) NATURE AND EXTENT OF LIABILITIES.

Appellate jurisdiction of action to declare lien on railroad property as dependent on whether constitutional question is involved, see COURTS, § 220 (7).

Subjects and titles of acts, see STATUTES, § 113.

§ 146. Liabilities on contracts in general.

Authority of agents of company to make contracts, see ante, § 17.

[a] (Sup. 1887)

A contract entered into by a railroad company, before the completion of its line, for the carriage of freight, is not necessarily ultra vires nor invalid; and, where it has been so far ex-

ecuted that the company has received its benefits, it cannot, while retaining such benefits, assert that it had no power to make the contract.—*Louisville, N. A. & C. Ry. Co. v. Flanagan*, 113 Ind. 488, 14 N. E. 370, 3 Am. St. Rep. 674.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 458.

See, also, 33 Cyc. p. 442.

§ 148. Making and indorsement of negotiable instruments.

[a] (Sup. 1858)

A railway company chartered for the specific purpose of constructing a railroad between two points to connect with a railroad company of another state without having the express power to execute bills and notes has the power to make bills and notes necessary or proper in carrying through the undertaking, but it cannot execute accommodation paper or paper to aid in undertaking not contemplated by the charter, and such paper, if executed, will be void in the hands of an assignee.—*Smead v. Indianapolis, P. & C. R. Co.*, 11 Ind. 104.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 460.

See, also, 33 Cyc. p. 443.

§ 149. Making and issue of bonds.

Validity of bonds issued by consolidated company, see ante, § 144.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 461-471.

See, also, 33 Cyc. pp. 444, 454.

§ 152. — Negotiation and sale.

Sale of bonds of other railroad company, see ante, § 18.

[a] (Sup. 1859)

The bonds of a railroad company are not, it seems, exactly governed by the law merchant, but they pass by delivery, like bank notes, so as to vest a complete title in the bona fide possessor; and they are entitled to all the privileges of commercial paper.—*Junction R. Co. v. Cleaneay*, 13 Ind. 161.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 465, 466.

See, also, 33 Cyc. pp. 447, 448.

§ 154. Guaranty and suretyship.

[a] (Sup. 1865)

A railroad company, for the purpose of enabling another company to build a connecting road, guarantied the latter's bonds. *Held*, that the guarantor was liable to a bona fide holder of the bonds, although its charter contained no authority to make an accommodation guaranty, as it was within the corporate powers of the guarantor to sell and guaranty bonds held by it in the usual course of business, and as the guaranty appeared, on its face and from a circular

of the guarantor's agent who sold the bonds, to be such a contract as the company had power to make.—*Madison & I. R. Co. v. Norwich Sav. Soc.*, 24 Ind. 457.

FOR CASES FROM OTHER STATES.

SEE 41 CENT. DIG. R. R. §§ 472, 473.

See, also, 33 Cyc. pp. 453-457.

§ 159. Liens for labor or supplies.

Foreclosure, see post, §§ 180-200.

Liability in general, see ante, § 111.

Limitation of subcontractor to amount payable under principal contract, see *MECHANICS' LIENS*, § 164.

Priorities, see post, § 171.

[a] (Sup. 1890)

The right to a lien is not a merely personal privilege, and the assignment of estimates for amounts due contractors, certified to by the railroad company for whom the work was done, and of the contract with the company, carries the right of lien for the estimates, and for work done before and after the assignment.—*Midland Ry. Co. v. Wilcox*, 122 Ind. 84, 23 N. E. 506.

Act March 6, 1883, provides that contractors, subcontractors, and laborers, who shall furnish material or perform labor for any railroad corporation whose road is not in operation over the whole line thereof, in the way of grading, building embankments, or making excavations for a track, or building or repairing bridges or trestle work, shall have a lien on the work so performed. Act July 18, 1885 (Elliott's Supp. §§ 1699-1704), amending and explaining the foregoing act, provides that a lien shall be on a railroad within the "county" in which the labor and material is performed and furnished. *Held*, that the act of 1885 is merely explanatory of the act of 1883, and does not profess to sweep away any rights created by the former act, or create any new ones, and both acts must be considered together in arriving at the legislative intent expressed in the former.—*Id.*

Act July 18, 1885 (Elliott's Supp. §§ 1699, 1704), amending and explaining the foregoing act, provides that the lien shall be on the railroad within the "county" in which the labor and material is performed and furnished. *Held*, that the legislature did not intend to limit the lien to a single county, and, where the work extends into two or more counties, it may be enforced in any one of the counties as to the entire line of unfinished road.—*Id.*

Where a corporation having a line of railroad in operation to a town or city within a county contracts for the construction of a part of the road leading from such town or city to a point beyond the county limits, the contractors may acquire a lien upon the part which they construct or aid in constructing, though a portion of it lies within the county in which a part of the road is completed and in operation.—*Id.*

Where a line of railroad, though it extends through two or more counties, is treated in the contract and in the performance of the work under the contract as a continuous line of road, the contractors are not required as against the railroad company, however it may be as to mortgagees or judgment creditors, to divide the road into parts corresponding to the counties which it traverses, and enforce the lien in each county separately, and, if a notice is filed in each county, it will be sufficient, though it does not divide the road into parts.—*Id.*

Act March 6, 1883, provides that contractors, subcontractors, and laborers, who shall furnish material or perform labor for any railroad corporation whose road is not in operation over the whole line thereof, in the way of grading, building embankments, or making excavations for the track, or building or repairing bridges or trestlework, shall have a lien on such grading, embankment, or excavation, and on such bridges or trestlework as they may have built or repaired. *Held*, that it was the intent of the legislature to give a lien on the railroad, and not on mere parcels of it.—*Id.*

[b] (Sup. 1891)

Where a lien is obtained on a railroad by filing such notice as the law requires in one county, the lien created extends to the fund derived from the sale of the entire railroad pursuant to an interlocutory decree rendered after trial, and in cases where the parties by agreement submit the questions to the court for trial at the intermediate hearing.—*Farmers' Loan & Trust Co. v. Canada & St. L. Ry. Co.*, 26 N. E. 784, 127 Ind. 250, 11 L. R. A. 740.

The acquisition of a mechanic's lien results from a compliance with the requirements of the statute, and is not effected by the consequences which flow from its acquisition.—*Id.*

A day laborer employed by, and a man who furnishes material to, a contractor on railroad construction, are not subcontractors, within the meaning of the lien law.—*Id.*

Where a lien is obtained by laborers and materialmen against a railroad running continuously through several counties, by filing such a notice as the law requires in one county, the lien extends to the proceeds of a sale of the entire road, both as against the owners and mortgagees of the road.—*Id.*

[c] (App. 1895)

The lien given by Act March 9, 1889, § 6, to persons performing labor in the construction of a railroad, is measured by the reasonable value of such labor, and not by the terms of the contract between the laborer and the contractor.—*Chapman v. Elgin, J. & E. Ry. Co.*, 11 Ind. App. 632, 39 N. E. 289.

[d] (App. 1898)

Under Rev. St. 1894, § 7265, providing, *inter alia*, that all persons who perform work of any kind in the construction or repair of a railroad, whether under a contract with the rail-

road or with a contractor or subcontractor, shall have a lien upon the right of way and franchises of such railroad, a laborer who performs work for a contractor in digging a well at the stock yard owned by a railroad company is entitled to a lien for the amount due him for his labor.—*Wabash R. Co. v. Achemire*, 49 N. E. 835, 19 Ind. App. 482.

[e] (App. 1905)

Burns' Ann. St. 1901, § 7265, providing that persons who shall furnish work or material in the construction of a railroad shall have a lien thereon, gives a lien for materials which go into the construction of the railroad, so as to be in a sense incorporated therein.—*Cincinnati, R. & M. R. R. Co. v. Shera*, 36 Ind. App. 315, 73 N. E. 293.

A person furnishing coal consumed in the operation of a steam shovel used by a contractor in the construction of a railroad is not entitled to a lien on the right of way and franchises of the railroad company, under *Burns' Ann. St. 1901*, § 7265, giving such lien for labor or materials used in the construction or repair of any railroad.—Id.

[f] (App. 1905)

Under section 7265, *Burns' Ann. St. 1901* (Acts 1889, p. 257, § 6), giving a lien for labor performed in pursuance of a contract, with any person engaged as lessee, contractor, subcontractor, or agent of a railroad company, in the work of constructing or repairing its road, a lien may be had for any work done in pursuance of an authority originally emanating from the railroad company.—*Pere Marquette R. Co. v. Smith*, 36 Ind. App. 439, 74 N. E. 545.

[g] (App. 1905)

Burns' Ann. St. 1901, § 7265, declares that all persons who shall perform labor in building bridges or other structures in the construction or repair of any railroad, whether under a contract with the railroad corporation, or a contract with any person, corporation, or company engaged, as lessee, contractor, subcontractor, or agent of such railroad company, in constructing or repairing any such railroad, shall have a lien. *Held*, that such section conferred a lien on laborers employed for railroad construction by a subcontractor in the second degree; such work being performed in pursuance of recognized authority originally emanating from such railroad corporation.—*Pere Marquette R. Co. v. Baertz*, 74 N. E. 51, 36 Ind. App. 408; *Same v. McGovern*, 74 N. E. 1128, 36 Ind. App. 703; *Same v. McCaully*, 74 N. E. 1129, 36 Ind. App. 703; *Same v. Jones, Id.*; *Same v. Sharzinski*, 74 N. E. 1129, 36 Ind. App. 704; *Same v. Kubsch, Id.*; *Same v. Nimmo, Id.*; *Same v. Skurath, Id.*; *Same v. Folk, Id.*; *Same v. Palmer, Id.*; *Same v. Koch, Id.*; *Same v. Black*, 74 N. E. 1130, 36 Ind. App. 704; *Same v. McMannis, Id.*; *Same v. Jones, Id.*; *Same v. Donnelly*, 74 N. E. 1130, 36 Ind. App. 705; *Same v. Swanson, Id.*; *Same v. Leslie, Id.*; *Same v. Bellasty, Id.*; *Same v. Locush, Id.*; *Same v.*

Baker, Id.; *Same v. Grund*, 74 N. E. 1131, 36 Ind. App. 705; *Same v. Martenson, Id.*; *Same v. Aho, Id.*; *Same v. Wonries, Id.*; *Same v. Philips, Id.*

Where, in an action based on time checks issued to railroad construction laborers, there was evidence that the checks were indorsed by the laborers to whom issued, and purchased by plaintiff at the suggestion of the maker, it was sufficient to show an assignment of the laborers' claims, with their right to a lien.—Id.

[h] (App. 1905)

Burns' Ann. St. 1901, § 7265, giving a lien to one performing labor in construction of a railroad under a contract with a subcontractor of the railroad company, extends to a laborer of one having a subcontract under a subcontractor.—*Pere Marquette R. Co. v. Smith*, 74 N. E. 545, 36 Ind. App. 439; *Same v. Palmer*, 74 N. E. 546, 36 Ind. App. 703; *Same v. McGovern*, 74 N. E. 1128, 36 Ind. App. 703; *Same v. McCaully*, 74 N. E. 1129, 36 Ind. App. 703; *Same v. Jones, Id.*; *Same v. Sharzinski*, 74 N. E. 1129, 36 Ind. App. 704; *Same v. Kubsch, Id.*; *Same v. Nimmo, Id.*; *Same v. Skurath, Id.*; *Same v. Folk, Id.*; *Same v. Palmer, Id.*; *Same v. Koch, Id.*; *Same v. Black*, 74 N. E. 1130, 36 Ind. App. 704; *Same v. McMannis, Id.*; *Same v. Jones, Id.*; *Same v. Donnelly*, 74 N. E. 1130, 36 Ind. App. 705; *Same v. Swanson, Id.*; *Same v. Leslie, Id.*; *Same v. Bellasty, Id.*; *Same v. Locush, Id.*; *Same v. Baker, Id.*; *Same v. Grund*, 74 N. E. 1131, 36 Ind. App. 705; *Same v. Martenson, Id.*; *Same v. Aho, Id.*; *Same v. Wonries, Id.*; *Same v. Philips, Id.*

[i] (App. 1908)

Burns' Ann. St. 1901, § 7265, giving to persons who perform work or furnish material in the construction of railroads a lien for the services and material furnished, was intended for the sole benefit of the persons named in the law, and under section 7266, providing that a person desiring to acquire the lien shall give notice of his intention to hold it by causing a notice thereof to be recorded in the recorder's office in the proper county, no lien attaches until the required notice has been filed; hence an assignment of such a claim by persons performing work or furnishing material made before a lien is perfected carries with it no right to a lien.—*Fleming v. Greener*, 41 Ind. App. 77, 83 N. E. 354.

[j] (Sup. 1909)

Mechanic's Lien Act (Acts 1883, p. 140, c. 115), as amended in 1889 (Acts 1889, p. 257, c. 123), giving a lien to "mechanics, laborers," etc., was intended to protect the class of persons commonly known by those terms, who generally personally perform the work, and "laborers" does not embrace "contractors"; and hence section 12 of the act (*Burns' Ann. St. 1908*, § 8305), giving liens to persons performing work in the construction of a railroad, etc., does not

apply to contractors.—Indianapolis Northern Traction Co. v. Brennan, 87 N. E. 215.

[k] (Sup. 1909)

Burns' Ann. St. 1908, § 8305, giving a lien to persons performing work, etc., in constructing a railroad, does not give subcontractors a lien because they are not within the scope of the title to the act.—Cleveland, C., C. & St. L. Ry. Co. v. De Frees, 87 N. E. 722.

[l] (Sup. 1909)

Acts 1873, p. 187, c. 78, providing, in section 1, that all persons who by contract with any railroad corporation shall perform work or labor in the way of grading, building embankments, etc., for the track of any railroad, shall have a lien on such grading, etc., does not apply to a contractor who performs no manual labor himself, but who employs men and teams in the performance of his contract and derives his compensation from the profits realized. Rehearing, 87 N. E. 215, denied.—Indianapolis Northern Traction Co. v. Brennan, 90 N. E. 65.

[m] (Sup. 1909)

Burns' Ann. St. 1908, § 8305 (Burns' Ann. St. 1901, § 7265), only gives a lien for labor or materials furnished a railroad corporation upon the right of way and franchises of such corporation and upon all works and structures mentioned in said section that may be "upon the right of way and franchises of such railroad within the limits of the county" in favor of the person performing the work or furnishing the material, and does not create a personal liability against the owner of the property. Rehearing, 87 N. E. 719, denied.—Fleming v. Greener, 90 N. E. 72.

Before any lien can be acquired under Burns' Ann. St. 1908, § 8305, a notice of intention to hold such lien must be recorded in the recorder's office as expressly required by section 8306, and, where no such notice was given before labor claims against railroad companies were assigned, no lien on the railroads passed to the assignees.—Id.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 477, 486-504.
See, also, 33 Cyc. pp. 465-482; note, 75 C. C. A. 274.

§ 162. Mortgages and trust deeds.

Effect of consolidation of companies, see ante, § 144.

Foreclosure, see post, §§ 180-200.

Priorities, see post, § 171.

Right to mortgage money appropriated to aid railroads, see ante, § 34.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 505-548.
See, also, 33 Cyc. pp. 483-520.

§ 163. — Power to mortgage.

[a] (Sup. 1880)

The power to mortgage, conferred by Loc. Laws 1851, p. 43, had reference only to such

lands and property as the company could lawfully acquire, and could not, therefore, have included such as were not necessary for the purposes of the road.—Taber v. Cincinnati, L. & C. Ry. Co., 15 Ind. 459.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 505-509.
See, also, 33 Cyc. pp. 483-487.

§ 164. — Nature as security.

[a] (Sup. 1882)

A railroad corporation's deed of trust to secure its bonds or coupons operates as a mortgage.—Coe v. Johnson, 18 Ind. 218.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 510.
See, also, 33 Cyc. pp. 485-487.

§ 167. — Property and funds included.

[a] (Sup. 1884)

A deed of trust, executed by a railroad company, to a trustee, to secure the payment of certain bonds, and giving certain powers to the trustee touching the operation of the road, in the granting clause of which the following words are used: "The road, railways, bridges, locomotives, engines, cars, depots, right of way, and land, with all buildings, shops, tools, and machinery then in use, owned by them, or which they might thereafter require, with the superstructure, rails, and other materials used thereon"—must be construed to embrace wood provided for the use of the road from time to time.—Coe v. McBrown, 22 Ind. 252.

[b] (App. 1903)

Mortgages executed by a railway company covered property afterwards acquired, "connected with or appertaining to" the railway. The decree in foreclosure and the master's deed executed thereunder contained the same description. *Held* that property acquired after the execution of the mortgage, adjacent to depot grounds of the railway, but never used for railroad purposes, and leased to different parties for a barber shop, grocery, and other uses entirely foreign to the operation of the railway, did not pass by the foreclosure, and was therefore subject to sale under a judgment rendered against the company after the execution of the mortgage.—Chicago, I. & L. Ry. Co. v. McGuire, 65 N. E. 932, 31 Ind. App. 110, 99 Am. St. Rep. 249, writ of error dismissed (1904) 25 S. Ct. 200, 196 U. S. 128, 49 L. Ed. 413.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 519-533.
See, also, 33 Cyc. pp. 493-506; note, 33 Am. Rep. 353; note, 99 Am. St. Rep. 252.

§ 169. — Rights, duties, and liabilities of mortgagees and trustees.

[a] (Sup. 1865)

A. sold land to a railroad company, reserving the right to occupy it for a time, but the reservation was omitted from the conveyance by

mistake. He afterwards sold to the same company another tract of 80 acres. The company then deeded the above tracts with others to A. and B. in trust to secure the payment of its bonds to each of which was appended a certificate by A. and B. that the company had conveyed to them certain land by deeds which they had recorded to secure the payment of the bonds, but there was a mistake in description in the deed of trust of the 80-acre tract. The company reserved the right to sell any of the land at not less than its value as appraised in the trust deeds, and the trustees, on the surrender of any of the company's bonds, were to convey a proportionate amount of the land to the party so surrendering. *Held*, that the sale of the 80-acre tract by the company to A. was in substantial compliance with the terms of the deed of trust by which the company reserved the right to sell any of the lands on the surrender of an amount of the bonds equal to the appraised value of the lands sold.—*Sample v. Rowe*, 24 Ind. 208.

The company having afterwards consolidated with another company, A. purchased the 80-acre tract by surrendering \$3,000 of the bonds and crediting the company with \$200 for his services as trustee. *Held* that, if the fact that A. paid \$200 of the appraised value in a claim for services as trustee and not in bonds rendered the sale voidable, it could only be avoided by a direct proceeding to set aside the sale and the repayment to him of the purchase money and interest.—*Id.*

[b] (*Sup.* 1868)

A railroad company conveyed 44 tracts of land, each numbered, described, and valued to trustees, to secure the payment of bonds amounting in the aggregate to \$75,000, put on the market to raise money, reserving the right in the company to sell any portion of the land at the valuation thereof, and, on the surrender to the trustees of bonds to the amount of the land sold by the company, the former were empowered to convey the land in fee. *Held*, that this was a power coupled with an interest, and that the surrender of bonds to the trustees to an amount equal to the valuation of the land so sold was a substantial compliance with the terms of the power.—*Rowe v. Lewis*, 30 Ind. 163.

[c] (*Sup.* 1876)

A petition seeking to hold a trustee of a railroad liable to pay a judgment recovered against the company was defective, where it did not allege what moneys of the company had come to the hands of the trustee.—*Nicholson v. Louisville, N. A. & C. Ry. Co.*, 55 Ind. 504.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 536-548.

See, also, 33 Cyc. pp. 507-520.

§ 171. Priorities of liens and mortgages.

[a] (*Sup.* 1891)

Where the mortgagee intrusts machinery to the mortgagor for a long period of time to be

used by him in operating a railroad, it will be presumed against the mortgagee that all necessary repairs were contemplated, and that the mortgagor was, in case of needed repairs, constituted the agent of the mortgagee in procuring such repairs, and in such case equity gives the mechanic a lien for his services and materials, and such lien is paramount and superior to the lien of the mortgagee.—*Watts v. Sweeney*, 26 N. E. 680, 127 Ind. 116, 22 Am. St. Rep. 615.

A railroad mortgagor of a locomotive, the only one on the road, retaining possession under the terms of the mortgage, and also after forfeiture and breach, will be presumed to be the mortgagee's agent to keep it in repair, and has the right to create a lien thereon for repairs made after the forfeiture, which is paramount to the mortgage.—*Id.*

[b] (*Sup.* 1891)

A railway company contracted with a construction company to build and equip its road. The president of the railway company was also the general manager of the construction company. The railway company ordered the execution of a trust deed, which was signed in duplicate, and one of the duplicates was delivered by such president to a trust company, and the other was retained by the railway company. The bonds which the trust deed was executed to secure were retained by the company who executed the mortgage, but from time to time bonds were delivered to such president on estimates issued to him by the railway company's engineer. Ten of the bonds were transferred to D., and 66 were transferred to a subcontractor, and the remainder were hypothecated by the construction company. Liens were claimed for material and labor performed, for the construction company. *Held*, that such laborers and materialmen were justly adjudged to have the prior lien on the fund derived from the sale of the railroad.—*Farmers' Loan & Trust Co. v. Canada & St. L. Ry. Co.*, 26 N. E. 784, 127 Ind. 250, 11 L. R. A. 740.

Where a mechanic files his notice within the time and in the mode prescribed by the statute, he has, as against the mortgagee, a paramount lien on the entire road.—*Id.*

In the absence of proof that the holder thereof is a bona fide holder, the lien of a mortgage on a railroad, given to a contractor before its construction, and assigned by him, is inferior to liens of laborers and materialmen for the subsequent construction of the road.—*Id.*

A principal contractor cannot defeat the liens of those whose debtor he is for work and materials by asserting the lien of a mortgage executed by the owner by whom he was employed to build a railroad.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 554-576.

See, also, 33 Cyc. pp. 522-544; note, 54 Am. St. Rep. 400.

§ 172. Interest and coupons.

[a] (Sup. 1860)

Complaint to foreclose a mortgage executed by a railway company to a trustee, to secure the payment of certain bonds. The mortgage was conditioned that after default in the payment of the principal, or of any interest on said bonds, the trustee might lease the lands, or, at his option, he might, and upon request of holders of one-half the bonds he should, cause the lands to be sold at public auction. The charter contained no express grant of power to acquire, hold, mortgage, or dispose of real estate, and the lands included in this mortgage were not such as were needed or used in the operation of the road. The bonds were issued after the law of January 20, 1852 (1 Rev. St. p. 427, § 2), authorizing railroads to receive lands in payment of subscriptions of stock, went into effect. *Held*, that a demand of the interest due upon the bonds by the holders thereof, at the place where they were payable, was sufficient, without any demand by the trustee.—*Taber v. Cincinnati, L. & C. Ry. Co.*, 15 Ind. 459.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 577-580.

See, also, 33 Cyc. pp. 545, 546.

§ 174. Payment and satisfaction.

[a] (Sup. 1890)

Where subcontractors, materialmen, and laborers obtain judgments against the railroad company in actions of the pendency of which the contractor had due notice, the latter is bound by such judgments, and to the amount thereof his lien is abated.—*Midland Ry. Co. v. Wilcox*, 122 Ind. 84, 23 N. E. 506.

[b] (Sup. 1892)

Elliott, Supp. § 1710, provides that all persons who shall perform work or labor in the construction of a line of railroad, whether for the company owning such railroad or for a contractor thereof, shall have a lien upon the right of way and franchises of such railroad. *Held*, in an action by a laborer to enforce his statutory lien, that defendant railroad is not exonerated by showing that the labor was performed for a contractor, who was paid in full therefor by defendant.—*Indiana, I. & I. R. Co. v. Larrew*, 130 Ind. 368, 30 N. E. 517.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 588-592.

See, also, 33 Cyc. pp. 552-554.

§ 176. Enforcement of liabilities against property.

Order on railroad company for payment of judgment for stock killed, see post, § 450.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 391, 594-600;

21 CENT. DIG. Execution, § 49; 36 CENT.

DIG. Mun. Corp. § 1245; 45 CENT. DIG.

Tax. § 1160.

See, also, 33 Cyc. pp. 554-557.

§ 177. — In general.

[a] (Sup. 1864)

A sheriff having a valid execution against a railroad company, which has mortgaged its road, has a right to levy upon and sell its interest in the property of the company, and cannot be enjoined from doing so; but the purchaser at such sale will not be entitled to the possession of the property sold until he has complied with the conditions of the mortgage.—*Coe v. McBrown*, 22 Ind. 252.

[b] (Sup. 1880)

An execution sale of property of a railway company is not invalid, on collateral attack, because of a slight variance between the true name of the company and its name as described in the judgment and execution, in using the word "Railway," instead of "Railroad."—*Talbot v. Hale*, 72 Ind. 1.

[c] (Sup. 1903)

Burns' Ann. St. 1901, § 834a, provides that, when a judgment against a railroad company operating a line through the state shall remain unpaid for a year, the creditor may file a complaint alleging such facts, and cause summons to be served on the railroad company, whereupon the court shall order the issuance of a writ for any employé of the road to appear and answer as to the amount of money in his hands belonging to the company, and the probable amount of money receivable by him, and, if such agent shall answer that he had been in constant receipt of money as such agent, the court shall order him to pay into the clerk's office such portions thereof, not exceeding one-half as the court may deem just, until the judgment is paid. *Held*, that such proceeding was quasi in rem in the nature of garnishment, and where no writ was issued against an agent, and he did not answer concerning funds in his hands, or which would probably come into his hands, there was no res within the court's jurisdiction to sustain a judgment ordering such agent to pay a certain amount out of funds coming into his hands as such, until plaintiff's judgment was satisfied.—*Chicago & S. E. Ry. Co. v. Witt*, 67 N. E. 519, 160 Ind. 680.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 391, 594-599;

21 CENT. DIG. Execution, §§ 49, 135; 45

CENT. DIG. Tax. § 1160.

See, also, 33 Cyc. p. 555.

§ 178. — Claims against specific property.

[a] (Sup. 1902)

Such property of a railroad corporation as is essential to the operation of the road will not be ordered sold by piecemeal to satisfy a statutory lien for a street improvement, but, in lieu thereof, the court has power to render a personal judgment against the corporation, to be collected as ordinary judgments are col-

lected.—Pittsburgh, C., C. & St. L. Ry. Co. v. Fish, 63 N. E. 454, 158 Ind. 525.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 600; 36 CENT. DIG. Mun. Corp. § 1245; 45 CENT. DIG. Tax. § 1160.

See, also, 33 Cyc. pp. 555–557.

§ 179. Actions on obligations.

Filing written instrument with pleading, see PLEADING, § 308.

[a] (App. 1893)

Under Act April 13, 1885, § 1, as amended by Act March 9, 1889, § 6, (Elliott's Supp. § 1710.) providing that, if the work is done in pursuance of a contract with any subcontractor of a railroad corporation, the person performing it need not give notice to the corporation, as provided by Act March 6, 1883, to entitle him to a lien, but the performing of the work shall be sufficient notice, and that the provisions of the latter act, when applicable, shall remain in force, except that part of section 9 in reference to notice, no notice to the railroad company was necessary, further than the filing of notice of lien, to entitle a foreman of the subcontractors, to maintain an action against it for his services.—Ferguson v. Despo, 8 Ind. App. 523, 34 N. E. 575.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 601–604; 11 CENT. DIG. Contracts, § 1754.

See, also, 33 Cyc. pp. 557–559.

(B) FORECLOSURE OF LIENS AND MORTGAGES.

Estoppel of company in action to foreclose mortgage, see ESTOPPEL, § 30.

Receivers on foreclosure, see post, §§ 205–211.

§ 180. Right to foreclose.

[a] (Sup. 1863)

In a mortgage by a railroad company to a trustee, the power given to the trustee to sell is a cumulative remedy, and does not deprive the bondholders of the right to foreclose.—Eaton & H. R. Co. v. Hunt, 20 Ind. 457; Varnum v. Same, Id. 468.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 605–609.

See, also, 33 Cyc. pp. 562–565.

§ 183. Rights of action and defenses.

[a] (Sup. 1891)

In an action against a railroad company to enforce liens for labor and material, defendant cannot contend that plaintiffs were subcontractors, and were to be paid in bonds of the company as the contractors were to be paid, unless it shows that the bonds were tendered.—Farmers' Loan & Trust Co. v. Canada & St. L. Ry. Co., 127 Ind. 250, 26 N. E. 784, 11 L. R. A. 740.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 612.

See, also, 33 Cyc. p. 567.

§ 184. Jurisdiction and venue.

Jurisdiction as dependent on situs of property, see COURTS, § 18.

[a] (Sup. 1863)

The R. Railroad Company, of Indiana, issued bonds secured by mortgage to a trustee, which were guarantied by the E. Railroad Company, of Ohio. The former company issued other bonds, secured by a second mortgage on its road to the same trustee. Afterwards such railroads, which met at the state line, were consolidated as the E. Railroad Company, under the respective laws of such states, neither of which directly gave to the other jurisdiction over the property of the companies. The articles of consolidation provided that the corporate name and franchises of the E. Company should be kept, except so far as modified by the enlarged interest of the company and by the laws of Indiana, and that it should have all the property and franchises of the R. Company, whose organization and name should cease, and whose debts should be paid by the E. Company. Before the consolidation the original E. Company issued bonds for the payment of which a lien existed on its road, and after the consolidation it issued other bonds, securing them by a lien on the whole road. Held, in an action by the first bondholders of the R. Company to foreclose their mortgage against the consolidated company, that defendant took the road of the original E. Company, subject to mortgages existing thereon, and the mortgagees could maintain an action in the courts of Indiana and have a sale of the road within the limits of such state.—Eaton & H. R. Co. v. Hunt, 20 Ind. 457; Varnum v. Same, Id. 468.

No jurisdiction existed in or was given to the courts of Ohio to foreclose such mortgage.—Id.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 613.

See, also, 33 Cyc. pp. 568–570.

§ 188. Pleading.

In action to enforce street assessment, see MUNICIPAL CORPORATIONS, § 567.

[a] (App. 1895)

Where a complaint in an action to foreclose a laborer's lien alleges that plaintiff performed work and labor in grading and constructing a railroad between certain stations at the special instance and employment of a subcontractor, it was not necessary to allege the terms of the contract between the railroad company and the contractors.—Chapman v. Elgin, J. & E. Ry. Co., 39 N. E. 289, 11 Ind. App. 632.

[b] (App. 1895)

A complaint in an action to enforce a mechanic's lien against a railroad company for

labor in the construction of the roadbed, which shows that the company was engaged in the construction of a railroad between two points in P. county, that the company contracted with its codefendants for the construction of the road, that the contractors sublet a portion of the work to plaintiff, that plaintiff performed work under the contract in the construction of the road until stopped by the contractor, and that the work was of a certain value, is not demurrable as failing to show that the work was performed in P. county, that it was work for which a lien can be enforced, and that the work was such as was provided for by the contract.—*Dean v. Reynolds*, 12 Ind. App. 97, 39 N. E. 763.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 615-621.

See, also, 33 Cyc. pp. 575, 576.

§ 189. Evidence.

[a] (App. 1906)

Where, in a suit to foreclose laborers' liens on a railroad, it was agreed that since the performance of the work the defendant railroad company had been running work trains on the railroad, and that plaintiff finished the work on a specified date, such agreement sufficiently supported findings of fact that the place where the work was done was a part of defendant's right of way necessarily used by it in the prosecution of its business as a common carrier, and that the lien could not be foreclosed against the same without interfering with the rights of the public.—*Pere Marquette R. Co. v. Baertz*, 74 N. E. 51, 36 Ind. App. 408; *Same v. McGovern*, 74 N. E. 1128, 36 Ind. App. 703; *Same v. McCaully*, 74 N. E. 1129, 36 Ind. App. 703; *Same v. Jones, Id.*; *Same v. Sharzinski*, 74 N. E. 1129, 36 Ind. App. 704; *Same v. Kubsch, Id.*; *Same v. Nimmo, Id.*; *Same v. Skurath, Id.*; *Same v. Folk, Id.*; *Same v. Palmer, Id.*; *Same v. Koch, Id.*; *Same v. Black*, 74 N. E. 1130, 36 Ind. App. 704; *Same v. McMannis, Id.*; *Same v. Jones, Id.*; *Same v. Donnelly*, 74 N. E. 1130, 36 Ind. App. 705; *Same v. Swanson, Id.*; *Same v. Leslie, Id.*; *Same v. Bellasty, Id.*; *Same v. Locush, Id.*; *Same v. Baker, Id.*; *Same v. Grund*, 74 N. E. 1131, 36 Ind. App. 705; *Same v. Martenson, Id.*; *Same v. Aho, Id.*; *Same v. Wonries, Id.*; *Same v. Phillips, Id.*

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 622.

See, also, 33 Cyc. p. 576.

§ 191. Judgment or decree and execution.

[a] (App. 1905)

Where that part of a right of way of a railroad company on which labor was performed by plaintiff's assignors was a part of an entire system of railroad, and necessary for the carrying out of the railroad's duties to the public, so that it could not be sold apart from the entire line to foreclose a laborer's lien, it was

proper for the court, in the exercise of its equity powers, to direct a personal judgment against the railroad company.—*Pere Marquette R. Co. v. Baertz*, 74 N. E. 51, 36 Ind. App. 408; *Same v. McGovern*, 74 N. E. 1128, 36 Ind. App. 703; *Same v. McCaully*, 74 N. E. 1129, 36 Ind. App. 703; *Same v. Jones, Id.*; *Same v. Sharzinski*, 74 N. E. 1129, 36 Ind. App. 704; *Same v. Kubsch, Id.*; *Same v. Nimmo, Id.*; *Same v. Skurath, Id.*; *Same v. Folk, Id.*; *Same v. Palmer, Id.*; *Same v. Koch, Id.*; *Same v. Black*, 74 N. E. 1130, 36 Ind. App. 704; *Same v. McMannis, Id.*; *Same v. Jones, Id.*; *Same v. Donnelly*, 74 N. E. 1130, 36 Ind. App. 705; *Same v. Swanson, Id.*; *Same v. Leslie, Id.*; *Same v. Bellasty, Id.*; *Same v. Locush, Id.*; *Same v. Baker, Id.*; *Same v. Grund*, 74 N. E. 1131, 36 Ind. App. 705; *Same v. Martenson, Id.*; *Same v. Aho, Id.*; *Same v. Wonries, Id.*; *Same v. Phillips, Id.*

[b] (App. 1906)

A personal judgment against a railroad company may be given a laborer, who has a lien on the road for work done under a subcontractor in the construction of the road, the road being practically completed, though the company is not yet engaged in the business of a common carrier.—*Pere Marquette R. Co. v. Smith*, 74 N. E. 545, 36 Ind. App. 439; *Same v. Palmer*, 74 N. E. 546, 36 Ind. App. 703; *Same v. McGovern*, 74 N. E. 1128, 36 Ind. App. 703; *Same v. McCaully*, 74 N. E. 1129, 36 Ind. App. 703; *Same v. Jones, Id.*; *Same v. Sharzinski*, 74 N. E. 1129, 36 Ind. App. 704; *Same v. Kubsch, Id.*; *Same v. Nimmo, Id.*; *Same v. Skurath, Id.*; *Same v. Folk, Id.*; *Same v. Palmer, Id.*; *Same v. Koch, Id.*; *Same v. Black*, 74 N. E. 1130, 36 Ind. App. 704; *Same v. McMannis, Id.*; *Same v. Jones, Id.*; *Same v. Donnelly*, 74 N. E. 1130, 36 Ind. App. 705; *Same v. Swanson, Id.*; *Same v. Leslie, Id.*; *Same v. Bellasty, Id.*; *Same v. Locush, Id.*; *Same v. Baker, Id.*; *Same v. Grund*, 74 N. E. 1131, 36 Ind. App. 705; *Same v. Martenson, Id.*; *Same v. Aho, Id.*; *Same v. Wonries, Id.*; *Same v. Phillips, Id.*

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 624-633.

See, also, 33 Cyc. pp. 578-583.

§ 192. Sale.

[a] (Sup. 1889)

Plaintiff obtained a statutory lien against defendant's predecessor for grading and preparing part of its roadbed, and afterwards recovered a personal judgment against said company. After consolidation with defendant company, plaintiff sued to establish his claim, and to obtain a decree directing the sale of the roadbed constructed by him, and for general relief. The court found the amount due plaintiff, and directed its payment, and, on default, the sheriff was directed to sell all of defendant's property within the state, including all the rights, franchises, and privileges. *Held* that, as the debt remained unpaid, the lien afforded the basis

for the exercise by equity of jurisdiction to coerce payment, and that the order directing sale of all the property, etc., was beyond the power of the court.—*Louisville, N. A. & C. Ry. Co. v. Boney*, 117 Ind. 501, 20 N. E. 432, 3 L. R. A. 435.

[b] (App. 1906)

A continuous line of railroad is to be treated as an entirety and when in operation must be sold as an entirety and not in parts.—*Pere Marquette R. Co. v. Baertz*, 36 Ind. App. 408, 74 N. E. 51.

FOR CASES FROM OTHER STATES.

SEE 41 CENT. DIG. R. R. §§ 391, 634-642.
See, also, 33 Cyc. pp. 584-589.

§ 193. Rights and liabilities of purchasers.

Rights in respect to grant of public aid, see ante, § 39.

FOR CASES FROM OTHER STATES.

SEE 41 CENT. DIG. R. R. §§ 643-658.
See, also, 33 Cyc. pp. 590-604.

§ 194. — In general.

[a] (Sup. 1863)

A railroad company conveyed certain real estate belonging to the company to a trustee, to secure the payment of certain scrip or treasury warrants of the company, and provided that the trustee might sell the lands to redeem the scrip, and the lands should be subject to entry by the scripholders. *Held*, that a sale of lands by the trustee was not valid against a creditor of the company.—*Thompson v. Hollingsworth*, 21 Ind. 475.

[b] (Super. 1871)

Plaintiff and others living near a railroad constructed a grade, and furnished cross-ties for a switch for neighborhood convenience, under a contract with the company that the switch should remain permanently. The road and franchise of the contracting company were subsequently sold under a decree of foreclosure, and purchased by the defendant. *Held*, that defendant could remove the switch, unless it assumed the original contract, in accordance with the provisions of Act March 3, 1865, § 2, authorizing the purchasers at a sale of a railroad to form corporations and assume any debts and liabilities of the former company.—*Smith v. Indianapolis P. & C. Ry. Co.*, Wils. 88.

[c] (Sup. 1883)

A purchaser at a sale under a decree of foreclosure of a mortgage covering the property rights and franchises of a railway company takes all that the mortgage authorizes and the rights of such a purchaser are strictly analogous to those of purchasers at ordinary foreclosure sales.—*Ingalls v. Byers*, 94 Ind. 134.

[d] (Sup. 1887)

Where a property owner conveys to a railroad company a right of way, and the property

and franchises of the company to which the conveyance is made are subsequently mortgaged, and are sold on a decree of foreclosure, the railroad corporation which becomes the owner of such property and franchises, and constructs a railroad on the right of way, will be entitled to hold and enjoy the easement granted to the company by which the mortgage was executed.—*Columbus, H. & G. Ry. Co. v. Braden*, 110 Ind. 558, 11 N. E. 357.

[e] (Sup. 1890)

The rule is that a corporation which succeeds to the property and rights of another corporation through the medium of a sale upon a decree of foreclosure is not responsible for the general debts of the corporation whose property and franchises it acquires. But a purchaser of a railroad right of way at a foreclosure sale is bound by the covenant of the mortgagor to fence its track, entered into with the owner of the land, incorporated into the deed conveying the right of way.—*Midland Ry. Co. v. Fisher*, 24 N. E. 756, 125 Ind. 19, 8 L. R. A. 604, 21 Am. St. Rep. 189.

An owner conveyed to a railway company a right of way in consideration of which the company by an agreement incorporated in the deed promised to fence the track. The railroad property was sold at a foreclosure sale. *Held*, that the covenant in the deed of the right of way, through which the purchaser at the foreclosure sale claimed, imparted notice of the covenant and notice of its nonperformance.—*Id.*

An owner conveyed to a railway company a right of way in consideration of which the company by an agreement incorporated in the deed promised to construct a fence on each side of the track as soon as it should be completed. *Held*, that a purchaser of the railroad at a foreclosure sale must take the right of way with the burden annexed to it by the conveyance; the performance of the agreement to build the fence being a condition of the right to enjoy the right of way.—*Id.*

[f] (App. 1891)

A court authorized a receiver of a railroad company to issue traffic debentures with coupons which should be receivable at par in payment for freight, in an amount not greater "than one-half the amount then to be paid by the holder thereof." The road having been sold expressly subject to these debentures, a person frequently receiving freight for several years tendered less than half the sums due in coupons, but the company's agents uniformly refused to receive them, and thereupon the whole freight was paid in cash. In many cases the freight bills as presented included freights upon connecting lines, but the amount due for carriage upon the line subject to the debentures was not separately stated, and no effort was made to ascertain it. Subsequently the person tendering the coupons placed the matter before the general officers of the company, and demanded that the coupons should be received. He was informed, however, that nothing could

be done for him, as the company regarded the debentures as illegal and unjust. On again tendering coupons to the local agent, he was threatened with arrest if he made any further tenders. *Held*, that this constituted a repudiation of the whole contract, and that thereupon all the debentures held by the shipper became due, whether they had ever been tendered or not, and he could maintain an action of assumpsit for their par value.—*Evansville & I. R. Co. v. Frank*, 3 Ind. App. 96, 29 N. E. 419.

[g] (*Sup.* 1892)

Where a railroad company's road was sold at foreclosure there was no abandonment of the rights acquired by the old company over the land on which its roadbed was made, but the purchaser took possession by virtue of its purchase as successor to its rights.—*Harshbarger v. Midland Ry. Co.*, 131 Ind. 177, 27 N. E. 352, 30 N. E. 1083.

[h] (*Sup.* 1892)

Where a deed to a railroad company provided that it should maintain a good, substantial fence on each side of the granted right of way, it was binding on the purchaser under a sale of foreclosure of a mortgage executed before the deed was executed.—*Lake Erie & W. R. Co. v. Priest*, 31 N. E. 77, 131 Ind. 413.

[i] (*App.* 1894)

Plaintiff made an agreement with a railroad company, whereby, in consideration of the grant of certain right of way upon which to build certain spur tracks, and the exclusive use of a track belonging to him in connection therewith, it was to give him special freight rates. Thereafter, a mortgage on the railroad was foreclosed, and the decree provided that the purchasers of the railroad might disclaim the agreement in question, which they did, and their disclaimer was approved by the court. *Held*, that defendant, claiming through such purchasers, was not bound by the agreement.—*Chicago & E. R. Co. v. Towle*, 10 Ind. App. 540, 37 N. E. 358.

The fact that defendant used plaintiff's track in connection with the other tracks built under the agreement, and repaired it, did not constitute a ratification of the contract; such use not being exclusive, and it not delivering to plaintiff any freight under the terms of the contract, but always repudiating any liability thereunder.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 643-655.

See, also, 33 Cyc. pp. 590-598.

§ 195. — Purchasing bondholders or other creditors.

[a] (*Sup.* 1892)

Plaintiff agreed to erect a station for two railroad companies, each of which was to pay part of the cost thereof, and he agreed to pay part of the cost himself, though it did not appear that he was to have any interest in the station when completed. He built the station

as agreed, but did not receive payment from one of the roads. Later this road was sold under a mortgage foreclosure, and bought in by the bondholders, who organized a new corporation to own and run it. The new corporation used the station, and plaintiff sued it for the amount which the former owners of the road agreed to pay him. *Held*, that he could not recover.—*Moyer v. Ft. Wayne, C. & L. R. Co.*, 132 Ind. 88, 31 N. E. 567.

A corporation formed by the bondholders of a railroad company to purchase and which purchases the road at a sale on a decree foreclosing the mortgage securing their bonds does not become liable for the debts of the mortgagor.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 656-658, 660.

See, also, 33 Cyc. pp. 599-604.

§ 196. Reorganization by purchasers.

[a] (*Sup.* 1893)

Where judgment had been rendered against a railroad company for land condemned for its road, which judgment remained unpaid, and, after a sale of the entire road and franchises under a foreclosure of a mortgage, a new company was organized, took possession of the road, and occupied the land, the new company is liable in equity to pay said judgment, on the ground of having ratified the original transaction.—*Lake Erie & W. R. Co. v. Griffin*, 92 Ind. 487.

[b] (*Sup.* 1892)

Plaintiff agreed to erect a station for two railroad companies, each of which was to pay part of the cost thereof, and he agreed to pay part of the cost himself, though it did not appear that he was to have any interest in the station when completed. He built the station as agreed, but did not receive payment from one of the roads. Later this road was sold under a mortgage foreclosure, and bought in by the bondholders, who organized a new corporation to own and run it. The new corporation used the station, and plaintiff sued it for the amount which the former owners of the road agreed to pay him. *Held*, that he could not recover.—*Moyer v. Ft. Wayne, C. & L. R. Co.*, 132 Ind. 88, 31 N. E. 567.

An agreement between the bondholders of the original company that a certain sum should be retained for the payment of small claims, as required, creates no obligation in favor of plaintiff.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 659-661.

See, also, 33 Cyc. pp. 604, 605.

§ 200. Operation and effect.

Effect as to grant of public aid, see ante, § 39.

[a] (*Sup.* 1895)

In the absence of a decree, order of sale, execution, or return in foreclosure proceedings,

a deed of railroad property to the alleged purchaser on foreclosure is insufficient to prove title.—*Indianapolis, D. & W. Ry. Co. v. Center Tp.*, 40 N. E. 134, 143 Ind. 63.

FOR CASES FROM OTHER STATES.

SEE 41 CENT. DIG. R. R. § 642½.

See, also, 33 Cyc. p. 589.

IX. RECEIVERS.

Action against receiver, see RECEIVERS, § 183.

Appointment in proceedings to compel operation of road, see post, § 219.

Leave of court to sue receiver, see RECEIVERS, § 174.

Liability of receivers for injuries from operation of road, see post, § 265.

§ 205. Grounds of appointment.

[a] (Sup. 1892)

In an action for the appointment of a receiver of a railroad without notice, a statement in the complaint of an apprehension that another company, made defendant, would, if necessary for the purpose, proceed to another jurisdiction, and procure the appointment of a receiver friendly to its own interests, or harass the plaintiff by delay and vexatious litigation, or make way with the rolling stock, is a mere statement of opinion, and unsupported by facts is insufficient to justify the appointment.—*Wabash Ry. Co. v. Dykeman*, 32 N. E. 823, 133 Ind. 56.

[b] (Sup. 1901)

In an action for the appointment of a receiver of a railroad company, the evidence included not only affidavits of complainants that the company was insolvent, but it showed that the judgments and claims of complainants had long been due and unpaid, and that defendant, while admitting their validity, refused to pay them. It further showed that the company's property was mortgaged to its full value, that the company had no rolling stock, that its rails were owned by other persons, that it owed large sums in addition to its mortgage debts, and that for more than three years it had been unable to pay its employes. Some of the evidence was contradicted by affidavits in behalf of defendant. *Held*, that the evidence was sufficient to sustain the discretionary action of the court in appointing a receiver.—*Chicago & S. E. Ry. Co. v. Kenney*, 62 N. E. 26, 159 Ind. 72.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 673-675.

See, also, 33 Cyc. pp. 613-615.

§ 206. Appointment, qualification, and tenure.

Ex parte appointment, see RECEIVERS, § 35.

Hearing of application for receivers, see RECEIVERS, § 40.

[a] (Sup. 1892)

The verified complaint in an action by a stockholder of a railroad company against such company and another company having a 99-year lease of the former's road, alleged that such lease was void; that the lessee has wrecked the leased property, and has carried off to its main line, and converted to its own use, all the engines, cars, and machinery and rolling stock of the lessor; that the directors and certain stockholders of the latter are assisting the lessee to destroy the lessor's franchise; that the former designs moving the shops from the latter's road, and locating them on lessee's main line; that the lessee is insolvent; that the large stockholders of the lessor, in league with the lessee, elect directors of the former from among their own number, who are invariably nonresidents; that the secretary and treasurer resides in an eastern city, and has in his possession the lessor's records and papers, and the only copy of the inventory of its rolling stock is in possession of the lessee; "that there is an emergency for the immediate appointment of a receiver for said" lessor, "its property and franchises, before summons and notice can be given," because of the nonresidence of its officers and directors; that in the time required for service irreparable damage will be done lessor, its property and franchises, and plaintiff's cause of action will be defeated, as he believes, because the lessee "will resort to desperate measures to retain possession of said road," and will, if necessary, proceed to another jurisdiction, and "procure the appointment of a receiver friendly to its interests for said" lessor, or both of said roads, and institute other actions to harass plaintiff; that it will make way with said inventory, tear up and convert to its own use the remaining tracks, move the repair and machine shops, and scatter and run off the rolling stock beyond the jurisdiction of the court, so that it cannot be found; that some accident is liable to occur whereby great injury may be done to life and property, subjecting the lessor to heavy damages. *Held*, that the appointment of a receiver, without notice to the lessee, when the same could be served in the county where the proceedings were had, was erroneous.—*Wabash R. Co. v. Dykeman*, 133 Ind 56, 32 N. E. 823.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 676-682.

See, also, 33 Cyc. pp. 615-621.

§ 210. Authority to control and manage road, and exercise thereof in general.

[a] (App. 1891)

A court authorized a receiver of a railroad company to issue traffic debentures with coupons which should be receivable at par in payment for freight, in an amount not greater "than one-half the amount then to be paid by

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the holder thereof." *Held*, that they were receivable, not merely for exactly half the freight due, but for any amount less than half, when the remainder was paid in cash.—*Evansville & I. R. Co. v. Frank*, 3 Ind. App. 96, 29 N. E. 419.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 696-701.

See, also, 33 Cyc. pp. 627-631.

§ 211. Effect of appointment on status of railroad company.

[a] (Sup. 1863)

The mere appointment of a receiver, with the powers usually given to a receiver in chancery, does not relieve the railroad company from liability to suit. The receiver operates the road subject to that liability.—*Ohio & M. R. Co. v. Fitch*, 20 Ind. 498.

[b] (Sup. 1864)

The possession of a railroad by a receiver appointed by the court cannot be regarded as the possession of the railroad company.—*Ohio & M. R. Co. v. Davis*, 23 Ind. 553, 85 Am. Dec. 477.

FOR CASES FROM OTHER STATES,

See 33 Cyc. pp. 627-631.

X. OPERATION.

Carriage of passengers, see CARRIERS, §§ 235-413.

Competency of witnesses to testify as experts on questions relating to operation, see EVIDENCE, § 539½.

Constituting private nuisance, see NUISANCE, § 6.

Fellow servants in operation, see MASTER AND SERVANT, § 198.

Injuries to employés, see MASTER AND SERVANT, §§ 85-297.

Judicial notice as to, see EVIDENCE, § 20.

Judicial notice as to movement of cars, see EVIDENCE, § 8.

Liability for injuries inflicted while switching in private yards, see NEGLIGENCE, § 32.

Liability of city for failure to require railroads to use precaution against accidents, see MUNICIPAL CORPORATIONS, § 762.

Liability of railroad company for injuries caused by hand car left in highway by employé, see MASTER AND SERVANT, § 301.

Operation by receiver, see ante, § 210.

Operation of as private nuisance, see NUISANCE, § 25.

Persons entitled to raise constitutionality of statute relating to, see CONSTITUTIONAL LAW, § 42.

Regulation of as regulation of commerce, see COMMERCE, § 58.

Right to pass laws as to employés on trains engaged in interstate commerce in absence of legislation by Congress, see COMMERCE, § 10.

Statutory actions for causing death, see DEATH, §§ 9, 25, 31.

(A) DUTY TO OPERATE.

§ 216. Private branches, spurs, and side tracks.

Power of railroad company to contract with competing line not to construct private branches or sidings, see ante, § 121.

Restraining construction of switch track to mine, see INJUNCTION, § 34.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 713.

See, also, 33 Cyc. p. 637.

§ 219. Proceedings to compel operation.

[a] (Sup. 1892)

In an action by judgment creditors against a railroad company for the appointment of a receiver, the complaint alleged that executions had been levied on defendant's rolling stock, preventing its operation; that it and its predecessor were both insolvent; that there were large quantities of stock along the road under contract for immediate shipment, and immense quantities of grain to be threshed within the next 10 days, which would be shipped over defendant's road if it was in operation; that, if trains were not running on the road at once, great damage would accrue both to citizens and to defendant. *Held*, that the facts alleged did not justify the appointment of a receiver without notice to defendant.—*Chicago & S. E. Ry. Co. v. Cason*, 133 Ind. 49, 32 N. E. 827.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 716-718.

See, also, 33 Cyc. pp. 640, 641.

§ 221. Injuries from failure to operate road.

[a] (App. 1902)

The courts cannot deny a corporation, organized in compliance with the general railroad law, the powers granted it by statute, because of its failure to equip its road to carry freight, as the remedy of an individual wronged thereby is under Burns' Rev. St. 1901, § 5190, providing that, on refusal of such corporation to transport passengers or property, it shall pay to the party aggrieved all damages sustained.—*Demaree v. Bridges*, 65 N. E. 601, 30 Ind. App. 131.

§ 222. Injuries to property from operation of road.

Injuries from construction or maintenance, see ante, §§ 112, 113.

Injuries from fires, see post, §§ 453-488.

Injuries to animals, see post, §§ 405-451.

[a] (Sup. 1879)

The legislature may, when deemed necessary for the public welfare, require that to be done which would, on common-law principles and without the statute, be deemed a nuisance, as the sounding of a whistle by a locomotive on approaching a crossing.—*Pittsburgh, C. & St. L. Ry. Co. v. Brown*, 67 Ind. 45, 33 Am. Rep. 73.

[b] (Sup. 1884)

Where a complaint by a lot owner alleges that buildings on his lot are used for worship, and that the use of the street adjoining by a railroad company interrupts the worship and obstructs the street, an answer setting up that the railroad is operated in the usual way and was constructed by leave of the city and as required by the ordinance, and that the street is not obstructed save as the running of the cars carefully has that effect, is a sufficient defense.—*Dwenger v. Chicago & G. T. Ry. Co.*, 98 Ind. 153.

An abutting lot owner has no cause of action against a railroad company which has been permitted by the city to lay its track through the street, no harm being sustained by him beyond that sustained by other lot owners.—*Id.*

[c] (App. 1895)

It appeared from the complaint that the injury complained of was caused by the alleged negligent operation of defendant's locomotives, thereby causing plaintiff's hotel building, located near the tracks, to jar, and cracking the walls of the building. *Held*, that the circumstances under which the injury occurred required no other duty of plaintiff than to remain passive, and a general averment that he was not contributory to the injury is unnecessary.—*Pittsburg, C., C. & St. L. Ry. Co. v. Welch*, 12 Ind. App. 433, 40 N. E. 650.

An allegation that defendant negligently caused malodorous freight to remain an unreasonable and unnecessary time in front of plaintiff's premises sufficiently shows abuse of right of common carrier, whether the action be for negligence or nuisance.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 720-724.

See, also, 33 Cyc. pp. 642-647; note, 5 Am. St. Rep. 537.

(B) STATUTORY, MUNICIPAL, AND OFFICIAL REGULATIONS.

Consolidation of companies, see ante, §§ 141-144.

Denial of equal protection of laws, see CONSTITUTIONAL LAW, § 241.

Deprivation of property without due process of law, see CONSTITUTIONAL LAW, § 297.

Imposition of liability for personal injuries as denial of equal protection of laws, see CONSTITUTIONAL LAW, § 245.

Imposition of liability for personal injuries as deprivation of property without due process of law, see CONSTITUTIONAL LAW, § 301.

Laws conferring judicial powers on executive officers, see CONSTITUTIONAL LAW, § 80.

Persons entitled to raise constitutionality of statutes, see CONSTITUTIONAL LAW, § 42.

Subjects and titles of acts, see STATUTES, § 113.

Time of taking effect of statutes, see STATUTES, § 250.

§ 223. Authority, construction, and operation in general.

[a] (Sup. 1865)

Where the legislature, by special act incorporating a railroad company, reserved the right to alter the charter, it may, under such reserved power, properly apply the general law regulating the liability of railroad companies for stock killed.—*Jeffersonville R. Co. v. Gabbert*, 25 Ind. 431.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 725-729, 738.

See, also, 33 Cyc. pp. 648-650; note, 5 L. R. A. (N. S.) 187.

§ 224. Companies and persons to whom applicable.

[a] (Sup. 1861)

A clause giving to a railroad company the fee simple in their track, with the subuse and occupation of the same, also providing that no person or body corporate or politic shall interfere therewith, etc., or do anything "to detract from or affect the profits of said corporation," will not exempt such railroad company from the operation of the statutes rendering railroad corporations liable for cattle killed by them.—*Indianapolis & C. R. Co. v. Kercheval*, 16 Ind. 84.

Neither the cost of making and keeping in repair the fence, nor the amount of damages paid for stock killed, does "detract from or affect the profits of the" company, in the sense of these words as used in the charter.—*Id.*

[b] (Sup. 1866)

The liability of a railroad company for defect of fences extends as well to companies organized under special charters as to those organized under the general law.—*Indianapolis, P. & C. R. Co. v. Marshall*, 27 Ind. 300.

[c] (Sup. 1892)

The fact that defendant's charter gave it the power to regulate the speed of its trains did not exempt it from the restriction imposed by a valid city ordinance regulating the speed of trains in the city limits.—*Cleveland, C., C. & I. Ry. Co. v. Harrington*, 131 Ind. 426, 30 N. E. 37.

[d] (Sup. 1892)

Act March 9, 1889, § 1, provides that every "corporation, company, or person" operating a railroad within the state shall place in each passenger depot of such "company," located at any station in this state at which there is a telegraph office, a blackboard, on which such "company or person" shall post, before the schedule time for the arrival of each passenger train stopping at such station, the fact whether such train is on schedule time or not. Section 2 prescribes penalties for violations of the act. *Held*, that the statute is not indefinite and inoperative as to "corporations" because of the omission of the word "corporation" therefrom.—*State v. Indiana & I. S. R. Co.*, 133 Ind. 69, 32 N. E. 817, 18 L. R. A. 502; *Same v. Pennsylvania Co.*, 133 Ind. 700, 32 N. E. 822.

[c] (App. 1904)

Under Burns' Ann. St. 1901, § 1309, defining the word "person" as extending to bodies politic and corporate, a city ordinance providing that it shall be unlawful for any engineer, conductor, or other person to run or permit to be run on any railroad track within limits of the city any locomotive engine, car, or train at a greater speed than 8 miles per hour, applies to railroad corporations operating railroads within the city.—*Southern Ry. Co. v. Jones*, 71 N. E. 275, 33 Ind. App. 333.

[f] (App. 1904)

A belt line railroad, maintained in a city by two connecting through railroad lines, for the purpose of affording better facilities for receiving and transferring freight from one line to the other, and from various manufacturing establishments located on such belt line, from which switches were constructed, was a steam railroad operated within the state, within Burns' Ann. St. 1901, § 5173a et seq., requiring switches on such railroads to be indicated by a signal light, so attached as to indicate safety when the switch is closed, and danger when open, and requiring such light to be kept burning at night and on dark and foggy days.—*Toledo, St. L. & W. R. Co. v. Bond*, 72 N. E. 647, 35 Ind. App. 142.

[k] (App. 1907)

Burns' Ann. St. 1908, § 5260 (Acts 1891, p. 364, § 1), providing that "all railroads owned or operated in the state having more than two tracks * * * or if only one track * * * said railroad corporation shall * * * place a flagman" at certain highway crossings, applies to corporations operating steam railroads.—*Grand Trunk Western Ry. Co. v. State*, 40 Ind. App. 695, 82 N. E. 1017.

FOR CASES FROM OTHER STATES.

SEE 41 CENT. DIG. R. R. §§ 734-737.

See, also, 33 Cyc. pp. 651-653.

§ 227. Train service.

Laws relating to as class legislation, see CONSTITUTIONAL LAW, § 208.

Regulation of interstate commerce, see COMMERCE, § 58.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 741.

See, also, 33 Cyc. p. 657.

§ 229. Equipment of trains.

Laws relating to as denial of equal protection of laws, see CONSTITUTIONAL LAW, § 241. Right to pass laws as to employes on trains engaged in interstate commerce in absence of legislation by congress, see COMMERCE, § 10.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 743

See, also, 33 Cyc. p. 660.

§ 230. Employés.

[a] (Sup. 1939)

Acts 1907, p. 18, c. 11, § 1, relating to freight trains, requires 6 employes on trains of more than 50 freight or other cars, and 5 on trains consisting of less than 50 freight or other cars. Section 2 requires 5 employes other than baggage and express messengers on passenger, mail, or express trains, and section 3 declares that any railroad company doing business in the state who shall send out on its road any train not manned "in accordance with sections 1 and 2" shall be guilty of a misdemeanor. *Held*, that the conjunction "and" in the phrase "sections 1 and 2" should be construed disjunctively in order not to defeat the intention of the Legislature, though the statute is penal.—*Pittsburgh, C., C. & St. L. Ry. Co. v. State*, 172 Ind. 147, 87 N. E. 1034.

Acts 1907, p. 18, c. 11, known as the "Full Crew Act" (section 3), declares that any railroad doing business in the state who shall "send out" on its road, or cause to be sent out, any train not manned in accordance with sections 1 and 2 of the act, shall be guilty of a misdemeanor. *Held*, that the words "send out" did not limit the act to trains originating within the state, but that such words were used in the sense of "operate" or "run over its road," so that the act was applicable to all trains while being operated within the state, though they originated in another state and passed through Indiana to points beyond.—*Id.*

Const. U. S. art. 1, § 8, conferring on Congress exclusive power to establish post offices and post roads and to regulate the same, did not prohibit or abrogate the right of the state to pass Acts 1907, p. 18, c. 11, specifying the number of employes to be carried on trains operated through the state in the reasonable exercise of the state's police power when applied to mail trains.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 744.

See, also, 33 Cyc. p. 664.

§ 232. Notices.

Companies and persons to whom applicable, see ante, § 224.

Laws relating to as class legislation, see CONSTITUTIONAL LAW, § 208.

Laws relating to as denial of equal protection of laws, see CONSTITUTIONAL LAW, § 241.

Local and special laws relating to posting notice as to time of arrival of trains, see STATUTES, § 71.

Local and special laws requiring railroads to maintain blackboards at stations showing time of arrival of trains, see STATUTES, § 85.

Penalties, see post, § 254.

Persons entitled to raise constitutionality of statute relating to, see CONSTITUTIONAL LAW, § 42.

Time of taking effect of statute requiring blackboards at stations showing time of arrival of trains, see STATUTES, § 250.

[a] (Sup. 1892)

Act March 9, 1889, § 1, requiring railroad companies to place a blackboard at all stations at which there is a telegraph office, on which it shall post the fact whether its trains are on time or late, is not objectionable in that it requires a blackboard to be placed in each passenger depot, whether there is a telegraph office therein or not, provided there is a telegraph office in the town or city at which the depot is located, and wholly disconnected with the operation of the railroad, since such blackboard is not required if there is not a telegraph office at the station where the train stops.—*State v. Indiana & I. S. R. Co.*, 133 Ind. 69, 32 N. E. 817, 18 L. R. A. 502; *Same v. Pennsylvania Co.*, 133 Ind. 700, 32 N. E. 822.

[b] (Sup. 1892)

A statute imposing a duty carries with it the doing of such things as are necessary to perform the duty, so that Act March 9, 1889, requiring railroads to post notices on blackboards as to whether trains are on time, imposes the duty to procure and post a blackboard.—*State v. Ind. & Ill. Southern Ry. Co.*, 32 N. E. 817, 133 Ind. 69, 18 L. R. A. 502.

[c] (Sup. 1894)

Elliott's Supp. §§ 1088, 1089, requiring railroad companies to have written on a blackboard, 20 minutes before the schedule time for the arrival of a train at a depot, a statement whether the train is on time or not, and, "if late, how much," does not apply to a company operating a line, the regular time of passage from one terminus of which to the other is less than 20 minutes.—*State v. Kentucky & I. Bridge Co.*, 136 Ind. 195, 35 N. E. 991.

[d] (App. 1895)

Rev. St. 1894, § 5186, requiring every railroad company at any station at which "there is a telegraph office" to register, on a blackboard kept in a conspicuous place for that purpose, 20 minutes before a passenger train is due by schedule time, whether it is on time, and, if late, how late, does not require the registering of night trains at passenger stations where its telegraph office is kept open only during the day-time.—*Terre Haute & I. R. Co. v. State*, 13 Ind. App. 529, 41 N. E. 952.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 746.

See, also, 33 Cyc. p. 664.

§ 233. Signals and lookouts.

Companies and persons to whom applicable, see ante, § 224.

Laws requiring as impairing obligation of contracts, see CONSTITUTIONAL LAW, § 125.

Penalties, see post, § 254.

Violation of statute or ordinance as affecting liability for injuries, see post, § 368.

Violation of statute or ordinance as affecting liability for injuries to animals, see post, § 415.

What law governs in action for death, see DEATH, § 8.

[a] (Sup. 1901)

A city ordinance, making it the duty of persons in charge of a moving locomotive to ring a bell attached thereto, and providing that no train shall be run backward without a watchman on the rear thereof, is a valid exercise of the power conferred on cities by Burns' Rev. St. 1894, § 3541, cl. 42 (Rev. St. 1881, § 3106; Horner's Rev. St. 1897, § 3106), to provide by ordinance for the security of persons from the running of trains, and applies to a private switch yard of a railroad company situated in the city.—*Baltimore & O. S. W. Ry. Co. v. Peterson*, 59 N. E. 1044, 156 Ind. 364.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 747.

See, also, 33 Cyc. pp. 665-668.

§ 234. Rate of speed.

As affecting liability for injuries from accidents to trains, see post, § 285.

Companies and persons to whom applicable, see ante, § 224.

Penalties, see post, § 254.

Violation of statute or ordinance as affecting liability for injuries, see post, § 373.

Violation of statute or ordinance as affecting liability for injuries to animals, see post, § 417.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 748, 749.

See, also, 33 Cyc. pp. 668-670; note, 53 Am. Rep. 52.

§ 236. — In cities, towns, and villages.

[a] (Sup. 1870)

The municipal authorities of cities may, under their general police powers, pass ordinances to regulate the speed of cars through cities.—*Whitson v. City of Franklin*, 34 Ind. 392.

An ordinance regulating speed of trains through the town is not inconsistent with the statute law of this state, but is plainly authorized by section 53 of the general act of 1867 for the incorporation of cities.—*Id.*

In an action for the violation of a city ordinance, providing that it shall not be lawful for a railroad company to run its trains within the corporate limits of a city at a faster rate than four miles per hour, it is no defense that the railroad company was engaged in carrying the mail under a contract with the United States, and was required by such contract to transport the mail within a prescribed time, which could not be done if the towns and cities through which the road ran were allowed to regulate the speed of trains passing through them.—*Id.*

In a prosecution of a railroad engineer for violating an ordinance regulating the rate of speed of trains within a city, *held*, that the

ordinance providing that railroad trains shall not be run within the corporate limits of the city at a faster rate of speed than four miles an hour applies to all the territory within the corporate limits over which the railroad runs, including that portion not platted, and lands owned by the railroad company.—Id.

[b] (Sup. 1892)

Where there is, at the time of the passage of an ordinance limiting the speed of trains within a city to four miles an hour, a statute conferring the power to pass such an ordinance, the same cannot be adjudged unreasonable and void.—*Cleveland, C., C. & I. Ry. Co. v. Harrington*, 131 Ind. 426, 30 N. E. 37.

[c] (Sup. 1899)

The power of a city to pass an ordinance regulating the speed of trains is conferred as a police power for the protection of the public.—*Pittsburg, C., C. & St. Louis Ry. Co. v. Moore*, 53 N. E. 290, 152 Ind. 345, 44 L. R. A. 638.

[d] (Sup. 1903)

Burns' Rev. St. 1901, § 4404, conferring on trustees of incorporated towns the exclusive power over the streets, alleys, highways, and bridges within the towns, and section 4357, cls. 4, 6, 9, 16, empowering the trustees to declare what shall constitute a nuisance, to regulate things tending to endanger persons and property, and to adopt ordinances to carry into effect the provisions of the act, authorize the trustees to regulate the speed of trains in the corporate limits.—*Baltimore & O. R. Co. v. Town of Whiting*, 68 N. E. 266, 161 Ind. 228.

[e] (Sup. 1907)

A city ordinance limiting the speed for locomotives while passing through the city did not become invalid from a failure to afterwards limit the speed of electric cars; the fact that such cars are more readily controlled than steam cars affording just ground for distinguishing between them in respect to speed.—*Indianapolis Union Ry. Co. v. Waddington*, 169 Ind. 448, 82 N. E. 1030.

Act March 6, 1891 (Acts 1891, p. 137, c. 97), governing cities of more than 100,000 inhabitants, gave the right to regulate the speed of cars and locomotives, and also to secure the safety of citizens and others in the running of trains through the city, and provided (*Burns' Ann. St. 1901, § 3772*) that all ordinances, etc. not inconsistent with the act should remain in force until repealed by the common council, etc. *Held*, that the act did not repeal an ordinance passed in 1866, under authority of Acts Sp. Sess. 1865, p. 3, c. 1, limiting the speed of locomotives and cars.—Id.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 749.

See, also, 33 Cyc. pp. 658-670.

§ 238. Lighting track.

Construction of ordinance, see MUNICIPAL CORPORATIONS, § 120.

Penalties, see post, § 254.

Regulation of as regulation of commerce, see COMMERCE, § 58.

[a] (Sup. 1896)

Where an act authorizes cities to pass ordinances requiring railroad companies to maintain lights at public crossings, and to provide a penalty for the enforcement thereof, an ordinance, passed in pursuance of such power, specifying that the lights shall be on the same schedule plan used by the city, and imposing a fine for each night there is a failure to provide the specified lights, should fix definitely the time during which the lamps must be lighted.—*City of Shelbyville v. Cleveland, C., C. & St. L. Ry. Co.*, 44 N. E. 929, 146 Ind. 66.

Act March 4, 1893, conferring on cities power to provide "for the security and safety of citizens and other persons from the running of trains," by requiring railroad companies "to keep and maintain lights on all nights that the common council may direct, at a point where the railroad tracks cross a street in any city," does not authorize an ordinance requiring a railroad company to maintain a light "wherever a track of such railroad company crosses a public street in said city," without regard to whether the safety of citizens requires a light at all such points.—Id.

Power conferred by the Legislature upon a city to provide for the safety of citizens by requiring railroad companies to maintain lights at public crossings, and to declare "what kind of lights" said companies shall maintain, but not to require any different kind than that used by the city, does not authorize a city using electric lights to require lights furnished by a railroad company to be of any particular electric pattern.—Id.

[b] (Sup. 1896)

An ordinance requiring railroads to keep a 2,000 candle power electric light burning all night at every street crossing, under penalty of a fine, was impliedly repealed by an ordinance requiring railroad companies to establish lights at certain specified street crossings, to be kept burning during certain hours, under penalty of a fine.—*Terre Haute & L. R. Co. v. City of South Bend*, 45 N. E. 324, 146 Ind. 239.

[c] (Sup. 1897)

Act March 4, 1893, giving cities power to provide "for the security and safety of citizens and other persons from the running of trains," by requiring railroad companies to maintain lights on all nights the council may direct at a point where the railroad tracks cross a street, does not authorize an ordinance requiring a railroad company to light at the crossings, every night, from dark to dawn, each of 10 streets crossed by its railway, and to use arc lamps of nominal 2,000 candle power, suspended at least 25 feet above the tracks, where the company does not run any train through such city after 8 o'clock any night.—*Cleveland, C., C. & St. L. Ry. Co. v. City of Connersville*, 147 Ind. 277.

46 N. E. 579, 37 L. R. A. 175, 62 Am. St. Rep. 418.

[d] (Sup. 1905)

Burns' Ann. St. 1901, § 5173, grants to cities the power to require railroad companies to maintain at street crossings the same kind of lights maintained by the city on all nights that the city may direct, and to provide what kind of lights shall be maintained. *Held*, that an ordinance in conformity to the section is not rendered invalid for indefiniteness because it excuses lighting by the company at such times as the moon furnishes sufficient light to light such crossings and at all times when the city lights are not in operation.—Chicago, I. & L. Ry. Co. v. City of Crawfordsville, 72 N. E. 1025, 164 Ind. 70.

In an action against a railroad company for failure to light street crossings as required by a city ordinance authorized by an act of the Legislature, an answer alleging that there is a device which can be attached to the railroad track so that an approaching train at a distance will ignite a lamp at the crossing, and continue the light until the train passes, but by reason of the ordinance requiring a constant light defendant is unable to install the device, constitutes no defense.—Id.

Where a municipal corporation maintains a system of electric lights, it may, by ordinance, require all railroad companies running trains through its limits to maintain electric lights at crossings and provide what nights they shall be kept burning, and such ordinance is not void for unreasonableness or uncertainty.—Id.

Act March 4, 1893 (Burns' Ann. St. 1901, p. 302, § 5173), giving to cities the power to require railroad companies to maintain at crossings the same kind of lights maintained by the city on such nights as the common council may direct, is a specific grant of police power of the state, and it authorizes a requirement for lights at all hours of the night or parts of nights, and such grant, when in harmony with the Constitution, cannot be questioned by any other body as to its reasonableness.—Id.

[e] (Sup. 1906)

Under Burns' Ann. St. 1901, § 237, requiring crimes and misdemeanors to be defined by statute, and section 4357b, empowering town boards of trustees to enact penal ordinances requiring railroads to keep and maintain lights at crossings, and providing that the trustees may in such ordinances provide what kind of lights the railroads shall maintain, except that they shall not be required to maintain any different kind of lights than those maintained by the town, an ordinance requiring a railroad to provide electric lights of not to exceed 2,000 candle power, and to give such light and service as the town maintains, is too indefinite in its description of the kind and degree of light required to be maintained, and is consequently invalid.—Chicago, I. & L. Ry. Co. v. Town of

Salem, 76 N. E. 631, 166 Ind. 71; Id., 76 N. E. 634, 166 Ind. 703.

[f] (Sup. 1907)

Neither the statute authorizing the ordinance, nor the ordinance itself requiring railroad companies to light their street crossings with lights of the same power as those used by the town, is a violation of the federal or state Constitution.—Chicago, I. & L. Ry. Co. v. Town of Salem, 170 Ind. 153, 82 N. E. 913, 19 L. R. A. (N. S.) 658.

Acts 1905, p. 219, c. 129, declares that town trustees may require railroad companies operating a line over a street to maintain a street light at the crossing to be lit at night during the passage of any train, and for not less than 30 minutes prior thereto, provided that the railroad be not required to maintain any different kind of light at such crossing from that maintained by the town at other street crossings. *Held*, that the term, "kind of light," had reference to general classification as electricity, gas, oil, etc., rather than to grades or degrees of the same class, and that the town was authorized to require railroads to maintain at all crossings within the town the same kind of lights maintained by the town at its other street crossings, and no other.—Id.

Under Acts 1905, p. 219, c. 129, authorizing towns to require railroad companies to light railroad crossings with the same kind of lights maintained by the town at other street crossings for a period not less than 30 minutes prior to the passage of each night train over the crossing, an ordinance requiring railroads to maintain an electric light of 2,000 candle power at such crossings and to keep the same burning for not less than 30 minutes prior to the passage of trains during such nights as the city's streets are lighted on nonmoonlight nights, was not unreasonable as requiring lights of too great power; they being the same as those maintained by the town.—Id.

[g] (Sup. 1907)

Under Burns' Ann. St. 1901, § 5173, authorizing cities to adopt an ordinance requiring railroads running through cities to maintain lights at the points where the tracks cross streets, and declaring that cities may "provide what kind of lights" shall be maintained, a municipality may adopt an ordinance requiring a railroad to maintain a light at a street intersection.—Pittsburgh, C., C. & St. L. Ry. Co. v. Hartford City, 170 Ind. 674, 82 N. E. 787, 85 N. E. 362, 20 L. R. A. (N. S.) 461.

A municipal ordinance requiring a railroad company to maintain electric lights where its tracks cross streets of sufficient power to light the entire crossing, not to exceed the power of electric lights used by the city, and to keep the lights burning for five minutes before the arrival of each train at all times at night when there is no moon, etc., is not so indefinite as to be invalid, but requires a light of sufficient power, not exceeding that used by the city, to enable

a traveler, of good eyesight, in the nighttime, to perceive, before going upon the crossing, the tracks at the point of intersection and the character of the way across the same.—Id.

A municipal ordinance requiring a railroad company to maintain electric lights at points where its tracks cross streets of sufficient power to light the entire crossing, "but not to exceed the power of the electric lights used by the city," is not invalid because of the quoted phrase which merely keeps the ordinance from calling on the company to do more than Burns' Ann. St. 1901, § 5173, authorizing lights at street crossings, requires.—Id.

A municipal ordinance requiring a railroad company to maintain electric lights where its tracks intersect streets, adopted pursuant to Burns' Ann. St. 1901, § 5173, empowering councils to provide by ordinance that railroad companies shall maintain lights where the tracks cross streets and to provide what kind of lights the companies shall maintain, is not invalid on the ground that the municipality requires that the lighting shall be done by electricity, nor because it requires the lights to be burning for five minutes before the arrival of trains.—Id.

Where a municipal ordinance requiring a railway company to maintain electric lights where its tracks intersect streets does not fix the height of the lights, so that it will be a sufficient compliance if the lights are located at such a height that an engineer running a train over the streets will not be required to look directly toward them, the ordinance is not invalid on the ground that it impairs the efficiency of headlights on locomotives.—Id.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 753, 757.

See, also, 33 Cyc. p. 671; note, 41 L. R. A. 422.

§ 239. Crossing railroads.

Right of state to order connection with other railroad in absence of regulations by congress, see COMMERCE, § 10.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 750, 751.

See, also, 33 Cyc. p. 670.

§ 242. Crossing highways and public places.

Liability of railroad company for injuries, from defects in crossings, see post, § 303.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 752, 754-757.

See, also, 33 Cyc. pp. 672-674.

§ 243. — Signboards, signals, flagmen, and gates at crossings.

Companies and persons to whom applicable, see ante, § 224.

What law governs in actions for wrongful death, see DEATH, § 8.

[a] (Sup. 1896)

Rev. St. 1894, § 4404 (Rev. St. 1881, § 3367), gives the board of trustees of an incorporated town exclusive control over streets within the limits of the town. Section 4357 (3333) authorizes the town to prevent and remove a nuisance, to regulate the use of firearms or other things endangering persons or property, to prevent interference with the free use of the streets, and to make such ordinances as may be necessary to carry into effect the provisions of the act. Held not to give towns the right to provide by ordinance that a railroad company shall keep at its own expense a watchman, and erect gates on each side of the track at each street crossing.—Pittsburgh, C. & St. L. Ry. Co. v. Town of Crown Point, 45 N. E. 587, 35 L. R. A. 684, 146 Ind. 421.

[b] (Sup. 1898)

Rev. St. 1894, § 5174, requiring railroads having more than two tracks across any public highway or road on the order of the county commissioners to place a flagman there, does not apply to crossings in incorporated towns, as Rev. St. 1894, § 4404 (Horner's Rev. St. 1897, § 3367), gives the trustees of such towns "exclusive power over the streets" within the corporate limits, and hence an order of the commissioners requiring a flagman at a crossing in such town is invalid.—State v. Chicago, I. & L. Ry. Co., 51 N. E. 914, 151 Ind. 474.

[c] (Sup. 1905)

Where a railroad crossing in a city was over switch tracks only, used in moving cars between the main track and certain local industries, and such tracks were not in use after 6 o'clock p. m., nor on Sundays or legal holidays, an ordinance requiring the railroad company to maintain a flagman at the crossing "between the hours of 7 o'clock a. m. and 9 o'clock p. m. of each and every day in the year" is unreasonable and oppressive, at least as applied to the hours and days when the tracks are not in use, and, being indivisible in that respect, is wholly void.—Southern Indiana Ry. Co. v. City of Bedford, 75 N. E. 268, 165 Ind. 272.

A city ordinance, passed in the exercise of the power conferred on the council of cities by Burns' Ann. St. 1901, § 3541, cl. 42, to "provide by ordinance for the security of citizens and others from the running of trains through any city, and to require railroad corporations to observe the same," to be valid, must be reasonable, fair, and impartial, and not arbitrary or oppressive.—Id.

[d] (App. 1907)

Burns' Ann. St. 1908, § 5260 (Acts 1891, p. 364, § 1), providing that a railroad corporation "shall upon the order of the county commissioners in which said railroad is located, place a flagman" at certain highways and crossings, empowers the board of commissioners in any county through which such railroad passes to order flagmen for crossings within such county

only.—Grand Trunk Western Ry. Co. v. State, 40 Ind. App. 695, 82 N. E. 1017.

"Regularly," as used in Acts 1891, p. 364, c. 150, § 1, providing "that all railroads * * * having more than two tracks across any public highway * * * and used for switching purposes exclusively or regularly * * * shall, upon the order of the county commissioners * * * place a flagman at said crossing, * * *," means in conformity with the established mode, and as a part of the routine business done at that point, slight variations in the intervals between particular acts of switching being immaterial, and does not mean at certain times or intervals of time according to some certain uniform and well-established practice.—Id.

Acts 1891, p. 364, c. 150, § 1, providing that "all railroads owned or operated in the state having more than two tracks across any public highway or road, and used for switching purposes exclusively or regularly, or if only one track, and used for switching purposes, said railroad corporation shall, upon the order of the county commissioners in which said railroad is located, place a flagman at said crossing and maintain the same at their expense from six o'clock a. m. to eight o'clock p. m. of each and every day, or so long as said commissioners deem it necessary," is not void for indefiniteness, in that the words "said railroad corporation" lack any antecedent, nor because of the use of the phrase, "the order of the county commissioners, in which said railroad is located," nor because the railroad may run through several counties, nor because it speaks of "their" rather than "its" expense; the legislative intent being plain, so that defects in grammatical construction may be disregarded.—Id.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 754, 757.

See, also, 33 Cyc. pp. 672-674; note, 3 L. R. A. (N. S.) 140.

§ 244. — Lights, signals, and lookouts from trains.

Local and special laws, relating to lighting of track, see STATUTES, § 80.

Violation of statute or ordinance as affecting liability for injuries, see post, § 313.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 755.

See, also, 33 Cyc. pp. 666-668.

§ 247. Crossing private roads.

[a] (App. 1909)

The ordinances of the city of Chicago regulating the running of trains by providing for signals at crossings do not apply to cars approaching a crossing on private property of the company.—Freitag v. Chicago Junction Ry. Co., 89 N. E. 501.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 761.

See, also, 33 Cyc. pp. 674, 675.

§ 252. Contributory negligence as ground of defense.

[a] (App. 1902)

Burns' Rev. St. 1901, § 359a, making it unnecessary for plaintiff in an action for injuries to allege or prove the want of contributory negligence, and providing that such negligence shall be matter of defense, and that the act shall not affect pending litigation, applies to a case commenced after it took effect, though the cause of action accrued prior thereto.—Wabash R. Co. v. De Hart, 65 N. E. 192, 32 Ind. App. 62.

§ 254. Penalties for violations of regulations.

Application of statute relating to payment of wages generally, see MASTER AND SERVANT, § 83.

Instructions as to credibility of witnesses, see TRIAL, § 236.

Liability of lessee of railroad, see ante, § 134. Pleading ordinance in action for penalty for violation of, see MUNICIPAL CORPORATIONS, § 633.

Removability of cause to federal court, see REMOVAL OF CAUSES, § 41.

[a] (Sup. 1888)

Act March 2, 1883, § 23, imposing a penalty of \$5 per day for the unnecessary obstruction of a highway, does not apply to a railway company lawfully intersecting a road with its track, though it may omit the duty enjoined by Rev. St. Ind. 1881, § 3903, which, while it permits the obstruction of a highway by an intersecting track, requires the highway to be restored to its former state, as near as possible, or so as not to unnecessarily impede its usefulness.—Cummins v. Evansville & T. H. R. Co., 115 Ind. 417, 18 N. E. 6.

[b] (Sup. 1892)

Under Act March 9, 1889, §§ 1, 2, making railroads liable to a penalty for failure to keep a blackboard at its stations on which it shall post the fact whether its trains are on time or late, the liability of a railroad company is not limited to a single penalty for its violation, but it is liable for one penalty for each train during each trip, at each station where there is a failure to comply with its provisions.—State v. Indiana & I. S. R. Co., 133 Ind. 69, 32 N. E. 817, 18 L. R. A. 502; Same v. Pennsylvania Co., 133 Ind. 700, 32 N. E. 822.

Act March 9, 1889, § 2, provides that for each violation of the provision of this act, "in failing to report, or in making a false report," of the fact whether trains are on time or late, such corporation shall pay \$25, to be recovered in a civil action, etc. Held, that a railroad company was liable for the penalty provided for failing to make such report at a station where no blackboard had been put up, though

no penalty was prescribed for failure to put up the blackboard.—Id.

[c] (App. 1892)

Where the engineer of a railroad company runs his train within the city limits at a rate of speed forbidden by a city ordinance the company is liable thereunder, though it had instructed the engineer not to so run his train, and had no knowledge of his act.—*City of Hammond v. New York, C. & St. L. Ry. Co.*, 5 Ind. App. 526, 31 N. E. 817.

[cc] (Sup. 1901)

Under Acts 1889, p. 279, as amended by Acts 1897, p. 176 ("Blackboard Law"), providing that railroad companies shall cause a blackboard at least three feet long and two feet wide to be placed in every station, and to be written thereon whether or not trains are to arrive on schedule time, etc., and that for each violation of the provision of the act in failing to report, or in making a false report, such companies shall forfeit the sum of \$25, the railroad company is liable to the penalty only for failure to make report, or for making a false report, and not for failing to maintain a blackboard of the dimensions required by the statute.—*State v. Cleveland, C. & St. L. Ry. Co.*, 61 N. E. 669, 157 Ind. 288.

[d] (Sup. 1905)

Under Burns' Ann. St. § 5187, providing a penalty of \$25 for each violation by a railroad company of section 5186, requiring every corporation operating a railroad within the state to bulletin trains, the state is not limited to a single penalty, but is entitled to recover a separate penalty for each violation proved.—*Southern Ry. Co. v. State*, 75 N. E. 272, 165 Ind. 613.

Where a complaint alleged that defendant railroad company maintained a certain telegraph passenger station, that a passenger train operated by defendant was scheduled to arrive and stop at such station on a day specified, and that defendant unlawfully failed and neglected to cause to be written on a blackboard placed in a conspicuous place in the station, at least 30 minutes before the schedule time for the arrival of the train, the fact whether it was on time or not, and, if late, how late, and that at the time defendant regularly employed a telegraph operator at the station, and did not then have any device, indicator, etc., for use instead of a blackboard for the posting of trains, and that such train was not a freight train carrying passengers, it stated a cause of action for violation of Burns' Ann. St. 1901, §§ 5186, 5187, requiring such posting of trains, and was not objectionable as admitting that "some" report was made; there being no attempt to charge the making of a false report.—Id.

A complaint, in an action against a railroad company to recover penalties for failure to post schedules of the arrival and departure of its trains, which substantially follows the language of the statute, is sufficient.—Id.

[e] (Sup. 1907)

A complaint against a railroad company for violating an ordinance requiring the lighting of crossings at night, alleging the due incorporation of the town, defendant's ownership and operation of a railroad through the town; the crossing of three named public streets therein, the proper enactment of the ordinance; the maintenance by the plaintiff of electric lights at street crossings in the town of 2,000 candle power; that the three named streets at the railroad crossing were much traveled by the public at all times of the day and night and were very dangerous unless lighted; that defendant had failed to put up and maintain lights of such candle power at crossings as required by the ordinance, and was running and had continued for a long time to run its cars and locomotives through the town—was sufficient in form.—*Chicago, I. & L. Ry. Co. v. Town of Salem*, 170 Ind. 153, 82 N. E. 913, 19 L. R. A. (N. S.) 658.

[f] (App. 1907)

In an action against a railroad company to recover a penalty for failure to obey an order of the county commissioners requiring the company to keep a flagman at a highway crossing, evidence held sufficient to sustain judgment against the defendant.—*Grand Trunk Western Ry. Co. v. State*, 40 Ind. App. 695, 82 N. E. 1017.

In an action against a railroad to recover a penalty for failure to obey an order of the county commissioners directing the employment of a watchman at a certain crossing, an objection that the complaint does not allege that defendant owned or operated tracks on the date when it was ordered by the board of commissioners to employ the watchman cannot be sustained, where the order stating that defendant owned and operated the tracks at that date was made a part of the complaint.—Id.

In an action against a railroad to recover a penalty for failure to employ a watchman at a crossing, an allegation in the complaint that the four tracks were used "exclusively or regularly" for switching purposes is not objectionable under the rule that allegations shall be direct and certain, and not in the alternative, since either alternative furnished a basis of liability.—Id.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 764-772.

See, also, 33 Cyc. pp. 677-685.

§ 255. Offenses in operation of railroads.

Duplicity in indictment or information, see INDICTMENT AND INFORMATION, § 125.

Offenses in construction of railroad, see ante, § 12.

[a] (Sup. 1871)

Act June 10, 1852, § 29, prescribing punishment for maliciously obstructing a railroad track, or misplacing a switch, etc., is not repealed by Act June 14, 1852, § 66 (2 Gav. & H. St. p. 475), defining misdemeanors and their

punishment. The last act does not cover the entire subject-matter of the former, and there is no irreconcilable repugnancy between the two.—*Coghill v. State*, 37 Ind. 111.

[b] (Supp. 1873)

On a trial for maliciously obstructing a railroad track, the court is not warranted in instructing the jury that "if the proof shows conclusively that defendant placed the timbers upon the track of the railroad in question, in such a manner as to obstruct the passage of cars, the presumption is that the act was willfully and maliciously done." There are many circumstances under which a person may place timbers on a railroad track, so as to obstruct the passage of trains, which would have precluded the idea of its having been done willfully and maliciously.—*Allison v. State*, 42 Ind. 354.

Under an indictment for maliciously placing pieces of timber on a railroad track, it is not necessary that the proof should correspond with the allegation as to the number of pieces placed on the track. One piece calculated to obstruct passing trains is sufficient to constitute the offense.—*Id.*

[c] (Supp. 1882)

A railroad company, having the right to use the streets, is subject to indictment if it so abuses its rights as to unnecessarily incumber or obstruct the streets.—*State v. Louisville, N. A. & C. Ry. Co.*, 86 Ind. 114.

[d] (Supp. 1884)

An indictment for obstructing a railroad track under Rev. St. 1881, § 1960, need not allege that the obstruction was such as would endanger the passage of trains or throw the engine or cars from the track.—*Riley v. State*, 95 Ind. 446.

[e] (App. 1893)

An affidavit against a conductor, for obstructing a highway with a train, need not state the name of the railroad company,—the accused's employer. It is enough that it describe the way and the obstruction.—*State v. Malone*, 8 Ind. App. 8, 35 N. E. 198.

[f] (Supp. 1894)

Under 2 Burns' Rev. St. 1894, § 5188, 5189, making it criminal for railroad companies operating lines through towns of over 250 inhabitants not to provide suitable waiting rooms, and to keep them open for an hour preceding the arrival of passenger trains, an information charging the offense of failure to keep open waiting rooms is bad, unless it avers that the company had waiting rooms.—*State v. Cleveland, C. & St. L. Ry. Co.*, 137 Ind. 75, 36 N. E. 713.

[g] (App. 1904)

Burns' Ann. St. 1901, § 2291, imposes a penalty on any one who, running a railroad train carrying freight, permits or suffers the same, or any car or locomotive engine compos-

ing the same, to remain standing across any street, or who, whenever it becomes necessary to stop such train across any street, fails to leave a space across the street. *Held*, that an affidavit on a prosecution under the statute which averred that defendant had charge of running a railroad freight train and freight cars was not insufficient, in failing to allege that the train was carrying, or used for carrying, freight.—*Becker v. State*, 71 N. E. 188, 33 Ind. App. 261.

Evidence that defendant did not have charge of a train ready for movement from station to station, but merely of a cut of cars which were being switched from place to place, was sufficient to warrant a conviction.—*Id.*

[h] (App. 1908)

Burns' Ann. St. 1901, § 2293, makes it an offense to run a locomotive over a railroad crossing without stopping to ascertain whether a train is approaching on the other track.—*Cincinnati, H. & D. R. Co. v. Acrea*, 42 Ind. App. 127, 82 N. E. 1009.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 773-788.

See, also, 33 Cyc. pp. 685-696.

(C) COMPANIES AND PERSONS LIABLE FOR INJURIES.

See NEGLIGENCE, § 54.

Acts of independent contractor, see MASTER AND SERVANT, § 323.

Ejection of passengers and intruders, see CARRIERS, §§ 371-373.

Injuries to passengers, see CARRIERS, § 306.

Judicial notice of foreign statutes, see EVIDENCE, § 35.

§ 256. Ownership, possession, and control of road in general.

[a] (App. 1900)

Where plaintiff, in the employ of a manufacturing company, was injured on its premises by the negligent act of the operatives of a switch engine belonging to defendant railroad company, which, while engaged in the yards of the manufacturing company, was entirely under its control, the railroad company, having no control over its operatives while there, was not liable for the injury.—*Lake Erie & W. R. Co. v. Gaughan*, 58 N. E. 1072, 26 Ind. App. 1.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 789-792.

See, also, 33 Cyc. pp. 696-698.

§ 257. Contractors for construction.

[a] (Supp. 1873)

Act March 4, 1863 (Davis' Rev. St. Supp. 1870, p. 413), makes the company owning the railroad jointly and severally liable with the "lessees, assignees, receivers, and other persons, running or controlling any railroad," for stock killed or injured. *Held*, that contractors

were embraced in the phrase "other persons," used in the statute.—*Huey v. Indianapolis & V. R. Co.*, 45 Ind. 320.

It is no defense for a railroad company, in an action to recover for stock killed by a train of cars run on its railway track, that the injury was done by the train of another company, which was in the exclusive use and possession of contractors for the construction of defendant's line of road, who had not finished the same, or delivered to the defendant the completed portion of said road.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 793-798.

See, also, 33 Cyc. pp. 698, 699; note, 14 L. R. A. 828.

§ 259. Lessors and lessees.

[a] (Sup. 1871)

A railroad company, operating a railroad under a lease from another railroad company, is not liable, at common law or by statute, for torts committed by the lessor prior to the execution of the lease.—*Pittsburg, C. & St. L. Ry. Co. v. Kain*, 35 Ind. 291.

[b] Under 1 Rev. St. 1876, p. 751, providing "that lessees, assignees, receivers, and other persons running or controlling any railroad in the corporate name of such company shall be liable jointly and severally with such company for stock killed or injured by the locomotives or cars of such company to the extent and according to the provisions of this act," the lessee of a railroad, operating the same in its own name, is liable for injuries to stock caused by failure to fence the tracks, and the lessor is not liable, unless the road is being operated in its name.—(1877) *Pittsburg, C. & St. L. Ry. Co. v. Bolner*, 57 Ind. 572; (1877) *Same v. Gadsbury*, 57 Ind. 327; (1877) *Same v. Miller*, 58 Ind. 596; *Same v. Green*, *Id.* 598; (1878) *Same v. Hannon*, 60 Ind. 417; (1878) *Same v. Currant*, 61 Ind. 38.

[c] (App. 1891)

An instrument which was in form a lease of a railroad by one company to another also provided that the two companies should operate the road jointly, and should have equal rights thereon; that each company should settle all claims for damages caused by its own trains; and that the lessor was to direct the running of all trains, and prescribe the rules therefor. *Held*, that this was a valid lease, and not a mere running arrangement, with license to use the road, and the lessee was liable for stock wrongfully killed by its trains; Rev. St. 1881, § 4001, providing that every railroad company running its trains on the track of another company shall be liable to third persons for all damages caused thereby.—*Wabash R. Co. v. Williamson*, 3 Ind. App. 190, 29 N. E. 455.

[d] (Sup. 1895)

A company owning a railroad is not liable for injuries to an employé of a lessee of the road caused by defects in an engine owned and con-

trolled by the lessee, merely because the lease was made without statutory authority.—*Baltimore & O. & C. R. Co. v. Paul*, 143 Ind. 23, 40 N. E. 519.

[e] (Sup. 1906)

A railway company which leases its line is liable to a servant of the lessee for injuries caused by a defect in the road.—*Southern Ry. Co. v. Sittasen*, 166 Ind. 257, 76 N. E. 973.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 802-816.

See, also, 33 Cyc. pp. 703-709; note, 44 L. R. A. 737; note, 71 Am. Dec. 295.

§ 260. Companies permitting use of road by others.

[a] (Sup. 1884)

Under the statute, the corporation which owns a railroad is liable for damages caused by another railroad company by killing stock while running trains on said railroad in its own name.—*Indianapolis & M. R. Co. v. Solomon*, 23 Ind. 534.

[b] (Sup. 1873)

A railroad company, which owns the track on which stock is killed, may be sued alone for damages, though the locomotive directly causing the injury was operated by another company.—*Ft. Wayne, M. & C. R. Co. v. Hinebaugh*, 43 Ind. 354.

[c] (Sup. 1886)

Under Rev. St. 1881, § 4025, making any railroad corporation, lessee, receiver, or other person or corporation controlling or operating any railroad liable jointly or severally for stock killed, it is immaterial whether the railroad is operated by the company owning the line or by another.—*Cincinnati, H. & I. R. Co. v. McDougall*, 8 N. E. 571, 108 Ind. 179.

[d] (Sup. 1905)

The servants of a railroad operating its cars on the tracks of another under a traffic contract between the roads are entitled to recover from the road owning the tracks for injuries resulting from any negligence on its part or on the part of its employes.—*Chicago Terminal Transfer R. Co. v. Vandenberg*, 73 N. E. 990, 164 Ind. 470.

[e] (Sup. 1909)

An agreement by one company with another to furnish signalmen and switchmen for the latter's trains in passing over the former's tracks impliedly bound the former to discharge the service with reasonable care, and this obligation extended to the employes of the latter road while running its trains over such tracks.—*Cleveland, C. & St. L. Ry. Co. v. Gossett*, 172 Ind. 525, 87 N. E. 723.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 817-823.

See, also, 33 Cyc. pp. 710-712.

§ 261. Companies operating or using roads of others.

[a] (Sup. 1878)

Under 1 Rev. St. 1876, p. 751, § 1, providing "that lessees, assignees, receivers, and other persons running or controlling any railroad in the corporate name of such company" shall be liable for live stock killed by the trains of the company, if the tracks are not fenced, one company, running in its own name another's road, is not liable for stock killed thereon.—*Cincinnati, H. & D. R. Co. v. Bunnell*, 61 Ind. 183; *Same v. Norris*, Id. 285; *Jeffersonville, M. & I. R. Co. v. Downey*, Id. 287; *Evansville & C. R. Co. v. Snapp*, Id. 303.

[b] (App. 1891)

Where a contract between two railroad companies provides that the line should be operated and each should have equal rights thereon, and that each should pay and settle all claims for injuries committed by its trains and servants in the management of the road including damages for the killing of stock, the fact that the contract provided that the officers of one of the roads should prescribe the rules for and direct the running of trains did not in any way change the character and effect of the contract, and the company occupying the position of lessee in the contract is liable for stock killed by its trains under Rev. St. 1881, § 4001, providing that every railroad company that shall run and operate its locomotives and trains on the track and road of another company shall be liable to third persons for all damages occasioned by its locomotives and trains in the same manner and to the same extent as though the track and road on which said locomotives and trains are run and operated belonged to the company acting and operating the same.—*Wabash R. Co. v. Williamson*, 29 N. E. 455, 3 Ind. App. 190.

[c] (App. 1898)

Any arrangement by which a railroad company runs its trains over the road of another company does not affect the right of one whose horses were killed by the trains of the first-named company, because of the road not being fenced, to recover damages against it, under *Burns' Rev. St. §§ 5312, 5313* (Rev. St. 1881, §§ 4025, 4026), providing that such company shall be liable as if the road belonged to it.—*Pittsburg, C. C. & St. L. Ry. Co. v. Thompson*, 50 N. E. 823, 21 Ind. App. 355.

[d] (Sup. 1899)

Whether a railroad operating its trains over the track of another company is a trespasser on the track, or operating under contract, under Act March 10, 1873, §§ 1, 3, authorizing such contracts, and making the companies so operating their trains liable to third persons for damages caused thereby, it is responsible for the negligence of its operatives.—*Cleveland, C. C. & St. L. Ry. Co. v. Berry*, 53 N. E. 415, 152 Ind. 607, 46 L. R. A. 33.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 824-830.

See, also, 33 Cyc. pp. 713-715; note, 92 C. C. A. 152.

§ 263. Consolidated roads.

[a] (Sup. 1892)

Where, in an action against a railroad company for the wrongful death of plaintiff's intestate, it was shown, after a verdict for plaintiff, that the then defendant and certain other railroad corporations had consolidated their respective franchises, and had formed a new company, which had succeeded to all the rights and liabilities of the original corporations, the court properly substituted the consolidated company in the place of the original defendant.—*Louisville, E. & St. L. Consol. R. Co. v. Summers*, 131 Ind. 241, 30 N. E. 873.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 833, 834.

See, also, 33 Cyc. pp. 717, 718; note, 23 L. R. A. 231.

§ 264. Mortgagees and trustees in possession.

Leave of court to sue receiver, see RECEIVERS, § 174.

[a] Acts 1863, p. 25 (Davis' Rev. St. Supp. 1870, p. 413, § 1), provides "that lessees, assignees, receivers, and other persons running or controlling any railroad in the corporate name of such company shall be liable jointly or severally with such company for stock killed or injured by the locomotives, cars, or other carriages of such company." Section 2 provides that any action under the above section may be brought against the railroad company whether the railroad was being run by the company or by a lessee, assignee, receiver, or other person in the name of the company. *Held*, that an action under section 1 could be maintained against a railroad company, though it was in the hands of a receiver appointed by a federal court, since the appointment of the receiver does not terminate or suspend the corporate existence of the railroad company.—(Sup. 1863) *Ohio & M. R. Co. v. Fitch*, 20 Ind. 498; *Alsop v. McKinney*, Id. 509; (1874) *Louisville, N. A. & C. R. Co. v. Cauble*, 46 Ind. 277.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 835-837.

See, also, 33 Cyc. p. 718.

§ 265. Effect of operation of road by receiver.

[a, b] (Sup. 1864)

Under 1 Gav. & H. St. p. 522, making railroad companies liable for stock killed by its cars, a railroad company is liable in such case, although the road is at the time operated by a receiver duly appointed by a competent court.—*McKinney v. Ohio & M. R. Co.*, 22 Ind. 99.

[c] (Sup. 1864)

Receivers having the full possession, control, and operation of a railroad under the directions of a court are alone liable for the negligence or wrongdoing of their agents and employes in the operation of the road, and the railroad company itself is not liable to suit upon a cause of action so arising.—*Ohio & M. R. Co. v. Davis*, 23 Ind. 553, 85 Am. Dec. 477.

Where the property of a corporation is in the possession of a receiver, the corporation is not liable for the acts of a servant of the receiver.—*Id.*

[d] (Sup. 1875)

An action under Act March 4, 1863, will lie against a railroad company for the value of an animal killed by a passing train, the road not being fenced, although at the time of the killing the railroad was controlled and run by a receiver in bankruptcy.—*Indianapolis, C. & L. Ry. Co. v. Ray*, 51 Ind. 260.

[e] (Sup. 1876)

To a complaint against a railroad company for injuries received by the plaintiff in being run over by a train of cars of the defendant, it is a sufficient answer that when the injuries were inflicted on the plaintiff, the railroad, engines, cars, and all other property of the company were in the hands, and under the control, of a receiver duly appointed and acting.—*Bell v. Indianapolis, C. & L. R. Co.*, 53 Ind. 57.

[f] (Sup. 1888)

Plaintiff, intending to take passage from N. to C., purchased a ticket which by mistake read from C. to N. The road was then in the hands of a receiver, but was later restored to defendant company. About four months after purchasing the ticket, defendant's conductor refused to receive it for plaintiff's fare from N. to C. *Held*, that plaintiff could not recover damages, as defendant was not liable for the mistakes of the receiver or his agents, and was not bound to redeem tickets issued by the receiver.—*Godfrey v. Ohio & M. R. Co.*, 116 Ind. 30, 18 N. E. 61.

[g] (App. 1909)

A complaint for injuries to a licensee while preparing a freight car for loading against a railroad and its receiver alleged that the accident occurred on August 22, 1906, on which date, and ever since which time, the defendant railroad company owned and operated the railroad, and further alleged that, while plaintiff was on a ladder against the freight car, defendant railroad by and through its employes and trainmen, without warning or notice, carelessly ran its engine against the car, throwing plaintiff down and causing his injury. It was also alleged that on December 4, 1905, defendant H. was duly appointed and immediately qualified as receiver of the railroad's property, and ever since then had been acting in that capacity; that he was in full possession of all the property of the defendant railroad

company, and was operating the road and receiving the income therefrom. *Held*, that such complaint did not charge a cause of action against the receiver under the rule that he is only answerable for the acts of negligence of his own servants and employes operating the franchise of the corporation.—*Harmon v. Perkins*, 88 N. E. 961.

[h] (App. 1910)

A receiver of a railroad is not personally liable for demands for injuries to passengers or property through the negligence of his servants, and the demands may not be enforced against the railroad on taking back its property unless some provision is made for their payment.—*Vandalia Ry. Co. v. Keys*, 91 N. E. 173.

An order of the federal court directing its receiver of a railroad to restore to the railroad its property in his hands on the agreement of the railroad to assume "all lawful liabilities and obligations of" the receiver existing on a designated date and save the receiver harmless against the payment of any liabilities incurred by him, imposes on the railroad the payment of liabilities incidental to the receiver's operation of the road, including the liability for injuries to a passenger through the negligence of the receiver's servants; the word "obligations" meaning duties arising out of a contract or from an actionable tort, and the word "liabilities" including any form of legal obligation measured by money valuation, whether arising from contract, express or implied, from duty imposed by law or judgment of court, or in consequence of a tort (quoting *Words and Phrases*, vol. 6, p. 4878).—*Id.*

Where a federal court ordered its receiver of a railroad to restore to the railroad all its property in his hands on the agreement of the railroad to pay all liabilities and obligations of the receiver, a passenger injured through the negligence of the servant of the receiver could in his own name sue the railroad therefor.—*Id.*

FOR CASES FROM OTHER STATES.

SEE 41 CENT. DIG. R. R. §§ 838-853; 34 CENT. DIG. Mast. & S. § 164.

See, also, 33 Cyc. pp. 719-725; note, 15 L. R. A. 262.

§ 266. Joint liabilities.

[a] (Sup. 1888)

Defendant W. R. Ry. Co. owned and controlled two parallel switch lines in the city of I., which were crossed by the line of defendant, I. B. & W. Ry. Co. These switch lines were designed and permitted to be used for the purpose of transporting freight to and from a pork-house, by various connecting lines. Plaintiff, an engineer on a connecting line, while approaching the crossing of the I., B. & W. track on one of the switch lines, was injured through his engine being run into by a car of another connecting line, which left the track by reason of the unsafe condition of the crossing at the I., B. & W. track with the other switch line. Plaintiff was proceeding across the track of the I., B. & W.

Co. on a signal given by said company. *Held*, that plaintiff was at the place where he was injured upon the invitation of both defendants, and both were under obligation to provide for his safety while passing over their tracks.—*Indiana, B. & W. Ry. Co. v. Barnhart*, 115 Ind. 399, 16 N. E. 121.

[b] (Sup. 1885)

Where intersecting railroads use a common depot, and a person at the depot at night, for the purpose of taking passage on one of the roads, is injured on account of the failure to properly light the platform, the other road, which ran no trains during the night, is not liable for the injuries.—*Louisville, N. A. & C. Ry. Co. v. Treadway* 142 Ind. 475, 40 N. E. 807, 41 N. E. 794; *Id.*, 143 Ind. 689, 40 N. E. 807, 41 N. E. 794.

[c] (App. 1895)

In a suit against a railroad company and its manager, it appeared that the latter, without legal proceedings, changed the course of a highway which had existed 25 years, and built a fence across the old way; that he ordered the work done by the regular employes of the company, which paid them for it; that the fence was not visible at night; and that there were no lights or guards to indicate its presence, and plaintiff, not knowing of it, drove into it after dark, and was injured. *Held*, that though the manager acted merely as agent for the company, and the company was not interested in the land whereon the fence was constructed, and built the fence for others, to whom the expense was charged, a verdict for plaintiff against both defendants was justified.—*Blue v. Briggs*, 12 Ind. App. 105, 39 N. E. 885.

[d] (App. 1905)

Plaintiff, employed as a brakeman by the E. Railroad Company, which, together with the M. Company, operated trains over the tracks of the W. Company, was injured in a collision between a train of the M. Company and his train, and in an action for the injuries a paragraph of the complaint alleged that under orders of the W. Company plaintiff's train had pulled in upon a target switch, and, just as it started to leave the switch, the train of the M. Company rapidly approached the signal station and ran into plaintiff's train; that the train of the M. Company was a special one, of which plaintiff had no knowledge; and that the running of the trains was under the orders and directions of the W. Company. It was alleged that the W. Company carelessly omitted to give plaintiff any orders as to the running of the extra train; that the M. Company carelessly and negligently ran its trains at a high rate of speed, without having any signal giving it the right to run onto the semaphore; and that the E. Company negligently ran its train, and permitted the same to stand on the tracks at the time when the passenger train was approaching. *Held*, that the complaint showed a cause of action against all the defendants.—*Chicago & W. I. R. Co. v. Marshall*, 75 N. E. 973, 38 Ind. App. 217.

[e] (App. 1906)

Separate railroad companies maintaining a common system of signals, who employ a flagman at a common railroad crossing, are jointly liable for his negligence.—*Baltimore & O. S. W. Ry. Co. v. Kleespies*, 39 Ind. App. 151, 76 N. E. 1015, 78 N. E. 252.

[f] (App. 1908)

Where a passenger in a station is injured by the joint negligence of two railroads resulting from a collision between their trains at an intersecting crossing, both companies are liable for the injury.—*Cincinnati, H. & D. Ry. Co. v. Acrea*, 42 Ind. App. 127, 82 N. E. 1000.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 854-858.

See, also, 33 Cyc. pp. 726-728.

§ 268. Pleading ownership and operation.

[a] (Sup. 1863)

A railroad company, answering to a suit for stock killed by its machinery, that the road was in the hands of a receiver appointed by a federal court, should set forth a copy of the order or appointment of the receiver, or should file the original.—*Ohio & M. R. Co. v. Fitch*, 20 Ind. 498; *Alsop v. McKinney*, *Id.* 509.

[b] (Sup. 1864)

In an action against a railroad company for injuries resulting from a collision with a train, evidence showing that at the time of the accident the company was in the hands of a receiver appointed by the federal court and operated by him is admissible under the general issue.—*Ohio & M. R. Co. v. Davis*, 23 Ind. 553, 85 Am. Dec. 477.

[c] (Sup. 1868)

A complaint before a justice that "a locomotive owned and used by the said defendant on its railroad in the county of F.," etc., "on," etc., "killed one hog of the plaintiff, and that at the time and place of the killing the road was not fenced," was sufficient to show that the animal was killed in F. county, and that the defendant committed the injury.—*White Water Valley R. Co. v. Quick*, 30 Ind. 384.

[d] (Sup. 1870)

A complaint against a railroad company for killing stock must aver that the train by which the injury was done belonged to defendants or was run over its road.—*Toledo, W. & W. Ry. Co. v. Weaver*, 34 Ind. 298.

[e] (Sup. 1871)

A complaint against a railway company, for the killing of an animal, which charges that another railroad company killed the animal, and after the killing consolidated with a certain company, and that the consolidation was known as the "Plaintiff Company," is not supported by evidence which fails to show the consolidation.—*Pittsburgh, C. & St. L. Ry. Co. v. Kain*, 35 Ind. 291.

[f] (Sup. 1871)

A complaint against two railroad companies, charging them with having killed live stock of the plaintiff upon the track, may be good without alleging their relation to each other in managing the road and causing the injury. That is matter for proof on the trial.—*Indianapolis, C. & L. R. Co. v. Warner*, 35 Ind. 515; *Same v. Johnson*, 36 Ind. 267.

[g] To enforce the joint and several liability of two railroad companies under the statute (3 St. p. 413, § 1) for damages done to live stock by the cars of one run upon the road of the other, it is necessary to aver, to charge the company owning the road, that it had authorized the use of its track, and to charge the company owning the cars that it was running or controlling the road in the corporate name of the company owning it, either as lessees, assignees, receiver, or otherwise.—(Sup. 1871) *Cincinnati & M. R. Co. v. Paskins*, 36 Ind. 380; (1872) *Same v. Townsend*, 39 Ind. 38.

[h] (Sup. 1876)

To a complaint against a railroad company for injuries received by the plaintiff in being run over by a train of cars of the defendant, it is a sufficient answer that when the injuries were inflicted on the plaintiff, the railroad, engines, cars, and all other property of the company were in the hands, and under the control, of a receiver duly appointed and acting; and such answer need not set forth a copy of the order of court appointing the receiver.—*Bell v. Indianapolis, C. & L. R. Co.*, 53 Ind. 57.

[i] (Sup. 1877)

In an action against a railroad company for injury to or killing stock, the company, even in a justice's court, must show that the injury to or death of the stock was caused by defendant's locomotive cars, or other carriage.—*Pittsburgh, C. & St. L. Ry. Co. v. Troxell*, 57 Ind. 246.

[j] (Sup. 1878)

In an action against a railroad company under 1 Rev. St. 1876, p. 751, to recover for stock killed, the complaint must show that the killing was done by the locomotive or cars of the defendant.—*Pittsburgh, C. & St. L. Ry. Co. v. Hannon*, 60 Ind. 417.

[k] (Sup. 1880)

In an action against a railroad company for running its locomotives over and killing stock, the record of the lease by the defendant of the railroad line on which the stock was killed is admissible, though not specially pleaded as a defense, where the defendant is sued as the owner of the railroad, in view of the act of March 4, 1863 (1 Rev. St. 1876, p. 751), § 1, providing that lessees, assignees, receivers, and other persons, running or controlling any railroad in the corporate name of such company, shall be liable jointly or severally with such company for stock killed or injured by the locomotive cars or other carriages of the company.

—*Pittsburgh, C. & St. L. Ry. Co. v. Hunt*, 71 Ind. 229.

[l] (Sup. 1882)

When a complaint charges one railroad company with killing stock, and the evidence shows that another company, defendant's lessee, committed the injury, the variance is fatal.—*Cincinnati, R. & Ft. W. R. Co. v. Wood*, 82 Ind. 593.

[m] (Sup. 1883)

Rev. St. 1881, § 4025, provides that any railroad company, lessee, assignee, receiver, and any other person or corporation running, controlling, or operating any railroad shall be liable, jointly or severally, for stock killed or injured by the locomotives, cars, or carriages run on such road, in the name in which the road was run or operated at the time, to the extent and according to the provisions of the act. *Held*, that in an action against a railroad company for injuries to stock on its right of way, a complaint which avers that the train causing such injuries was "run and controlled by said defendant, or some lessee thereof, or other person unknown to the plaintiff," is insufficient in that it does not allege that defendant or any one for whom it is responsible did the alleged wrong.—*Wabash, St. L. & P. Ry. Co. v. Booker*, 90 Ind. 581.

[n] (Sup. 1884)

Under Rev. St. 1881, § 4025, providing that any railroad corporation, lessee, assignee, receiver, and other person or corporation running, controlling, or operating any railroad shall be liable, jointly or severally, for stock killed or injured in the name in which the road was operated at the time, *held* a complaint against a company for killing animals while operating the road of another company need not allege in what name the road was being operated.—*Cincinnati, H. & D. R. Co. v. Leviston*, 97 Ind. 488.

[o] (App. 1891)

Rev. St. 1881, § 4001, provides that every railroad company running its trains upon the track and road of another company shall be liable to third persons for all damages caused thereby, as if the road belonged to it. Section 4025 declares that any corporation, lessee, assignee, etc., operating any railroad, shall be liable jointly or severally for stock killed by the trains, "in the name in which the road was run or operated at the time." *Held*, that where a complaint for stock killing averred that a certain company owned the road, that it leased it to another company, and that the two companies operated the road jointly, it sufficiently showed in what names the road was operated.—*Wabash R. Co. v. Williamson*, 3 Ind. App. 190, 29 N. E. 455.

[p] (Sup. 1893)

As the corporation into which several railroad companies become merged by consolidation assumes, by implication, all the debts and liabilities of the several companies, plain-

tiff, in an action against the consolidated company for personal injuries resulting from the negligence of one of the original companies, need not allege an express assumption of such liability by defendant in the articles of consolidation.—*Cleveland, C. & St. L. Ry. Co. v. Prewitt*, 134 Ind. 557, 33 N. E. 367.

[d] (App. 1893)

In an action against a railway company for setting a fire on its right of way which spread to plaintiff's crops, a statement in the complaint "that the defendant is a railroad corporation doing business in the state of Indiana, and owning and operating a railroad through Benton county, and in and through plaintiff's lands, adjacent thereto; that on the 20th day of December the defendant company, in the operation of its trains and locomotives, carelessly and negligently set fire,"—sufficiently alleges that defendant was a railroad corporation owning and operating its road at the time of the fire.—*Lake Erie & W. R. Co. v. Griffin*, 8 Ind. App. 47, 35 N. E. 396, 52 Am. St. Rep. 465.

[r] (App. 1895)

Where, in an action against a railroad company for stock killed, the complaint alleges the killing of the stock by defendant's train, and there is evidence that another company also runs trains over the road, to support a verdict against defendant it must be shown that the stock was killed by one of defendant's trains.—*Lake Erie & W. R. Co. v. Rooker*, 13 Ind. App. 600, 41 N. E. 470.

[s] (App. 1906)

A complaint, showing that injuries were received in consequence of the several acts of negligence of three railroad companies using a single track, properly joined such three companies as defendants; an allegation of preconcerted action being unnecessary.—*Chicago & W. I. R. Co. v. Marshall*, 38 Ind. App. 217, 75 N. E. 973.

[t] (App. 1909)

A complaint for killing a cow, alleging defendant, at date and place in question, "was then and there engaged in running locomotives and cars over and upon said railroad," and, further, that the cow "was run against, upon, and over, and killed by said defendant's cars, locomotives, and trains, run and operated upon said defendant's right of way and tracks by its agents, servants, and employés," sufficiently shows defendant ran its cars, locomotives, etc., by its agents.—*Cleveland, C. & St. L. Ry. Co. v. Van Natta*, 87 N. E. 999, rehearing denied 88 N. E. 716.

[u] (App. 1909)

A complaint in an action for killing a horse on the track was not defective for not alleging that the engine was run by defendant or its servants, where it alleged that the horse went upon defendant's track and was struck by one

of its engines running upon the track.—*Baltimore & O. S. W. R. Co. v. Dickey*, 43 Ind. App. 509, 87 N. E. 1047.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 861-864.
See, also, 33 Cyc. pp. 729, 730.

§ 269. Evidence as to ownership and operation.

Affecting duty to maintain crossing, see ante, § 95.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 865-867.
See, also, 33 Cyc. pp. 732, 733.

§ 270. — Presumptions and burden of proof.

[a] (Sup. 1874)

Where, in an action against a railroad company for killing stock, it appears that the animal was killed on a railroad by being struck by a train, the judgment for plaintiff cannot be sustained in the absence of proof that the road was that of defendant company.—*Ft. Wayne, M. & C. R. Co. v. McClurg*, 47 Ind. 138.

[b] (Sup. 1881)

In an action against a railroad company to recover damages for killing stock, a verdict for plaintiff will be set aside on appeal where plaintiff introduced no evidence that the railroad on which the killing occurred or the locomotive by which the animals were struck belonged to or was operated by defendant.—*Wabash Ry. Co. v. Forshee*, 77 Ind. 158.

[c] (App. 1892)

Where the injury was proved to have been caused by an engine and car while being operated on defendant's track, it was unnecessary to prove the ownership of such engine and car, or that the persons operating them were defendant's employés.—*Lake Erie & W. R. Co. v. Carson*, 4 Ind. App. 185, 30 N. E. 432.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 865.
See, also, 33 Cyc. p. 732.

§ 272. — Sufficiency.

[a] (Sup. 1873)

Where, in an action against a railroad company alleged to own the railroad on which plaintiff's stock was killed, there is no evidence that such road was not owned by defendant, the fact that there was no direct or positive evidence that such road was owned by defendant will not warrant the setting aside of a verdict for plaintiff on appeal; defendant having appeared and defended the action.—*Evansville & C. R. Co. v. Snapp*, 61 Ind. 303.

[b] (Sup. 1882)

In an action for the value of a colt killed on a railroad track, due to its unfenced condi-

tion, it appeared that at the time the track was built it was supposed to belong to another railroad company, and that prior to the accident defendant had mortgaged the line, reciting that the company to which the track was supposed to belong had been consolidated with defendant. Trains were not run over the track regularly by defendant until after the accident. *Held*, that the evidence was sufficient to show that the track at the time of the accident belonged to defendant.—*Louisville, N. A. & C. Ry. Co. v. Meadows*, 87 Ind. 441.

[c] (*Sup.* 1885)

In an action against a railroad company for the killing of an animal, testimony that the animal was killed on the defendant's road, and that several trains had for a long time daily passed over the road, tends to show not only that the defendant was the owner of the road, but that it controlled the operation of cars thereon.—*Louisville, N. A. & C. Ry. Co. v. Hixon*, 101 Ind. 337.

[d] (*App.* 1894)

In an action against a railroad company for the burning of plaintiff's meadow, where a witness testified that he knew where said railroad (naming it) was located, and between what points it ran, and that it ran through plaintiff's farm, and that he saw its pay car running over the road on the day of the fire, the ownership and operation of said railroad were sufficiently established.—*Terre Haute & L. R. Co. v. Walsh*, 11 Ind. App. 13, 38 N. E. 534.

[e] (*App.* 1909)

Evidence, in an action to recover for killing plaintiff's cow, *held* sufficient to show that the cow was struck by a locomotive or train operated by defendant.—*Cleveland, C., C. & St. L. Ry. Co. v. Van Natta*, 87 N. E. 990, rehearing denied 88 N. E. 716.

FOR CASES FROM OTHER STATES.

SEE 41 CENT. DIG. R. R. § 867.

See, also, 33 Cyc. p. 733.

§ 273. Trial.

[a] (*App.* 1896)

In an action by one injured by a railroad train while attempting to cross several parallel railroad tracks entering a union depot, owned by defendant and leased to various railroads, if plaintiff must prove that the train which injured him was one operated within the Union Belt, and under defendant's control, the finding of such fact must be deemed by intentment to be included in a general verdict for plaintiff, and an answer by the jury to an interrogatory, that they did not know what train it was, does not necessarily contravene or overcome such presumption.—*Indianapolis Union Ry. Co. v. Neubacher*, 16 Ind. App. 21, 43 N. E. 576, 44 N. E. 669.

FOR CASES FROM OTHER STATES,

See 33 Cyc. p. 734.

(D) INJURIES TO LICENSEES OR TRESPASSERS IN GENERAL.

Companies and persons liable, see ante, §§ 256-273.

Injuries to persons on or near tracks, see post, §§ 354-402.

Machinery and other things attractive to children, see NEGLIGENCE, § 23.

§ 273½. Degree of care in general.

[a] (*Sup.* 1907)

Railroad companies must use ordinary care in keeping their premises in a reasonably safe condition for the use of persons on their premises by invitation, express or implied.—*Pittsburgh, C., C. & St. L. R. Co. v. Simons*, 168 Ind. 333, 79 N. E. 911.

Railroad companies are under no obligation to mere licensees to keep their premises free from dangers or defects.—*Id.*

[b] (*App.* 1909)

A railway company's duty to a trespasser begins when its servants discover him in a situation of danger, and its duty is limited to refraining from inflicting injury upon him willfully, wantonly, or recklessly.—*Freitag v. Chicago Junction Ry. Co.*, 89 N. E. 501.

[c] (*App.* 1910)

Railroads owe no higher duty than to avoid any positive wrongful act of willful injury to trespassers or licensees on their right of way, tracks, or cars.—*Pittsburg, C., C. & St. L. Ry. Co. v. Hall*, 90 N. E. 498.

Where one is on a railroad right of way, depot, grounds, tracks, or cars by invitation, express or implied, by those authorized to extend it, the company owes him the duty of exercising ordinary care.—*Id.*

FOR CASES FROM OTHER STATES,

See 33 Cyc. pp. 765-804; notes, 4 L. R. A. (N. S.) 80, 5 L. R. A. (N. S.) 775.

§ 274. Injuries to persons at stations.

Abandoned station, see NEGLIGENCE, § 33.
Persons liable, see ante, § 266.

[a] (*Sup.* 1887)

A railroad company must not allow its depot and grounds to which all people are invited to come to become more dangerous than such a place would reasonably be, having regard for the interests of its business and for the nature of the contrivances necessarily employed in carrying it on, but it is not required to make the place absolutely safe.—*Wabash, St. Louis & P. R. Co. v. Locke*, 14 N. E. 391, 112 Ind. 404, 2 Am. St. Rep. 193.

[b] (*App.* 1893)

A railroad company, which is a common carrier of goods, and by its conduct invites or induces the public to use its premises, such as depots and other places set apart for receiving and discharging freight, is under special obligation to keep such premises safe for such use for

all persons coming upon the premises to transact business with such company, and among those who are entitled to this protection are such persons as come there for the purpose of delivering or receiving freight.—*Toledo, St. L. & K. C. R. Co. v. Hauck*, 35 N. E. 573, 8 Ind. App. 367.

[c] (App. 1905)

In an action against a railroad company for injuries to plaintiff by a passing train, a complaint which shows that plaintiff was on the sidewalk near the platform of the depot some six feet from the railroad track is not subject to the objection of failing to show it to have been the duty of defendant to protect plaintiff from injuries in the place where he stood.—*Chicago, I. & L. Ry. Co. v. Thrasher*, 73 N. E. 829, 35 Ind. App. 38.

[d] (App. 1908)

Where railway mail clerks had for over two years been accustomed to throw mail sacks from the cars, the railroad was bound to know the custom.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Warrum*, 42 Ind. App. 179, 82 N. E. 934, 84 N. E. 356.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 868-872.

See, also, 33 Cyc. pp. 805-808; note, 41 C. C. A. 550.

§ 275. Injuries to persons working on or about cars.

[a] (Sup. 1893)

Where plaintiff purchased lumber of a lumber company on a flat car, it was not necessary to make the complaint good that its averments show explicitly that there was an executed contract to purchase a particular separate portion of all of the lumber on the car, for if he purchased a bill of lumber of the lumber company a part of which was on the car, not separated from the other, and he entered on the car at the request of the lumber company to assist in unloading it he would be unlawfully on the car.—*Chicago & I. Coal Ry. Co. v. McDaniel*, 32 N. E. 728, 33 N. E. 769, 134 Ind. 166.

[b] (App. 1893)

In an action against a railroad company for personal injuries, the jury found that defendant's agent had placed a box car on a side track, so that plaintiff might load goods therein, and that while she was in the car a train was backed in upon the track to take the car out, and struck the same, causing the injuries; that the agent knew the car was not ready, and failed to notify those in charge of the train; that no signals were given; and that no brakeman was on the rear of the train, from which, had he been there, he could have seen that the car was not ready. *Held* to show negligence on the part of defendant.—*Toledo, St. L. & K. C. R. Co. v. Hauck*, 8 Ind. App. 367, 35 N. E. 573.

[c] (Sup. 1894)

In an action for personal injuries, it appeared that plaintiff, an employee of a stock firm, after loading stock into one of defendant's cars, was attempting to remove the chute, when defendant's train, backing onto the switch, struck the car, thereby causing plaintiff's foot to be caught between the car door and the chute. There was no allegation that the accident was willfully caused. In addition to a general verdict for plaintiff, the jury found that the car was taken without defendant's orders, and that the engineer of the train was aware of plaintiff's position. *Held* that, notwithstanding the general verdict, judgment for defendant should have been rendered, as there was no allegation of willfulness on the part of defendant; and as plaintiff, by taking the car without permission, was a mere licensee or trespasser, defendant was not liable for mere negligence.—*Cleveland, C., C. & St. L. Ry. Co. v. Stephenson*, 139 Ind. Sup. 641, 37 N. E. 720.

[d] (App. 1895)

A railroad company is not necessarily free from negligence in backing its train over a dray standing alongside a car on a side track for the purpose of hauling freight from it, because the bell was rung continuously, and three whistles given before starting to back.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Ives*, 12 Ind. App. 602, 40 N. E. 923.

[e] (App. 1897)

Where a switching crew knew that a person was working in a car which they were about to move, and that such person continued to work while the car was being moved, it was their duty to use care to protect him from injury, and, if he did not know that the car was going to move until after it had started, he was not bound to leave it while it was in motion.—*Hopkins v. Boyd*, 47 N. E. 480, 18 Ind. App. 63.

[f] (App. 1898)

The fact that the place of delivery of freight was not a depot or public place, but a place selected by agreement between the consignee and the railroad for convenience, does not relieve the railroad from liability for negligently operating its train to one rightfully on the premises engaged in removing the freight.—*St. Louis, I. & E. R. Co. v. Ridge*, 49 N. E. 828, 20 Ind. App. 547.

[g] (App. 1902)

While a railroad company is engaged in making up a train of cars loaded with stone in a quarry,—the cars having been billed out,—an employé of the stone company who continues his work on the stone on one of such cars is a mere licensee, to whom the railroad company must answer only for active misconduct.—*Chicago, I. & L. Ry. Co. v. Martin*, 65 N. E. 591, 31 Ind. App. 308.

[h] (App. 1903)

The fact that a railroad company has the right to use a certain track in connection with

another company would not justify its employes in driving a locomotive and cars against certain detached cars with such force as to throw them against an engine standing, with brakes set, about a car's length away; thereby driving it a distance of 20 feet, and killing a fireman underneath it at the time.—*Chicago & E. I. R. Co. v. Stephenson*, 69 N. E. 270, 33 Ind. App. 95.

[I] (Sup. 1905)

Where two railroad companies have a contract whereby each may use the other's road in hauling trains, a servant of one of the roads is not a trespasser while on the track of the other, but each company owes the duty of using ordinary care toward the servants of the other in keeping its tracks in safe condition.—*Chicago Terminal Transfer R. Co. v. Vandenberg*, 164 Ind. 470, 73 N. E. 990.

[J] (Sup. 1907)

Decedent was assisting in loading a flat car with poles for shipment by his employer, when some one nearby shouted an alarm to stop a train, whereupon he left his place and went around the car to a point where he could see the approaching train, and was thrown upon a nearby track by the falling of poles caused by a defect in the car, and was killed. *Held* that, if the defect and the failure of the company to see that the car was in proper condition when delivered to the shipper was the proximate cause of the accident, and decedent was standing at that point rightfully, the company was liable, though there was no privity of contract between the company and decedent.—*Chicago, I. & L. Ry. Co. v. Pritchard*, 168 Ind. 398, 79 N. E. 508, 81 N. E. 78, 9 L. R. A. (N. S.) 857, transferred from appellate court, 39 Ind. App. 701, 78 N. E. 1044.

Railroad companies owe to the employes of shippers the duty of keeping the places for loading cars in a reasonably safe condition.—*Id.*

A railroad company may be liable in tort to the employe of the person to whom it has furnished cars, where the cars furnished are unsafe; the primary duty of inspection, however, being on the person in possession.—*Id.*

An employe injured while loading a car furnished his employer under a contract by a railroad company cannot maintain an action on such contract for the failure of the railroad company to furnish a safe and proper car.—*Id.*

[K] (App. 1908)

It is the duty of a railroad to furnish to a person lawfully upon its track loading or unloading freight protection from injury by approaching trains or locomotives, and such person has a right to occupy a position designated by the agent of the company, even if such position be hazardous, and to rely upon the diligence of the company to protect him.—*Baltimore & O. S. W. R. Co. v. Trennepohl*, 87 N. E. 1059.

[I] (App. 1910)

A glass company had private inclosed yards in which were railroad tracks connected with main tracks outside the inclosure. The tracks were operated by the railroad for the delivery of freight to the glass company. A car of crushed stone was placed on the switch track in the yards to be unloaded by the glass company, and in so doing its foreman directed the railroad switching crew to switch some cars which necessitated taking out the stone car and then placing it back. In accordance with the custom acquiesced in by the switching crew, of which the railroad and glass company had no knowledge, and which was in direct conflict with the rules of the railroad, an employe of the glass company unloading the stone remained in the car after notice and was injured by the unusual bumping of the car. *Held*, that the employe could not hold the railroad liable on the theory that by custom the manner of delivery of freight had been to permit employes to stay in the car, and hence was a contractual right, since the company could not be presumed to have knowledge of the custom, and since the glass company was doing the unloading.—*Pittsburg, C. & St. L. Ry. Co. v. Hall*, 90 N. E. 498.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 873-877.

See, also, 33 Cyc. pp. 809-813.

§ 276. Injuries to persons on trains.

Injuries to persons on passenger trains by invitation of carriers' employes, see *CARRIERS*, § 244.

[a] (Sup. 1887)

A carrier owes no duty to one who wrongfully intrudes himself into one of its trains.—*Indianapolis, P. & C. R. Co. v. Pitzer*, 109 Ind. 179, 6 N. E. 310, 10 N. E. 70, 58 Am. Rep. 387.

A railroad company cannot be deemed guilty of negligence merely because a child seven years of age enters a passenger train at one of its regular stations, as a carrier is not under any duty to keep persons, young or old, from entering its trains.—*Id.*

[b] (Sup. 1895)

Plaintiff, an active boy, eight years old, in disregard of the engineer's warning, jumped on a freight train moving up a sharp grade, eight miles an hour, and clung to the iron loop on the car, provided for that purpose, with one foot on the grease box of the truck. *Held*, that the fact that the trainmen saw him hanging there, and did not stop the train, did not render the company liable for injuries received by him in jumping off.—*Pittsburgh, C. & St. L. R. Co. v. Redding*, 140 Ind. 101, 39 N. E. 921, 34 L. R. A. 767.

[c] (Sup. 1904)

Where a person is allowed by a railroad company to ride in the caboose of its work train gratuitously, the company is bound to exercise

ordinary care for his safety.—*Pennsylvania Co. v. Coyer*, 72 N. E. 875, 163 Ind. 631.

Where decedent, an employé of a construction company, received notice from a railroad company, of a rule prohibiting the employés of such construction company from riding on a work train, the habitual disregard of such rule by such employés and the trainmen in charge of the work train will not render the railroad company liable for the death of decedent, in the absence of proof that the company had knowledge of such disregard, and acquiesced therein.—*Id.*

[d] (App. 1910)

An invitation to ride on a freight train, in contravention of the rules of the company, by an employé engaged in the operation of such train, will not render the company liable for a negligent injury to a person accepting such invitation, unless it is shown that the person extending the invitation was authorized by the company to do so.—*Pittsburg, C., C. & St. L. Ry. Co. v. Hall*, 90 N. E. 498.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 878-886.

See, also, 33 Cyc. pp. 815-819.

§ 277. Removal of trespassers.

From passenger trains, see CARRIERS, §§ 350-385.

[a] (Sup. 1882)

Where a trespasser upon a railway locomotive engine was thrown off by the servants of the railway company while the engine was moving at a dangerous speed, and run over and injured, *held*, that the company was liable therefor.—*Carter v. Louisville, N. A. & C. Ry. Co.*, 98 Ind. 552, 49 Am. Rep. 780.

[b] (Sup. 1886)

If a brakeman pushes or compels a trespasser to jump from a moving train, to his injury, the railroad company is liable.—*Wabash Ry. Co. v. Savage*, 110 Ind. 156, 9 N. E. 85.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 887-890.

See, also, 33 Cyc. pp. 819-822; note, 51 C. C. A. 578.

§ 278. Contributory negligence of person injured.

[a] (App. 1893)

In an action against a railroad company for personal injuries, the jury found that defendant's agent had placed a box car on a side track, so that plaintiff might load goods therein, and that while she was in the car a train was backed in upon the track to take the car out, and struck the same, causing the injuries. *Held*, that the fact that plaintiff did not watch the movements of the train does not show contributory negligence, as she had a right to assume that she would be permitted to complete the loading of the car, and that defendant would see to her safety while doing so.—*Toledo, St.*

L. & K. C. R. Co. v. Hauck, 8 Ind. App. 367, 35 N. E. 573.

[b] (App. 1895)

A person on railroad property for the purpose of hauling away freight has a right to occupy the position designated by the agent of the company, even if such position be hazardous, and to rely upon the diligence of the company to protect him from danger.—*Pittsburg, C., C. & St. L. Ry. Co. v. Ives*, 12 Ind. App. 602, 40 N. E. 923.

[c] (App. 1898)

Deceased was injured by the derailment of an engine, caused by defendant's negligently permitting gravel to accumulate on its track. At the time of the accident he was the employé of a street contractor engaged in removing gravel, which defendant had been delivering to his employer, depositing it near its track. It appeared that he did not know the dangerous condition of the track, had had no experience about railroads, and had been working but an hour and a half, before the accident, at a point where he could not see the track, though he could see the train approaching. *Held*, that he was not guilty of contributory negligence.—*St. Louis, I. & E. R. Co. v. Ridge*, 49 N. E. 828, 20 Ind. App. 547.

[d] (App. 1898)

Plaintiff backed his wagon up to a freight car on a side track to unload goods. There was a freight train on the side track, to which this car was coupled. The freight train was cut, and the engine was switching, and the time when it would couple up was uncertain. Plaintiff knew these facts, and was familiar with the tracks. The station agent told him he had time to get his goods out of the car, and he had unloaded them, and was on his wagon, when the train started. The wagon, without apparent necessity therefor, was placed so close to the car that a step on the latter caught and upset the wagon, injuring plaintiff. *Held*, that he was guilty of contributory negligence.—*Hadley v. Lake Erie & W. R. Co.*, 51 N. E. 337, 21 Ind. App. 675.

[e] (App. 1903)

A boarding house keeper went to the defendant's station to solicit travelers for his house. While the train which he had gone to meet was standing at the station, he walked past it, between the main track and a side track, away from the depot. After it had started he stepped over near the main track, and walked along it, with his back to the train, until he was struck and injured. He was about 60 years old at the time, and in full possession of his faculties. He knew the train would proceed on its way along the track on which he was walking. He did not look or listen. There was ample space between the main and side tracks, where he could have walked without danger. *Held* contributory negligence.—*Hill v. Indianapolis & V. R. Co.*, 67 N. E. 276, 31 Ind. App. 98.

[f] (App. 1903)

Rules of a railroad company requiring car inspectors to place signals when inspecting cars are not applicable to a fireman when underneath his engine, cleaning out the ash pan.—*Chicago & E. I. R. Co. v. Stephenson*, 69 N. E. 270, 33 Ind. App. 95.

A railroad fireman is not negligent, as a matter of law, in going under his engine and cleaning out the ash pan, in the performance of his duties, though while doing so cars are projected against the engine through the negligence of employes of another company, thereby causing his death.—*Id.*

[g] (App. 1907)

An employe of an independent contractor, repairing a depot, was injured by being caught between a car and a bumping post while procuring a lifting jack. The employe selected the most direct way in procuring the jack. He could not have gone on the sidewalk from the point where he was at work and needed the jack. *Held*, that the employe was not guilty of contributory negligence as a matter of law in selecting a dangerous way to procure the jack.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Cozatt*, 39 Ind. App. 682, 79 N. E. 534.

[h] (App. 1910)

Riding on freight trains is hazardous, as every one is presumed to know and appreciate, and one of its hazards is the sudden bumping or jerking of the cars.—*Pittsburg, C., C. & St. L. Ry. Co. v. Hall*, 90 N. E. 498.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 891-900.

See, also, 33 Cyc. pp. 823-850, 854.

§ 279. Proximate cause of injury.

[a] (App. 1903)

A railroad fireman went under his engine to clean out the ash pan. About a car's length away, certain cars were standing; and against these the employes of another company sent a locomotive and a number of cars, causing them to strike the fireman's engine, resulting in his death. *Held*, that the act of such employes was the proximate cause thereof.—*Chicago & E. I. R. Co. v. Stephenson*, 69 N. E. 270, 33 Ind. App. 95.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 901.

See, also, 33 Cyc. pp. 852-854.

§ 280. Willful or wanton injury.

[a] (Sup. 1884)

A person wrongfully on an engine of a railroad company did not thereby assume the risk to his person that might be caused by the wrongful act of the company's servants, and, if such acts were expressly or constructively authorized by the company, it must be held liable for their consequences.—*Carter v. Louisville, N. A. & C. R. Co.*, 98 Ind. 552, 49 Am. Rep. 780.

[b] (App. 1897)

A railroad company is liable to a trespasser for willful and unnecessary injury of him by the conductor acting within the scope of his authority.—*Baltimore & O. R. Co. v. Norris*, 46 N. E. 554, 17 Ind. App. 189, 60 Am. St. Rep. 166.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 902-909.

See, also, 33 Cyc. p. 857.

§ 281. Acts or omissions of employes or others.

[a] (Sup. 1890)

A complaint alleging that the plaintiff, while riding on the defendant's freight train by invitation and permission of the conductor in charge, was assaulted, and thrown under the wheels, by one of the servants of the defendant, and that the other employes negligently refrained from interfering and protecting him from injury, but not averring facts which showed him to be a passenger, or from which he might infer a right to ride on the train as such, and not showing that the scope and character of the service required to be performed by his assailant brought the assault within the line of his duty, does not state a cause of action.—*Smith v. Louisville, E. & St. L. R. Co.*, 124 Ind. 394, 24 N. E. 753.

[b] (Sup. 1894)

A railroad company is not liable for injury to a person thrown from a car through negligence of the trainmen, he being engaged in working his passage under an arrangement with the conductor and brakeman; they having no authority to employ assistance, and there being no custom or regulation of the company permitting the payment of fare by work on the train.—*Cooper v. Lake Erie & W. R. Co.*, 136 Ind. 366, 36 N. E. 272.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 902-909.

See, also, 33 Cyc. pp. 857-865.

§ 282. Actions for injuries to licensees or trespassers.

Error in instructions cured by withdrawal or giving other instructions, see TRIAL, 296.

Evidence as to ownership and operation of road, see ante, §§ 260-272.

Form, requisites, and sufficiency of instructions in general, see TRIAL, § 233.

Instructions invading province of jury, see TRIAL, § 191.

Pleading ownership and operation of road, see ante, § 268.

[a] (Sup. 1874)

A complaint against a railroad company to recover for an injury resulting in death, which showed that the deceased, in company with others, was voluntarily riding upon a hand car, on the track of the defendant, in the nighttime, and thus collided with a locomotive and train of the defendant. *Held* bad, because contribu-

tory negligence was shown on the part of the deceased.—*Ream v. Pittsburg, Ft. W. & C. R. Co.*, 49 Ind. 93.

[b] (Sup. 1884)

A complaint against a railroad company alleging that, plaintiff being on one of defendant's trains, its servants and employes ordered and compelled him to jump from the train, alleges mere conclusions, and what was done in ordering and compelling him to jump from the train should have been stated.—*Pennsylvania Co. v. Dean*, 92 Ind. 459.

A complaint for personal injuries to an infant caused by the railroad company's servants compelling him to jump from a train in motion whereon he was riding, and alleging that the injuries were due to the carelessness and negligence of the company's servants, is insufficient as failing to show by what right said infant was on the train, and what were the acts constituting the negligence of the company's servants, and what was the age of said infant, so that the degree of care required might appear.—*Id.*

[c] (Sup. 1886)

Where, in an action against a railroad company for damages for an injury maliciously inflicted, the manner and occasion of the injury are specifically set forth, it is not error to overrule a motion to make the complaint more specific by stating by what servant of the company the injury was inflicted, and at what time of day, and on what kind of a train, it occurred.—*Wabash Ry. Co. v. Savage*, 110 Ind. 156, 9 N. E. 85.

[d] (Sup. 1887)

Where the obligation of a railroad company is not in its nature so nearly absolute, and the circumstances of the accident suggest that it may have been unavoidable, notwithstanding ordinary care, the plaintiff charging negligence assumes the burden of proving that the defendant has by some act or omission violated a duty incumbent on it, from which the injury followed in natural sequence.—*Wabash, St. L. & P. R. Co. v. Locke*, 14 N. E. 391, 112 Ind. 404, 2 Am. St. Rep. 193.

[e] (Sup. 1893)

In an action against a railroad company for injuries sustained in the unloading of a car, a general averment that the injury was caused wholly by the fault and negligence of the defendant and without any fault or carelessness of the plaintiff is sufficient to withstand a demurrer, as such averment denies any negligence in failing to look for a train as well as any negligence which caused or contributed to the collision of the cars which produced the injury.—*Chicago & I. Coal Ry. Co. v. McDaniel*, 32 N. E. 728, 33 N. E. 769, 134 Ind. 166.

In an action for damages for injuries sustained through defendant railroad company's negligence while unloading a shipment of lumber on one of defendant's cars, plaintiff alleged that the car was side tracked in the usual place

for unloading provided by defendant, and that plaintiff was unloading the car at the request of the lumber company which made the shipment, and while he was so engaged on the car the injury was sustained. *Held*, that the allegation was sufficient to show that plaintiff was lawfully on the car at the time of the injury.—*Id.*

An allegation that the injury was caused wholly by the negligence of defendant, without any carelessness on the part of plaintiff, is sufficient without its appearing that plaintiff did not know that the train by means of which he was injured was approaching before he got on the car, or that by looking before getting on it he could not have seen the cars coming on the side track, and so avoided the injury.—*Id.*

[f] (App. 1894)

In an action against a railroad company for injuries received by stepping off at a station in the nighttime on the side of a track at which there was no platform, and falling a distance of several feet, it was harmless error to admit evidence that, after the accident, defendant greatly extended its platform at that point on the south side of the track, since the injury was caused by plaintiff's stepping off the north side; and the rule excluding evidence of repairs made after the injury did not apply.—*Kentucky & I. Bridge Co. v. McKinney*, 9 Ind. App. 213, 36 N. E. 448.

[g] (App. 1894)

In an action for the death of plaintiff's 12 year old son, who was injured at defendant's railroad depot, where he had been sent to meet his sister, the complaint need not allege that the boy had sufficient discretion to be sent to the depot.—*New York, C. & St. L. R. Co. v. Mushrush*, 11 Ind. App. 192, 37 N. E. 954, 38 N. E. 871.

[h] (App. 1897)

It appeared that while plaintiff, who was employed by a shipper of grain, was shoveling corn in a box car, which was being loaded, defendant railroad caused the car to be moved temporarily to another track; that plaintiff, having no notice of the intention to move the car, remained at work until after the car had started, and was struck by a sliding door of the car, and injured. It also appeared that there were piles of lumber close to the track, one of which was near the place where the box car had been standing; and there was testimony as to scratches on the side of the car, which was painted red, and that a projecting plank from one of the lumber piles had red paint on its end after the accident, it being plaintiff's theory that the projecting plank had caught the sliding door as the car passed, and forced it against him. *Held*, that a verdict in favor of plaintiff was sustained by sufficient evidence.—*Hopkins v. Boyd*, 18 Ind. App. 63, 47 N. E. 480.

[i] (App. 1900)

As to whether a person is of sufficient discretion to discern danger and understand the

hazard of attempting to get upon a moving train is a question of fact, and it does not necessarily follow that, because a boy is only nine years old, he is not possessed of sufficient discretion to realize danger in a hazardous undertaking.—*Wolfe v. Peirce*, 57 N. E. 555, 24 Ind. App. 680.

The general averment of the complaint for personal injury that plaintiff was without fault is overcome by the allegations that he attempted to get on a moving train, and that he was 9 years old, lacking a month, though there is the statement of a conclusion that he was not of sufficient discretion and judgment to understand the danger of his undertaking; no facts on which to base lack of discretion and judgment being averred.—*Id.*

[J] (App. 1900)

Where plaintiff, in the employment of a manufacturing company, while on the master's premises and endeavoring to adjust a steel plate connecting the floor of a car with a loading platform, was injured by reason of a switch engine of defendant railroad company starting in motion cars which collided with the car at the platform, and started it so that plaintiff's foot was caught between the steel plate and a post of the platform, an allegation of the complaint that the proximate cause of plaintiff's injury was due to defendant's negligence in backing the train without warning to plaintiff, and negligently moving forward the car and plate, sufficiently showed a legal obligation on the part of defendant towards plaintiff which it failed to perform, and that the injury was occasioned thereby.—*Lake Erie & W. R. Co. v. Gaughan*, 58 N. E. 1072, 26 Ind. App. 1.

[K] (App. 1903)

In an action for the death of a fireman, killed, while beneath his engine in the discharge of his duties, by certain cars being projected against it by employes of another company, a finding that there is no evidence that decedent took any precaution to warn or notify the employes of his position is not equivalent to a finding that he did not take any such precaution; the burden of establishing contributory negligence being upon the master of such employes.—*Chicago & E. I. R. Co. v. Stephenson*, 69 N. E. 270, 33 Ind. App. 95.

Evidence in an action for the death of a railroad fireman while underneath his engine, occasioned by its being struck by standing cars, propelled by an impact with a locomotive and cars under the control of the employes of another company, considered, and *held* to render the question of decedent's negligence one for the jury.—*Id.*

The fact that railroad employes running a locomotive and cars against standing cars, which were thereby projected against another engine, whose fireman was underneath it, cleaning out the ash pan, were not aware of the fireman's position, does not conclusively negative the idea of their negligence.—*Id.*

[L] (Sup. 1904)

The mere fact that a person is on a railroad train does not necessarily raise the presumption that he is there rightfully.—*Pennsylvania Co. v. Coyer*, 72 N. E. 875, 163 Ind. 631.

[M] (Sup. 1905)

In an action by a brakeman for personal injuries sustained while riding over the roadbed of another company, evidence considered, and *held* sufficient to sustain a verdict for plaintiff.—*Chicago Terminal Transfer R. Co. v. Vandenberg*, 164 Ind. 470, 73 N. E. 990.

[N] (App. 1905)

A complaint against a railroad company alleged that defendant's servants operated a train past a station in the nighttime with an object protruding laterally from the engine; that such protruding object, which plaintiff was unable to describe, because he could not see it, was not used in the operation of the engine; that because of such negligence of defendant's servants plaintiff was struck and injured by such protruding object. *Held* to sufficiently allege negligence by defendant.—*Chicago, I. & L. Ry. Co. v. Thrasher*, 73 N. E. 829, 35 Ind. App. 58.

[O] (App. 1906)

In an action for personal injuries, the complaint alleged that plaintiff was employed by a railroad as a car inspector, it being his duty to inspect cars placed on a transfer track by defendant railroad before the cars were received by plaintiff's employer; that at a certain time defendant placed several cars on the transfer track, whereupon plaintiff closed the switch, and that at that time defendant had no other cars that it had any intention or purpose or right to set on the track; that plaintiff proceeded to inspect the cars, knowing that defendant had no other cars to set out on the track that day; and that while plaintiff was under the cars defendant negligently ran a car toward the switch and opened it, so that there was a collision, whereby plaintiff was injured. *Held*, that the complaint was demurrable on the ground that it did not show that defendant violated any duty it owed plaintiff at the time of the injury; it not appearing that there was any time when cars might not be transferred, and it not appearing that defendant's servants knew that plaintiff was a car inspector, or even that he was about the premises.—*Lake Erie & W. R. Co. v. Hennessey*, 38 Ind. App. 374, 78 N. E. 670.

[P] (App. 1907)

The complaint in an action for injuries to an employe of an independent contractor, repairing a depot, by being caught between a car moved by the railroad and a bumping post, averred that in throwing an appliance over the track the employe's knee bent down, so that it was brought to the point of impact between the drawbar of the car that was moving and the bumping post. There was evidence that loose cinders gave way under the employe as he attempted to pass around the post, causing

him to get his knee in the place where it was injured. *Held*, that there was no material variance between the complaint and the proof.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Cozatt*, 39 Ind. App. 682, 79 N. E. 534.

In an action against a railroad company for injuries to an employé of an independent contractor under contract for the repair of a depot building in consequence of being caught between a car moved by the employés of the company and a bumping post, evidence examined and *held*, that the questions of negligence and contributory negligence were for the jury.—*Id.*

An instruction, in an action for injury to an employé of an independent contractor, repairing a depot, by being caught between a car moved by the railroad and a bumping post, that if the employé attempted to pass around the bumping post, and in passing over cinders which were piled around the post the cinders gave way and caused the injury, he could not recover, was properly refused, because it omitted any reference to the question of the negligence of the railroad, and because it restricted the rights of the parties to immaterial facts.—*Id.*

[q] (Sup. 1907)

It will be presumed that an employé of a shipper killed by a railroad train while pinioned on the track by poles which fell from a car on the side track which he was helping to load was acting outside the scope of his employment; he being on the opposite side of the car from the place of loading.—*Chicago, I. & L. R. Co. v. Pritchard*, 168 Ind. 398, 79 N. E. 508, 81 N. E. 78, 9 L. R. A. (N. S.) 857. Transferred from Appellate Court 39 Ind. App. 701, 78 N. E. 1044.

Where decedent, hearing some one shout "Stop the train," left his place where he was helping load a flat car with poles for shipment by his employer, and walked around the car to a point where he could see an approaching train, and was thrown upon a nearby track by the falling of poles caused by a defect in the car, and was killed by the train, it was for the jury to determine the proximate cause of the accident.—*Id.*

[r] (App. 1907)

Where, in an action against a railroad company for injuries to a person on a street struck by a mail pouch thrown from a rapidly moving train, the evidence showed that plaintiff was injured while on a railroad platform occupying a public street; that the traveling public and those having business with the company used the entire platform, and that similar accidents were liable to happen anywhere along the platform because of the custom of the mail clerks in throwing mail pouches from rapidly moving trains, a finding that the company was guilty of actionable negligence was warranted.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Warum*, 42 Ind. App. 179, 82 N. E. 934, 84 N. E. 356.

[s] (Sup. 1908)

In an action against a railroad company for personal injuries, the complaint simply charged that plaintiff boarded a box car for the purpose of setting a brake to prevent it from being driven against a flat car which he was loading, that he was seen on the box car by defendant's servants when they were one-half mile away, and that they negligently made a flying switch, whereby the cars, at the speed of 30 miles an hour, collided with the box car. There was no showing that plaintiff was rightfully engaged in loading, and it did not appear that the circumstances were such that defendant's servants should have perceived that their act would put plaintiff in a peril from which he could not escape. *Held*, that the complaint was demurrable because it did not show that a duty to exercise care was imposed on defendant. Judgment (App. 1907) 40 Ind. App. 732, 82 N. E. 1135, reversed.—*Evansville & T. H. R. Co. v. Yeager*, 170 Ind. 139, 83 N. E. 742.

[t] (Sup. 1909)

A complaint *held* to sufficiently allege a cause of action against a belt line company for death of an employé of another road.—*Cleveland, C., C. & St. L. Ry. Co. v. Gossett*, 172 Ind. 525, 87 N. E. 723.

The negligent change of signals by a signalman of defendant belt line company *held*, under the evidence, to be the proximate cause of the death of an employé of another railroad company.—*Id.*

In an action for death of an employé of a railroad company claimed to have resulted from the negligence of the signalman of defendant belt line company in changing the signals, contrary to a rule of defendant, before intestate's train had stopped, evidence *held* to sustain a finding that the signalman knew the orders of intestate's train, or might have known by exercising reasonable diligence.—*Id.*

In an action against two railroad companies for death of an employé of one of them by negligence of the signalman of the other at the place where the roads crossed, caused by changing signals before the employé's train stopped, a requested instruction that intestate assumed the risk of injury from the manner of manipulating the signals, if he had observed their operation for 18 months during the course of his employment, was properly refused, where there was no evidence as to the manner of manipulating the signals during that time.—*Id.*

[u] (App. 1909)

Under Burns' Ann. St. 1908, § 343, subd. 2, providing that a complaint shall contain a statement of the facts constituting the cause of action in plain and concise language, without repetition, and so that a person of common understanding may know what is intended, a complaint in an action for injuries to a person working in a car unloading wood, which states that defendant "carelessly and negligently and wrongfully ran said locomotive at high speed

upon and against the car in which plaintiff was loading said wood, and carelessly and negligently ran said locomotive against plaintiff with great force and violence, without giving to the plaintiff any warning of the approach of said locomotive engine," is sufficient to cover negligence of defendant in permitting its track to become slippery so that it was impossible to stop the locomotive.—*Baltimore & O. S. W. R. Co. v. Trennepohl*, 87 N. E. 1059.

[v] (App. 1909)

Where the relation of master and servant does not exist between plaintiff and defendant in an action for injuries to an occupant of a coal car struck by another car in switching, a complaint is sufficient, though it does not allege that plaintiff had no knowledge that the car on which he was working was about to be moved, since, assumed risk not being an issue in the case, the allegation could only apply to the contributory negligence of defendant, which, under *Burns' Ann. St. 1908*, § 362, plaintiff was not required to allege.—*Toledo, St. L. & W. R. Co. v. Miller*, 88 N. E. 968.

In an action for injuries to plaintiff while unloading a coal car on a side track by the running of a freight train against the car, thereby injuring plaintiff, an instruction that the fact that plaintiff knew that a freight train had arrived and would come in on the side track was not notice that it would come in on the side track and move or strike his car, so as to impose on him the duty of keeping a special watch to avoid danger, is not erroneous, in view of other instructions giving correct statements of the duty of plaintiff to use ordinary care as to contributory negligence.—*Id.*

In an action for injuries to plaintiff while unloading a coal car by running another car against such car, a requested instruction to find for defendant, if defendant did not know that plaintiff was in the car, and that defendant had no reason to believe that any one was therein, is properly modified by adding that if the defendant exercised reasonable care to ascertain such fact.—*Id.*

[w] (App. 1909)

Special findings refuting plaintiff's theory that the crossing on which she was injured by defendant's cars was either on a public street or in the private yards of another company, by whose permission the yards were used by both plaintiff and defendant, the findings showing that the injury occurred on the private property of defendant, and that plaintiff was a trespasser, but showing no facts refuting the existence of proof of willful injury alleged, are not so inconsistent with a general verdict for plaintiff as to overrule it and warrant a judgment for defendant non obstante veredicto.—*Freitag v. Chicago Junction Ry. Co.*, 89 N. E. 501.

[x] (App. 1910)

Notice to a railroad company of an habitual disregard of its rules and sanction thereof or

acquiescence therein cannot be presumed merely from evidence of such disregard or violations of permission therefor by complacent or faithless servants.—*Pittsburg, C., C. & St. L. Ry. Co. v. Hall*, 90 N. E. 498.

[y] (App. 1910)

In an action for damages against a railroad company for personal injuries, in which the theory of the complaint was that plaintiff was on defendant's right of way by invitation to receive merchandise from it, and at the usual place designated for that purpose, evidence for plaintiff that passengers were permitted to leave or enter trains at a certain coal chute and water tank which was within a few feet of the accident was within the issues.—*Southern Ry. Co. v. Seig*, 92 N. E. 194.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 910-923.

See, also, 33 Cyc. pp. 865-919.

(E) ACCIDENTS TO TRAINS.

Companies affected by regulations, see ante, § 224.

Companies and persons liable, see ante, §§ 256-273.

Criminal responsibility for obstructing trains, see ante, § 255.

Injuries to passengers, see CARRIERS, §§ 280-322, 325-349.

Release of claim for injuries, see RELEASE, §§ 29, 46.

§ 283. Care in management of trains in general.

[a] (App. 1904)

Rules made by a railroad for the management of trains may be superseded by habit and custom. Opinion (1903) 68 N. E. 191, withdrawn on rehearing.—*Southern Indiana Ry. Co. v. Davis*, 69 N. E. 550, 32 Ind. App. 569.

[b] (App. 1904)

A person in charge of an electric street car has the same right in crossing a railroad track at a street crossing as a person in charge of any other vehicle; it being his duty to use ordinary care under the circumstances.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Browning*, 34 Ind. App. 90, 71 N. E. 227.

FOR CASES FROM OTHER STATES,

See 33 Cyc. p. 734.

§ 285. Rate of speed.

[a] (Sup. 1871)

In an action against a railroad company for injury to the conductor of a street car caused by a collision of a train with a street car at a crossing, an ordinance of the city limiting the rate of speed of trains is admissible to prove that defendant was guilty of negligence.—*Madison & I. R. Co. v. Taffe*, 37 Ind. 361.

[b] (Sup. 1874)

The true criterion for determining whether at the time of an accident a train was running at a higher rate of speed than was safe and prudent, taking into consideration the condition of the track where the accident occurred, is the rate of speed at which other trains have been run over that portion of the road, both before and after the accident.—*Ohio & M. Ry. Co. v. Selby*, 47 Ind. 471, 17 Am. Rep. 719.

[c] (Sup. 1901)

In an action for damages for the death of an engineer, caused by collision with a train being run faster than permitted by a city ordinance, an instruction that the ordinance was enacted for the protection of the general public crossing the tracks, and not for the benefit of railroad employes, was properly refused.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Martin*, 61 N. E. 229, 157 Ind. 216.

[d] (App. 1906)

In the absence of any statute or ordinance on the subject, no rate of speed in running a railroad train is negligence per se.—*Southern Indiana Ry. Co. v. Messick*, 74 N. E. 1097, 35 Ind. App. 676.

[e] (Sup. 1907)

A complaint, alleging that defendant railroad company negligently ran its train at an excessive speed in violation of a city ordinance, and by reason of such excess struck a street car thereby killing decedent, stated a cause of action.—*Indianapolis Union R. Co. v. Waddington*, 169 Ind. 448, 82 N. E. 1030.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 924.

See, also, 33 Cyc. p. 735.

§ 286. Collisions.

Collision between street cars, see **STREET RAILROADS**, § 88.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 925-932.

See, also, 33 Cyc. pp. 735-740.

§ 287. — In general.**[a] (Sup. 1898)**

Where a written order is given an extra freight train, the order having been issued by the train dispatcher in the name of the superintendent, the statement of an operator to the engineer that there was a work train out, but that it was running under a flag, and that its orders did not concern the freight, did not amount to a modification of the written order.—*Louisville, N. A. & C. Ry. Co. v. Heck*, 50 N. E. 988, 151 Ind. 292; *Same v. Domke*, 50 N. E. 1124, 152 Ind. 696.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 925-927.

See, also, 33 Cyc. pp. 735, 736.

§ 288. — At railroad crossings.**[a] (Sup. 1888)**

Where two companies, whose tracks cross each other, agree on a code of signals to be used at the crossing, and each agrees to obey the signals, the company disobeying the signals is liable to the other for damage resulting from a collision, though the agreement did not in terms provide for compensation for its violation, as the law awards damages for breach of contract, and parties need not incorporate the law in their contracts.—*New York, C. & St. L. Ry. Co. v. Grand Rapids & I. R. Co.*, 116 Ind. 60, 18 N. E. 182.

[b] (Sup. 1889)

In an action for damages for injuries to a passenger on defendant's train through a collision at a crossing, it appeared that a watchman was stationed at the crossing with signals to regulate the passage of trains; that the engineer of defendant's train brought his train to a stop 700 feet south of the crossing, rang the bell, and sounded the whistle, and obtained the signal for his train to pass over the crossing. *Held*, that the failure of the engineer to stop his train near the crossing, and inform himself whether or not there was an approaching train on the other railroad, and in the vicinity of the crossing, was gross negligence, for which defendant was liable.—*Grand Rapids & I. R. Co. v. Ellison*, 117 Ind. 234, 20 N. E. 135.

[c] (Sup. 1897)

Negligence of a railroad company in running into the train of another company at a crossing is not excused by the fact that its crossing signal lights were hidden by the train of the other company, and obscured by a city electric light near the crossing, and that a light on such other train was mistaken for a switch light.—*Cleveland, C., C. & St. L. Ry. Co. v. Gray*, 46 N. E. 675, 148 Ind. 266.

[d] (App. 1906)

Where signals given to two companies crossing each other's tracks by the flagman employed by them to control the operation of trains at the crossing gave to one company the right to pass over the crossing, it was the duty of the other company, in face of such signal, to refrain from backing its train over the crossing while the former train was passing, and it must stop, look, and listen for the other train before entering on the crossing.—*Baltimore & O. S. W. R. Co. v. Kleespies*, 76 N. E. 1015, 78 N. E. 252, 39 Ind. App. 151.

[e] (App. 1908)

Burns' Ann. St. 1901, § 2293, makes it an offense for an engineer to run his locomotive across or upon the tracks of any railroad upon which passengers may be transported, until first coming to a full stop, etc. By the failure of intersecting railroads to observe the statute, a passenger in a waiting room of one of the roads was injured. *Held*, that the other railroad company was liable to the person so injured, though

there was no relation of carrier and passenger between them.—*Cincinnati, H. & D. Ry. Co. v. Acree*, 42 Ind. App. 127, 82 N. E. 1009.

[f] (App. 1910)

A violation of Acts 1905, c. 169, making it an offense for an engineer to run his locomotive across the tracks of any other railroad without first coming to a stop and ascertaining that there is no train approaching, is negligence per se.—*Louisville & N. Ry. & Lighting Co. v. Hynes*, 91 N. E. 962.

Where the act of negligence charged against a railroad, sued for injuries to the motorman of an electric car in a collision at a crossing of tracks, was the violation of a statute, it was not necessary that any injury should be foreseen to authorize a recovery.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 928-932.

See, also, 33 Cyc. pp. 736-740.

§ 289. Defects in roadbeds or tracks.

[a] (Sup. 1888)

Under Rev. St. §§ 3904, 3905, imposing on railway companies the duty of keeping in repair their tracks at crossings of one railroad by another, it is negligence per se to disregard this duty, and the company disregarding the statute is liable for injuries resulting, although it had no actual notice of the defects causing the injury.—*Indiana, B. & W. Ry. Co. v. Barnhart*, 115 Ind. 399, 16 N. E. 121.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 933.

See, also, 33 Cyc. p. 740.

§ 291. Animals on tracks.

[a] (Sup. 1867)

Where the owner of cattle knowingly permits them to wander at large in the vicinity of a railway crossing of a public highway, the road being properly fenced, in consequence of which they are run into by a train without the fault of the employees of the company, and the train is thereby damaged, the liability of the owner for such damage is not avoided by the fact that the board of county commissioners have, under the statute, passed an order permitting cattle and swine to run at large upon the uninclosed lands or public commons within the bounds of the township where the accident happened.—*Sinram v. Pittsburgh, Ft. W. & C. Ry. Co.*, 28 Ind. 244.

If the owner of cattle knowingly permits them to run at large in the vicinity of a railway crossing, upon a public highway, and they wander upon the track, and are run over by a train of cars, without any fault or neglect on the part of the servants of the company, and the train is damaged thereby, he is liable to the company for the injury done.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 935, 937.

See, also, 33 Cyc. p. 741.

§ 292. Incompetency, negligence, or misconduct of employees.

[a] (Sup. 1885)

A section foreman, in returning his hand car to the tool house, encountered an obstacle on his employer's track, and transferred his car to the neighboring track of another railroad company, and collided with a hand car run by the section foreman of such other company. There was no authority for transferring the car, either express or implied. *Held*, that the act was done in pursuance of the employment, and that the railroad company was liable for damage caused by the section foreman in wrongfully transferring his car.—*Pittsburgh, C. & St. L. Ry. Co. v. Kirk*, 102 Ind. 399, 1 N. E. 849, 52 Am. Rep. 676.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 938.

See, also, 33 Cyc. p. 742.

§ 293. Wrongful acts of third persons.

[a] (App. 1904)

Since, under the co-employee's liability act, a fireman can recover against his employer for negligence of the engineer resulting in injury to him, the fact that the negligence of the engineer contributed to a fireman's injury does not preclude him from recovering against another railroad, the train of which collided with that on which he was employed. *Opinion* (1903) 68 N. E. 191, withdrawn on rehearing.—*Southern Indiana Ry. Co. v. Davis*, 69 N. E. 550, 32 Ind. App. 569.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 939.

See, also, 33 Cyc. p. 742; note, 22 L. R. A. 306.

§ 295. Contributory negligence of person injured.

Imputed negligence, see NEGLIGENCE, §§ 89, 92.

[a] (Sup. 1888)

Plaintiff and defendant railroad companies, whose tracks crossed, agreed upon a code of signals to be used at the crossing. Owing to a disregard of the signals by defendant a collision occurred injuring plaintiff's property. *Held*, that though the servants of plaintiff company in charge of its train, while obeying the rightful signal to approach the crossing, saw defendant company's locomotive in time to have avoided the collision, does not charge plaintiff with negligence, as it was not bound to anticipate defendant's disobedience.—*New York C. & St. L. Ry. Co. v. Grand Rapids & I. R. Co.*, 116 Ind. 60, 18 N. E. 182.

[b] (Sup. 1896)

A train on which plaintiff's decedent was engineer was entering a yard in which decedent's company and defendant company had equal rights to the track. On seeing defendant's train backing towards him, decedent signaled, and both engines were reversed. Owing

to the breaking of a drawbar pin, seven cars broke from defendant's train, and ran into decedent's train, and killed him. If the pin had not broken, defendant's train would have been stopped in time to avoid the collision, but the pinbar was not defective, and its breaking was an inevitable accident. The servants of the two companies usually relied for protection on keeping a sharp lookout, which was done in this case, but, owing to a curve, the approaching trains could not be seen till they were too near to avoid collision, in view of the breaking of the pin. *Held*, that defendant was negligent, but that decedent was guilty of contributory negligence, since both neglected to take precautions to avoid dangers liable to be encountered in rounding the curve, and this negligence concurred with and induced the breaking of the pin.—*Evansville & T. H. R. Co. v. Krapf*, 143 Ind. 647, 36 N. E. 901.

[c] (Sup. 1901)

Defendant operated a railroad to carry stone from a quarry, and run a train whenever necessary for that purpose, and plaintiff's intestate, without invitation, boarded a coach attached to a train loaded with stone, and was invited by the conductor to ride on a car of stone, because he desired to switch the coach, and the intestate took a seat on the tool box back of the tender to avoid cinders, and the engine was derailed, resulting in the intestate's death. *Held*, that the intestate was guilty of contributory negligence as a matter of law, and hence it was proper to direct a verdict for defendant in an action to recover for his death.—*Menaugh v. Bedford Belt Ry. Co.*, 60 N. E. 694, 157 Ind. 20.

[d] (Sup. 1901)

Plaintiff's intestate was operating a switch engine on a common track used by several lines. There were no rules prescribing the manner in which this common track should be used, but by custom and tacit agreement all trains going in one direction used one track, and all those going in the opposite direction the other; no signals being used, but each train keeping a sharp lookout ahead, and being under perfect control, so as to stop immediately if necessary to avoid injury to those ahead. Passenger trains desiring the track were to run slowly, and signal switch engines to vacate the track by whistling. An ordinance prohibited the running of trains anywhere in the city at a speed exceeding four miles an hour. Deceased was proceeding slowly with his train under the direction of a conductor, when he was notified by the fireman that a train was approaching from the rear. Deceased blew his whistle according to custom, as a signal to the approaching train, saying to the fireman, "They will stop." At this time the approaching train was 400 feet away, and could have been stopped in 75 feet, if going at the usual speed; but before deceased could leap from his engine he was run into and killed by defendant's train, under a headway of 30 miles an hour. *Held*, that deceased was

free from negligence.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Martin*, 61 N. E. 229, 157 Ind. 216.

Where an engineer was killed by a train being run at a high rate of speed, in violation of a city ordinance and the rules of the track, he was not bound to exercise diligence to learn whether or not trains were ordinarily run at a speed prohibited by the rules and ordinance.—*Id.*

[e] (Sup. 1901)

In an action against a railroad for causing the death of a railroad engineer, it was shown that defendant's road at a certain town used the station of the road on which decedent was employed, reaching the same by means of a Y, which intersected decedent's road a quarter of a mile from the station. The complaint alleged that one of defendant's trains was due at the station two minutes after that of decedent, and the latter's train was five minutes late; but it did not appear when defendant's train was due on the Y at the point of intersection, or that decedent knew when it was due there. *Held*, that decedent would not be charged with knowledge that defendant's train was due at the intersection when he arrived with his train, so as to be guilty of culpable negligence in attempting to pass the intersection without first stopping, or taking precaution to avoid the danger.—*Southern Indiana Ry. Co. v. Peyton*, 61 N. E. 722, 157 Ind. 690.

[f] (App. 1904)

A rule for the operation of a railroad, making it the duty of trains crossing the tracks of another road at grade to stop, was construed by the Supreme Court not to require an engineer to stop at the intersection of a road permitted by his road to use its tracks at a certain town. For some months the employes of the two roads had recognized the right of way of the proprietor road, and the employes of the other road had been in the habit of sending forward a flagman to warn employes of the proprietor of an approaching train. *Held*, that it was not contributory negligence, in law, for an employe of the proprietor road to proceed onto the tracks used in common without stopping his train, where the road whose duty it was to send out the flagman failed to do so. Opinion (1903) 68 N. E. 191, withdrawn on rehearing.—*Southern Indiana Ry. Co. v. Davis*, 69 N. E. 550, 32 Ind. App. 569.

[g] (App. 1904)

Where a person in charge of a street car is compelled to cross a railroad track where his view is obstructed, he must stop his car and go forward to determine if it is safe to cross, and a failure to use such precautions is ordinarily contributory negligence as a matter of law.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Browning*, 34 Ind. App. 90, 71 N. E. 227.

Plaintiff, a motorman of a street car, who was injured in a collision with a railroad train at a crossing, had an unobstructed view of the

approaching train as he proceeded to climb the grade of the street to the crossing, and when 10 feet from the track his car was running $1\frac{1}{2}$ miles an hour, and was under full control. The approaching train was within plaintiff's view, and the train approached on an upgrade, with the bell ringing; but plaintiff did not appreciate the same, drove his car onto the track, and was injured. *Held*, that plaintiff was guilty of contributory negligence as a matter of law.—*Id.*

[h] (App. 1908)

A passenger in a station partly demolished by the collision of two trains at an intersection near the station, though uninjured by the accident itself, is not guilty of contributory negligence in attempting in her excitement to escape from the building, whereby she was injured.—*Cincinnati, H. & D. Ry. Co. v. Acrea*, 42 Ind. App. 127, 82 N. E. 1009.

FOR CASES FROM OTHER STATES.

SEE 41 CENT. DIG. R. R. §§ 940-942.

See, also, 33 Cyc. p. 742.

§ 296. Proximate cause of injury.

[a] (App. 1906)

Where a train of one company had the right of way to cross the track of another company by the signals given by the flagman employed by the two companies to control the operation of the trains at the crossing, the act of the latter company in backing its train against the train of the former while crossing the track was the proximate cause of an injury to a passenger of the former, received in consequence of the collision between the two trains.—*Baltimore & O. S. W. R. Co. v. Kleespies*, 76 N. E. 1015, 78 N. E. 252, 39 Ind. App. 151.

[b] (App. 1908)

While a passenger was waiting for a train on railroad "A," in a station of A., near which railroad B. crossed A. at right angles, a collision occurred between trains on the two roads, in which the engine of B. was carried by that of A. against the station house, and a portion of the building demolished. The passenger was not injured by the accident, but in endeavoring to escape from the station fell or was pushed through a window thereof, and was injured. *Held*, that the negligence of B. in crossing tracks of A. without stopping, as required by *Burns' Ann. St.* 1901, § 2293, was the proximate cause of the injury to the passenger of A.—*Cincinnati, H. & D. Ry. Co. v. Acrea*, 42 Ind. App. 127, 82 N. E. 1009.

[c] (App. 1910)

One of the objects of Acts 1905, c. 169, making it an offense for an engineer to run his locomotive across the tracks of any other railroad without first coming to a stop, is to prevent accidents in collisions between trains and electric cars at crossings, where the motorman is unable to stop his car, and where the injury to a motorman in a collision between his car and a train at a crossing was the joint result of the failure of the railroad to stop its train be-

fore entering the crossing, and the failure of the electric railroad company to properly equip its car, the railroad was liable.—*Louisville & N. Ry. & Lighting Co. v. Hynes*, 91 N. E. 982.

Where the injury to a motorman operating cars across the tracks of a railroad, sustained in a collision between his car and a train at a crossing, was the result of the negligence of the railroad, and an accident for which neither the railroad nor the motorman was responsible, the railroad was liable unless the injury would not have happened had it not been negligent.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 943.

See, also, 33 Cyc. p. 744.

§ 297. Actions for injuries.

Evidence as to conditions after injury, see NEGLIGENCE, § 130.

Evidence as to conditions preceding injury, see NEGLIGENCE, § 127.

Evidence as to ownership and operation of road, see ante, §§ 269-272.

Instructions excluding or ignoring issues, defense or evidence, see TRIAL, § 253.

Instructions invading province of jury, see TRIAL, § 18.

Pleading ownership and operation of road, see ante, § 268.

Scope of evidence in rebuttal, see TRIAL, § 62.

[a] (Sup. 1871)

In an action against a railroad company for injury caused by negligence in running its cars whereby a collision occurred with a street car on which plaintiff was conductor, it is not necessary to file a copy of an ordinance limiting the rate of speed of trains within the city limits with the complaint, but it is sufficient to aver the existence of the ordinance.—*Madison & I. R. Co. v. Taffe*, 37 Ind. 361.

In an action for injuries to the conductor of a street car caused by a collision with a train of defendant railroad company, an ordinance of the city limiting the speed of trains is admissible in evidence, under a general allegation in the complaint of the existence of such ordinance.—*Id.*

[b] (Sup. 1885)

In an action against a railroad company for damages for injuries caused by a broken rail, it is proper for the jury to consider the successive breaking of rails at the place of the accident, within a short time, to indicate the condition of the track and roadway at that point.—*Cleveland, C. & I. R. Co. v. Newell*, 104 Ind. 264, 3 N. E. 836, 54 Am. Rep. 312.

[c] (Sup. 1886)

An instruction in an action for damages caused by a railroad accident, that, upon plaintiff's showing lack of negligence on his part, it devolved on the railroad company to show how the accident happened, is not erroneous, if modified by the further statement that defendant would not be liable if the accident did not

occur through its negligence.—*Louisville, N. A. & C. R. Co. v. Jones*, 108 Ind. 551, 9 N. E. 476.

[d] (Sup. 1888)

Plaintiff company may show, in an action for the damages caused by a collision where the two roads intersect, that defendant's engineer had been drinking.—*New York, C. & St. L. Ry. Co. v. Grand Rapids & I. R. Co.*, 116 Ind. 60, 18 N. E. 182.

[e] (Sup. 1896)

Where the complaint alleged that defendant negligently ran its train into a train of which plaintiff's decedent was engineer, and killed him, and the facts raised no inference of contributory negligence, a general allegation that the injury was inflicted without the fault or negligence of decedent was sufficient.—*Evansville & T. H. R. Co. v. Krapf*, 143 Ind. 647, 36 N. E. 901.

A complaint alleged that defendant's train was running backward, and that plaintiff's decedent, who was engineer on a train running in the opposite direction, on seeing defendant's train signaled it to stop; that both engines were reversed; and that, on the reversal of defendant's engine, seven cars broke from its train, and by their momentum ran into decedent's engine, and killed him; and that the death was caused by defendant's negligence in having a defective drawbar pin, which broke when the engine was reversed, and caused the cars to be precipitated against decedent. *Held*, that the complaint was demurrable, since it did not show that the collision would have been avoided if the pin had not broken.—*Id.*

[f] (Sup. 1897)

A complaint alleging that defendant railroad company failed to stop its train before crossing the tracks of another company, on which a train was standing, and negligently ran into such train, thereby injuring a person on adjoining premises, does not rest entirely on a violation of Rev. St. 1894, § 2203 (Rev. St. 1881, § 2172), prescribing a penalty for failing to stop before crossing the tracks of another company, but states a cause of action on the common-law liability.—*Cleveland, C., C. & St. L. Ry. Co. v. Gray*, 46 N. E. 675, 148 Ind. 266.

A complaint for negligence in failing to stop before crossing the tracks of another company, as required by Rev. St. 1894, § 2203 (Rev. St. 1881, § 2172), need not negative the exception made by section 5156, Rev. St. 1894 (page 55, Acts 1883), of crossings provided with interlocking switches.—*Id.*

[g] (Sup. 1898)

A railroad company is conclusively presumed to know the whereabouts of all its trains.—*Louisville, N. A. & C. Ry. Co. v. Heck*, 50 N. E. 988, 151 Ind. 292.

[h] (Sup. 1898)

In an action for death owing to a collision between trains, evidence *held* to show that defendant railroad company's negligence was the proximate cause of the death.—*Louisville, N. A. & C. Ry. Co. v. Heck*, 50 N. E. 988, 151 Ind. 292; *Same v. Domke*, 50 N. E. 1124, 152 Ind. 696.

[i] (Sup. 1901)

In an action against a railroad company for the wrongful death of plaintiff's intestate, a complaint charging that decedent, in the performance of his duty, had his engine on the common tracks of certain railroad companies, and defendant wrongfully and negligently ran one of its engines against decedent's engine and killed him, and that it was the custom of all the companies, as defendant knew, that engines and cars should be run over the common tracks at a reasonable speed and under full control, and that defendant violated the rule and ran its engine at an unreasonable and dangerous speed without its being under the full control of the engineer, negligently against decedent's engine, and killed him without any fault on his part, and containing a general averment that decedent was free from contributory negligence, is sufficient as against a demurrer, on the ground that it did not affirmatively show that decedent was free from fault.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Martin*, 61 N. E. 220, 157 Ind. 216.

On an issue whether an engineer alleged to have been negligently killed while operating his engine on a common track used by several lines was exercising due care, a book of rules of the company, for which deceased worked, was irrelevant, in the absence of evidence that such rules were in force on the track where the accident occurred.—*Id.*

[j] (Sup. 1901)

In an action against a railroad for the death of an engineer employed by another road, which roads connected by means of a Y, the court instructed that it was the duty of defendant's employes, before running on decedent's track, to exercise ordinary care to ascertain the presence of trains on the latter track that might lead to a collision; and if it was shown that such employes did not use such care, and decedent's death was caused by such negligence, and without fault on his part, there should be a recovery. *Held*, that an objection that such instruction misled the jury from finding negligence or nonnegligence from all the evidence was untenable, as the court might properly declare the law on issuable facts which the evidence tended to prove.—*Southern Indiana Ry. Co. v. Peyton*, 61 N. E. 722, 157 Ind. 690.

[k] (Sup. 1905)

In an action against a railroad for injuries, evidence examined, and *held* that whether evidence was negligent was a question for the

jury.—Chicago Terminal Transfer R. Co. v. Vandenberg, 73 N. E. 900, 164 Ind. 470.

In an action against a railroad for injuries alleged to have resulted from the negligence of defendant in failing to keep a switch closed and locked, the complaint need not specifically charge that it was the duty of the defendant to keep the switch closed and locked.—Id.

[1] (App. 1906)

The presumption that the derailment of a train was due to the company's negligence does not apply in favor of persons not passengers.—Southern Indiana Ry. Co. v. Messick, 35 Ind. App. 676, 74 N. E. 1097.

[m] (App. 1905)

Where plaintiff, employed as a brakeman by the Erie Railroad Company which together with the M. Company operated trains over the tracks of a third company, was injured in a collision between a train of the M. Company and his train, a paragraph of the complaint alleging that plaintiff's train had reached a signal station and had gone under signal within the semaphore, and that the train of the M. Company ran into the train of the Erie Company, and that the injuries were caused by the carelessness of the railroad companies in running their trains and in their neglect in giving and receiving orders and the neglect of defendants to observe them, was insufficient; it being indefinite as to what orders were given and received, no act or omission being directly charged against any one or all of the defendants, and it not being directly alleged that defendants or either of them neglected or failed to observe the targets and signals.—Chicago & W. I. R. Co. v. Marshall, 75 N. E. 973, 38 Ind. App. 217.

[n] (App. 1906)

Evidence in an action for injuries received in a collision at a railroad crossing examined, and *held* to support the finding that plaintiff was injured as claimed by him.—Baltimore & O. S. W. R. Co. v. Kleespies, 76 N. E. 1015, 78 N. E. 252, 39 Ind. App. 151.

In an action for injuries to a passenger in a collision between two railroad trains at a crossing, the court charged that if, after the passage of the B. & O. train over the crossing, the flagman so adjusted the signal as to display a white light westwardly along the P. track, and the red light northwardly along the B. & O. track, after which the B. & O. train was backed into the P. train at the crossing, the B. & O. trainmen were guilty of negligence. The court further charged that if, after the B. & O. train had gone to a point of safety north of the crossing, it was backed to the point of collision in violation of the signal red color against it, and that a collision occurred in which plaintiff was injured without his fault, plaintiff was entitled to recover against the B. & O. Company, regardless of whether the P.

Company was liable or not. *Held*, that the latter instruction construed with the former was not erroneous as predicated plaintiff's right to recover on the sole fact of the signal being set against the B. & O. train.—Id.

The complaint was not bad as against the objection that it failed to show unity of action on the part of the defendants.—Id.

A complaint alleged that defendant's passenger train was struck by codefendant's train while crossing codefendant's track, injuring a passenger on defendant's train; that defendant had the right of way to cross by the signals exhibited by the flagman employed at the crossing of the tracks by defendants; that defendants maintained a joint system of signals to control the operation of trains over the crossing; that, when the signal was exhibited for defendant's train to cross, it indicated that the codefendant could not cross; that the servants of the codefendant in charge of the train could have seen the signal; and that they, in the face of the signal, backed the train over the crossing, colliding with defendant's train. *Held*, to sufficiently charge the codefendant with negligence.—Id.

[o] (Sup. 1907)

A complaint, alleging that defendant railroad company without decedent's knowledge through its engineer and conductor negligently ran against and collided with a street car, killing decedent, was sufficient on demurrer.—Indianapolis Union R. Co. v. Waddington, 169 Ind. 448, 82 N. E. 1030.

Where a complaint alleged that the concurrent negligence of a railroad company in running at a rate of speed in violation of a city ordinance, and of a street railroad company in running on the track without looking for an approaching car caused decedent's death, the question of proximate cause was for the jury.—Id.

[p] (Sup. 1908)

A complaint in an action against a railway company for injuries to a street car conductor in a collision with his car on a grade crossing, which alleges that defendant operated railroad tracks crossing the street on which street cars were operated; that plaintiff, when approaching the crossing stopped his car and looked across the railroad tracks, and saw thereon no approaching trains or cars; that the street car proceeded to cross the railroad tracks; that plaintiff boarded it; that defendant negligently, without any warning, kicked one of its cars across the crossing and against the street car, injuring plaintiff—shows a breach of duty owed by defendant to plaintiff.—Cleveland, C., C. & St. L. Ry. Co. v. Hilligoss, 171 Ind. 417, 86 N. E. 485, 131 Am. St. Rep. 258.

A street car conductor in charge of a car running on a street crossed by railroad tracks stopped and left his car before crossing the

tracks to ascertain whether any trains, engines, or cars were approaching. On seeing none, he signaled the motorman to make the crossing. *Held*, that whether the conductor was justified in giving the signal immediately after passing over the crossing on the nonappearance of approaching cars, or whether he should have stood on the crossing and looked for approaching cars for any definite period before signaling the motorman to advance, was for the jury.—*Id.*

[a] (App. 1908)

In an action against two railroad companies for injuries to a passenger of one of them while in its station, caused by the collision of trains of the two roads at an intersecting crossing near by, an instruction that if the jury found that the company of which plaintiff was not a passenger was guilty of any negligence as charged against it, which proximately contributed to the negligence of the other defendant as charged in the complaint, to produce plaintiff's injury, without her fault, then they should find such other company liable, is not erroneous as exacting the highest degree of care towards a person not a passenger, since it is to be understood as dealing only with the subject of concurrent negligence.—*Cincinnati, H. & D. Ry. Co. v. Acrea*, 42 Ind. App. 127, 82 N. E. 1009.

In an action by a passenger for injuries sustained by contact with other persons in attempting to escape from a station partly demolished by a collision between trains, the questions of contributory negligence, and whether the independent force by which plaintiff was injured would or would not have been applied, *held*, under the evidence, for the jury.—*Id.*

In an action for injuries to a passenger in attempting to escape from a station after a collision between trains partly demolishing the station, an instruction that when by the negligence of one, another is suddenly put in peril, if the person so imperiled seeks to escape and suffers injury from another source, the author of the original peril is answerable for all the consequences which ensue, is not erroneous as withdrawing the defense of intervening cause, where the evidence shows that plaintiff was injured by being pushed or thrown by other excited passengers.—*Id.*

A complaint in an action for a personal injury from collision of two trains at a crossing charged that defendant approached said crossing with its train without first stopping or listening or ascertaining whether or not an engine or a train was approaching said crossing on the intersecting track. *Held*, that this was sufficient, without alleging further that those in charge of the train by the exercise of reasonable care could have ascertained that another train was approaching, since it is sufficient, after showing the existence of a duty, to allege negligence in general terms.—*Id.*

In an action for injuries caused by the collision of two trains at an intersecting crossing, an instruction that it was the statutory duty of a railroad company, where no interlocking fixtures are maintained, to come to a full stop before entering upon the crossing of another track, and to first ascertain that there is no other train, etc., in sight approaching the crossing, and that the duty is mandatory, and that the engineer must stop the engine at a point from which he can see the crossing and can by reasonable diligence ascertain that there is no other train, etc., is not erroneous as requiring infallibility of those operating a train.—*Id.*

[r] (App. 1910)

In an action against a railroad for injuries to a motorman of an electric car received in a collision with a passenger train at the crossing of a railroad track, a complaint which alleged that the railroad negligently failed to bring the train to a stop before entering on the crossing, and without first ascertaining that there was no car approaching and about to cross, that, on the contrary, the railroad ran its train at full speed across the crossing, while the car was approaching in full sight and about to cross, stated a cause of action as against a demurrer under Acts 1905, c. 169, making it an offense for an engineer to run his locomotive across the tracks of any other railroad without first coming to a stop, etc.—*Louisville & N. Ry. & Lighting Co. v. Hynes*, 91 N. E. 962.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 944-953.

See, also, 33 Cyc. pp. 745-754.

(F) ACCIDENTS AT CROSSINGS.

Collisions between trains at crossings, see ante, § 288.

Companies and persons liable, see ante, §§ 256-273.

Injuries to animals, see post, § 410.

Injuries to persons on or near tracks, see post, §§ 354-402.

Requiring railroad companies to light tracks, see ante, § 238.

§ 298. Public or private character of crossings.

Instructions, see post, § 351.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 954, 955, 958.

See, also, 33 Cyc. pp. 920, 921.

§ 300. — Crossings by license or custom.

[a] (Sup. 1906)

Where defendant railroad company constructed and maintained a farm crossing, planking the space between the rails and building long approaches on either side, and plaintiff, a tenant

of the adjoining owner, frequently used the crossing prior to his injury because of its obstruction by defendant, plaintiff, in using the crossing, was not a mere licensee, who assumed the risk of defects in the premises, though defendant's intent in constructing and maintaining the crossing was never communicated to any one, and plaintiff acted on the assumption that the crossing was designed for his use.—*Baltimore & O. S. W. R. Co. v. Slaughter*, 167 Ind. 330, 79 N. E. 186, 7 L. R. A. (N. S.) 597, 119 Am. St. Rep. 503.

[b] (Sup. 1906)

The street on the east side of defendant's railroad track abutted on the right of way, with no fence between the end of the street and the right of way. Extending west across the right of way was a path, which passed through a gateway constructed by the railroad company about 11 years before plaintiff was injured while walking in the path, which had always been open to travel through the gateway, and was the only practical route between residences west of the track and the main part of the town. Before and at the time the gateway was constructed in the fence the path had been in almost constant use by the public. *Held*, that plaintiff, in traveling the path through the gateway across the tracks, did so by the implied invitation of defendant, and was entitled to the exercise of ordinary care by defendant.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Simons*, 168 Ind. 333, 79 N. E. 911.

A railroad company, which constructs a private crossing in a city, thereby avoiding the construction of a public street crossing, may render itself liable to a traveler as for implied invitation to cross, where it negligently permits such crossing to become dangerous.—*Id.*

Where a railroad company permits the use of a crossing without objection for 10 years, a person going on or using such crossing may be considered as using the same by invitation.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 955.

See, also, 33 Cyc. p. 921.

§ 301. Mutual rights and duties at public crossings.

[a] The duties, obligations, and rights of railroads and of highway travelers at a point of intersection are mutual and reciprocal, and both must use such care as a prudent man would under like circumstances.—(Sup. 1865) *Toledo & W. Ry. Co. v. Goddard*, 25 Ind. 185; (1882) *Indianapolis & V. R. Co. v. McLin*, 82 Ind. 435.

[b] The rights of a traveler on a highway, where it crosses a railroad, are not subordinate to those of the railroad company, or superior to them, but equal; and both parties are bound to use ordinary care, the one to avoid committing injury, and the other to avoid receiving it.—(Sup. 1874) *Pennsylvania Co. v. Krick*, 47 Ind. 368; (1893) *Chicago, St. L. & P. R. Co. v.*

Spilker, 33 N. E. 280, 34 N. E. 218, 134 Ind. 380; (App 1908) *Vandalia R. Co. v. McMains*, 42 Ind. App. 532, 85 N. E. 1038.

[c] (Sup. 1881)

A person has the right to cross a railroad at a crossing anywhere within the highway, even if a foot walk has been made across the railroad.—*Louisville, N. A. & C. Ry. Co. v. Head*, 80 Ind. 117.

[d] (Sup. 1888)

A traveler on a highway at a point where it crosses a railroad track and the railway company have mutual and reciprocal duties and obligations, and though a train has the right of way, the same degree of care and diligence to avoid collision is due from both.—*Ohio & M. Ry. Co. v. Walker*, 15 N. E. 234, 113 Ind. 196, 3 Am. St. Rep. 638.

[e] (Sup. 1907)

While the employes of a railroad company are required to exercise ordinary care for the safety of travelers while using a grade highway crossing such employes are only required not to willfully injure trespassers or mere licensees thereon.—*Chicago, I. & L. Ry. Co. v. McCandish*, 167 Ind. 648, 79 N. E. 903.

[f] (Sup. 1907)

The use and operation of a highway for a railroad crossing is subservient to the easement of the public to use the highway.—*Southeast & S. L. Ry. Co. v. Evansville & M. V. Electric Ry. Co.*, 169 Ind. 339, 82 N. E. 765, 13 L. R. A. (N. S.) 916.

[g] (Sup. 1909)

The rights of a railroad company and the public to the use of highway crossings are equal, except that the company is entitled to precedence over the crossing, upon giving due notice of its purpose to use it.—*Evansville & T. H. R. Co. v. Berndt*, 172 Ind. 697, 88 N. E. 612.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 956.

See, also, 33 Cyc. p. 922.

§ 303. Defects in crossings and approaches.

Admissibility of evidence, see post, § 347.

Instructions, see post, § 351.

Pleading, see post, § 344.

Presumptions and burden of proof, see post, § 346.

Proximate cause of injury, see post, § 337.

Questions for jury, see post, § 350.

Sufficiency of evidence, see post, § 348.

[a] (Super. 1873)

In constructing railroad crossings as well as in maintaining them in safe condition, a railroad company is bound to use only ordinary care and skill.—*Hurley v. Jeffersonville, M. & I. R. Co.*, Wils. 295.

A railroad company is required to maintain its tracks at a public crossing in a condition to

be reasonably safe to persons driving across the same.—Id.

[b] (Sup. 1887)

A railroad company which, in violation of an express statutory duty, places or causes an obstruction in a public highway at a crossing, will not be heard to say that it did not anticipate an injury resulting directly from such unlawful act.—*Evansville & T. H. R. Co. v. Carver*, 113 Ind. 51, 14 N. E. 738.

Rev. St. 1881, § 3903, subd. 5, conferring on railroad companies the right to construct its track across a public highway, imposes on such companies the duty of restoring the highway to its former state as nearly as possible, and failure to observe such statute was actionable negligence in respect to any person sustaining injury thereby without his fault.—Id.

[c] (Sup. 1890)

It is the duty of a railroad corporation to so construct and maintain its crossings that they may be safely used by persons traveling the highways, and for a negligent breach of this duty it must answer in damages to one who exercises ordinary care, and sustains an injury from the breach of duty by the company.—*Terre Haute & I. R. Co. v. Clem*, 23 N. E. 965, 123 Ind. 15, 7 L. R. A. 588, 18 Am. St. Rep. 303.

[d] (Sup. 1892)

It is the duty of a railroad company in building its railroad across a highway to restore the highway as nearly as possible to its previous condition, and, if it fails to do so, it is liable for damages on account of injuries received by reason of the unsafe condition.—*Louisville, E. & St. L. Con. R. Co. v. Pritchard*, 31 N. E. 358, 131 Ind. 564, 31 Am. St. Rep. 451.

[e] (App. 1893)

The fact that a city may be primarily liable for injury from a defective sidewalk does not relieve a railroad company from liability to a person injured by a defect in an approach to a railroad crossing, which the company had failed to restore to its original condition after making the crossing.—*Cincinnati H. & I. R. Co. v. Claire*, 33 N. E. 918, 6 Ind. App. 390.

[f] (App. 1897)

When the construction of a railroad causes a fill in the highway so as to make it dangerous for travelers, unless protected, it is the duty of the railroad company to erect proper guards or barriers to prevent travelers from falling off the embankment. Barriers are a reasonable part of a necessary restoration of the highway to a safe condition for travel.—*Seybold v. Terre Haute & I. R. Co.*, 46 N. E. 1054, 18 Ind. App. 367.

A railroad company in restoring a highway over which it has constructed its tracks must consider the climatic conditions which will exist at different times in the year and the effect they will have on the safety of the crossing.—Id.

Burns' Rev. St. 1894, § 5153, imposes on railroad companies the duty of restoring highways over which their tracks are constructed to their former state as nearly as possible, and the failure to observe such duty is actionable negligence in respect to any person who sustains injury thereby without his fault.—Id.

[g] (App. 1902)

A complaint in an action against a railroad alleged that its plank crossing over the tracks at a street intersection had been allowed to become worn, and that a board broke under the weight of plaintiff, who was thereby injured. *Held*, that no averment of notice of the condition of the crossing was necessary.—*Wabash R. Co. v. De Hart*, 65 N. E. 192, 32 Ind. App. 62.

Burns' Rev. St. 1901, § 5172, cl. 5, requires a railroad crossing a highway to so construct the crossing as not to interfere with the free use of the same, and to restore the highway to its former state. Section 5172a provides that a railroad crossing a street shall grade and plank or gravel the crossing, so as to afford a safe crossing. *Held* that, in an action for injuries owing to a crossing having become worn and defective, negligence should be alleged.—Id.

[h] (Sup. 1904)

A railroad company, at the time of the construction of its railroad across a highway at grade, put the crossing in a safe condition, and so maintained it until the county commissioners changed the crossing to an overhead crossing, and, without the express consent of the company, caused the erection of a wooden bridge across the track. Subsequently the commissioners decided to replace the wooden bridge with an iron structure, and the company erected on its right of way stone abutments on which the bridge was built. The approaches to the bridge were constructed by the commissioners. *Held*, that under Burns' Ann. St. 1901, § 5153, cl. 5, which requires railroad companies to restore highways crossed by their tracks in a manner not to impair their usefulness, the company was liable for injuries sustained to a traveler on the highway by reason of the defective condition of the approaches to the bridge.—*Southern Indiana Ry. Co. v. McCarrell*, 71 N. E. 156, 163 Ind. 469.

[i] (App. 1905)

Under Rev. St. 1894, § 5153, making it the duty of railroads to construct and maintain highway crossings in good condition for public travel, the failure of a railroad to construct and maintain guards along a narrow fill near a crossing where it had dug a pit was negligence.—*Evansville & I. R. Co. v. Allen*, 73 N. E. 630, 34 Ind. App. 636.

It is a railroad's duty to so construct a highway crossing as not to interfere with the free use of the highway, and to restore the highway to its full width, and it is not sufficient to

put merely a narrow strip of the highway in order for travel.—Id.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 959-963, 966, 967.

See, also, 33 Cyc. pp. 925-935.

§ 304. Obstructions at crossings.

Proximate cause of injury, see post, § 337.

Use of defective or obstructed crossing as contributory negligence, see post, § 326.

[a] (Sup. 1882)

A railroad company is liable for an injury sustained by a traveler on the highway, whose team came in contact with a hand car, negligently left thereon at night by a section foreman of the company.—Pittsburgh, C. & St. L. Ry. Co. v. Sponier, 85 Ind. 165.

Where a complaint alleged that defendant negligently and unlawfully put a hand car on a bridge, and that plaintiffs, without fault on their part, in attempting to cross the bridge ran into the hand car, and one of them was injured, it was competent for plaintiffs to show that the duty of defendant's section boss, who had charge of the hand car, was to burn off the dry grass and rubbish on the right of way to prevent fire from sparks spreading, and that in the performance of such duty he or his hands had negligently left the hand car in the highway and partly on the bridge.—Id.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 964.

See, also, 33 Cyc. p. 931.

§ 305. Frightening animals.

Pleading, see post, § 344.

Proximate cause of injury, see post, § 337.

Questions for jury, see post, § 350.

Sufficiency of evidence, see post, § 348

[a] (Sup. 1886)

The mere sounding of a whistle, on a locomotive is not negligence per se, although blown in close proximity to a highway; and where the special finding shows that a team of horses was caused to run, and an injury occasioned, by the mere blowing of the locomotive whistle while a train was crossing a bridge above a highway, but fails to show that the whistling was improper or unnecessary, there can be no recovery against the railway company.—Cincinnati, I., St. L. & C. Ry. Co. v. Gaines, 104 Ind. 526, 4 N. E. 34, 5 N. E. 746, 54 Am. Rep. 334.

[b] (Sup. 1888)

A railway company is not liable for injuries caused by horses taking fright at a box car, which was not encroaching on the road, nor is it liable if the car was left by the company at a point off the highway, but was afterwards moved upon it by persons for whom the company was not responsible, unless it is left there an unreasonable time.—Cleveland, C.,

C. & I. Ry. Co. v. Wynant, 114 Ind. 525, 17 N. E. 118, 5 Am. St. Rep. 644.

[c] (Sup. 1889)

Under Rev. St. 1881, §§ 1964, 2170, making it an indictable offense to wrongfully obstruct any highway, or for a person in charge of a freight train to permit it to stand across a highway, without having a space of 60 feet across such street, the railroad company has no right to use and obstruct all the highway except the plank crossing over it, and where it does so and causes a horse to become frightened, it is liable for the injuries resulting.—Pittsburgh, C. & St. L. R. Co. v. Kitley, 118 Ind. 152, 20 N. E. 727.

[d] (Sup. 1890)

Where a woman was thrown and injured by her horse taking fright at a hand car, which, two minutes before, and while she was approaching in full view of the sectionmen, had been left by them standing ten feet from the center of the highway, the evidence of negligence proximately causing the injury is sufficient to sustain a verdict against the company.—Ohio & M. Ry. Co. v. Trowbridge, 126 Ind. 391, 26 N. E. 64.

[e] (Sup. 1893)

It is not negligence for a locomotive engineer, in expectation of orders to immediately move his train, to permit his locomotive to stand near a street crossing, without drawing the fires; and the company is not liable for injuries sustained by the frightening of a horse by steam escaping from the automatic safety valve attached to the engine.—Louisville, N. A. & C. Ry. Co. v. Schmidt, 134 Ind. 16, 33 N. E. 774.

[f] (App. 1898)

If, in approaching a crossing, the engineer should see that a traveler on the highway is in imminent peril, it is his duty to slacken the speed of the train, and come to a stop, before reaching the crossing, if possible; but if the train has reached the point where the law requires the signal to be given, and it is uncertain whether the train can be stopped before reaching the crossing, the signal must be given, though it may frighten a team on the highway, causing damages.—Louisville, N. A. & C. Ry. Co. v. Stanger, 7 Ind. App. 179, 32 N. E. 209, 34 N. E. 688.

[g] (Sup. 1897)

Where a railway company stopped its engine near a crossing, and carried an excessive amount of steam, and a person being about to cross inquired of the engineer if it was safe, and was informed that it was, and the steam gauge allowed the steam to escape when it reached a certain pressure, making a very loud noise, and the steam at the time was at about such pressure, and on the person attempting to cross it escaped, frightening plaintiff's horse, whereby she was injured, the railroad company was liable.—Louisville, N. A. & C. Ry. Co. v. Schmidt, 46 N. E. 344, 147 Ind. 638.

[h] (Sup. 1898)

The mere sounding of a locomotive whistle, even at a place of extraordinary danger, is not negligence per se.—*Rodgers v. Baltimore & O. S. W. Ry. Co.*, 49 N. E. 453, 150 Ind. 397.

[i] (App. 1902)

Where plaintiff drove an apparently gentle unfrightened team upon a railroad crossing in full view of the crew of a train standing some 40 feet distant, and such team was frightened by the noise incident to starting the train in the usual way, the servants of the railway were not negligent.—*Lake Shore & M. S. Ry. Co. v. Butts*, 62 N. E. 647, 28 Ind. App. 280.

[j] (App. 1904)

Where, in an action for wrongful death at a railway crossing, both paragraphs of the complaint charged defendant's failure to give the statutory signals on approaching the crossing, it was not error for the court to charge that if, on the approach of the train to the crossing, the engineer observed a team near the crossing, frightened and becoming unmanageable, it was his duty to refrain from giving signals or doing any act tending to increase the fright of the team; and if, by reasonable exertion, he could avoid the accident by stopping the train, it was his duty to do so, but that, if the train had reached a point where the law required signals to be given, and it was uncertain whether the train could be stopped before reaching the crossing, he must give the signals.—*Nichols v. Baltimore & O. S. W. Ry. Co.*, 33 Ind. App. 229, 70 N. E. 183, 71 N. E. 170.

[k] (App. 1905)

Where a locomotive standing near a crossing whistled in order to warn those employed about the train that it was about to start, and the whistle frightened the horse of one crossing the tracks, there was no negligence on the part of the railroad.—*Lake Erie & W. Ry. Co. v. Fike*, 74 N. E. 636, 35 Ind. App. 554.

[l] (Sup. 1906)

A railroad company is liable for injuries caused by its negligence in placing a hand car calculated to frighten ordinarily gentle horses at the side of a farm crossing.—*Baltimore & O. S. Ry. Co. v. Slaughter*, 167 Ind. 330, 79 N. E. 186, 7 L. R. A. (N. S.) 597, 119 Am. St. Rep. 503.

Where defendant railroad company constructed and maintained a farm crossing and its approaches, and defendant's servants left a hand car just outside the traveled way of the crossing by which plaintiff's team became frightened and ran away while plaintiff was using the crossing, causing the injuries complained of, the fact that the car was not within the traveled way of the crossing as alleged would not preclude a recovery, if the car was negligently left in such position and was calculated to frighten teams of ordinary gentleness using the crossing.—*Id.*

[m] (App. 1908)

The use of steam by railroads being lawful, if an animal takes fright at the necessary escape of steam while it is being used in the ordinary manner, no action will lie, but if the steam is blown off negligently in an unusual or unnecessary manner, the railroad company will be liable.—*Vandalia R. Co. v. McMains*, 42 Ind. App. 532, 85 N. E. 1038.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 968-971.

See, also, 33 Cyc. pp. 936-940; note, 3 L. R. A. (N. S.) 111; note, 133 Am. St. Rep. 862.

§ 306. Signboards, signals, flagmen, and gates at crossings.

Companies affected by regulations, see ante, § 224.

Proximate cause of injury, see post, § 337.

Signals from trains, see post, §§ 311-313.

Sufficiency of evidence, see post, § 348.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 972-980.

See, also, 33 Cyc. pp. 941-949; note, 29 C. C. A. 90; notes, 15 L. R. A. 426, 16 L. R. A. 119, 17 L. R. A. 254; note, 100 Am. Dec. 412; notes, 17 Am. Rep. 363, 37 Am. Rep. 445.

§ 307. — In general.

[a] (App. 1904)

There is no duty on a railroad to maintain a watchman at a crossing in a small village.—*Evansville & T. H. Ry. Co. v. Clements*, 70 N. E. 554, 32 Ind. App. 659.

[b] (App. 1904)

The statutory duties imposed on railroad companies of keeping flagmen at railroad crossings, and of having trains give signals of their approach, are not merely to protect travelers from actual collision with passing trains, but also to afford opportunity to travelers in vehicles drawn by animals to secure them from taking fright at passing trains.—*Pennsylvania Co. v. Fertig*, 70 N. E. 834, 34 Ind. App. 459.

[c] (App. 1905)

The track of a railroad is of itself a warning of danger to a person approaching it.—*Van Winkle v. New York, C. & St. L. Ry. Co.*, 73 N. E. 157, 34 Ind. App. 476.

[d] (App. 1905)

The opening of the gates at a street crossing is an indication of safety and an invitation to cross, and for the injury of a person so crossing the railroad company is liable.—*Smith v. Michigan Cent. Ry. Co.* 35 Ind. App. 188, 73 N. E. 928.

[e] (App. 1907)

It is the duty of a railway company to place a flagman at a crossing in a thickly populated center where there is a large number of persons crossing the track and passage of trains.

—Cleveland, C., C. & St. L. Ry. Co. v. Schneider, 40 Ind. App. 38, 80 N. E. 985.

[f] (Sup. 1910)

The use of a railway crossing by the public and other circumstances may require a railway company to use care proportionate to the known danger, and hence, in a sense, a greater degree of care for the safety of the public than is required at another crossing not so perilous and less frequently used, but the measure of duty is that of ordinary care, and in all such cases the public may be safeguarded by the erection of gates or automatic signals, or by stationing flagmen or taking other precautions, regardless of the speed of passing trains.—Cleveland, C., C. & St. L. Ry. Co. v. Starks, 92 N. E. 54.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 972-977.

See, also, 33 Cyc. p. 941.

§ 309. Care in running trains in general.

[a] (Sup. 1865)

Where the engineer of a train of cars sounds the whistle and rings the bell and runs the train at a reasonable speed in approaching a crossing, he exercises reasonable and ordinary care, which is all the law requires.—Toledo & W. Ry. Co. v. Goddard, 25 Ind. 186.

[b] (App. 1894)

While a traveler on a highway may presume that the employés of a railroad company will obey the law and give the required warning, yet those in charge of the train may assume that the traveler will take every precaution commensurate with the danger which he is about to encounter, and will avoid going upon the track in front of the train.—Cincinnati, I., St. L. & C. Co. v. Grames, 34 N. E. 613, 37 N. E. 421, 8 Ind. App. 112.

[c] (Sup. 1904)

Where one or more railroad tracks cross a public street of a city in a populous neighborhood, greater vigilance and care on the part of the railroad company to avoid injuring persons using the street are required than at ordinary highway crossings in the country, or in sparsely settled and unfrequented places.—Cleveland, C., C. & St. L. Ry. Co. v. Miles, 70 N. E. 985, 162 Ind. 646.

[d] (App. 1909)

A railroad operating trains through a city must so run them and give such warnings as will avoid injury to all persons using the city streets with due care and in a proper manner, and the degree of care must be commensurate with the dangers of the particular situation created by its use of the streets.—Pittsburgh, C., C. & St. L. Ry. Co. v. Lynch, 43 Ind. App. 177, 87 N. E. 40.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 981.

See, also, 33 Cyc. pp. 949-953.

§ 310. Mode of running at crossings.

Questions for jury, see post, § 350.

[a] (Sup. 1885)

It is negligent in a railroad company to run trains so near together at a highway crossing as to make the statutory signals unavailing to warn travelers on the highway.—Chicago & E. I. R. Co. v. Boggs, 101 Ind. 522, 51 Am. Rep. 761.

[b] (Sup. 1890)

Where the presence of a three-year old child on a railroad track at a public street crossing is not attributable to the negligence of its parents, the railroad company is liable for injuries sustained by the child from being run over by a detached car while its employés were making a running switch without taking any precaution to avoid injuries to travelers on the crossing.—Louisville, N. A. & C. Ry. Co. v. Schmidt, 126 Ind. 290, 25 N. E. 149, 26 N. E. 45.

[c] (App. 1903)

The failure of a railroad company to side-track a train at a station in accordance with its previous custom which was known to a traveler, who was struck by the train at a crossing beyond the station, was not negligence.—Rich v. Evansville & T. H. R. Co., 66 N. E. 1028, 31 Ind. App. 10.

[d] (Sup. 1904)

A railroad company which, in a populous city runs a locomotive and car along a track across a street at 30 miles an hour without warning signal, while at the same time a long train of freight cars is running on a parallel track in the opposite direction, obstructing the view and drowning the noise of the locomotive and car for a pedestrian waiting to cross, and who, crossing behind the freight train, is struck by the locomotive, is guilty of negligence.—Cleveland, C., C. & St. L. Ry. Co. v. Miles, 70 N. E. 985, 162 Ind. 646.

[e] (App. 1904)

The right of a railroad company to run its engines over crossings is limited by restrictions imposed by law and reasonable prudence with regard to signals, etc.—Nichols v. Baltimore & O. S. W. R. Co., 33 Ind. App. 229, 70 N. E. 183, 71 N. E. 170.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 982-987.

See, also, 33 Cyc. p. 949; note, 18 L. R. A. 63.

§ 311. Lights, signals, and lookouts from trains or cars.

Instructions, see post, § 351.

Liability for injuries caused by sounding of whistles, see ante, § 222.

Pleading, see post, § 344.

Presumptions and burden of proof, see post, § 346.

Proximate cause of injury, see post, § 337.

Questions for jury, see post, § 350.

Sufficiency of evidence, see post, § 348.

To prevent frightening of animals, see ante, § 305.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 988-1005.

See, also, 33 Cyc. pp. 956-970; notes, 25 L. R. A. 287, 1 L. R. A. (N. S.) 307.

§ 312. — In general.

[a] Independent of statute or ordinance, it is the duty of a railroad company to give reasonable and timely warning of the approach of its train to the crossing of a public highway.—(Sup. 1873) *Indianapolis, C. & L. R. Co. v. Hamilton*, 44 Ind. 76; (1904) *Cleveland, C., C. & St. L. Ry. Co. v. Miles*, 70 N. E. 985, 162 Ind. 646.

[b] (Sup. 1874)

It is the duty of the engineer to give sufficient signals of the approach of a train to a road crossing by ringing the bell and sounding the whistle or otherwise as may be practicable, where the circumstances seem to require it.—*Pennsylvania Co. v. Krick*, 47 Ind. 368.

[c] (Sup. 1882)

The failure of a railroad company to give warning of the approach of a train to a crossing is negligence.—*Indianapolis & V. R. Co. v. McLin*, 82 Ind. 435; *Pittsburg, C. & St. L. Ry. Co. v. Martin*, 82 Ind. 476.

[d] (Sup. 1882)

In an action against a railroad for injuries by collision at a crossing an instruction was not improper that it was the duty of the engineer on approaching a highway to sound the whistle at least 80 rods before reaching the crossing, and, if he failed to do so and the accident occurred therefrom, that would be negligence of the company, and if the jury believed from the preponderance of the evidence that the defendant by its employes failed to so sound the whistle and by reason of such failure the accident occurred without negligence of plaintiff, their finding should be for the plaintiff. It appearing that the signal required by law was not given, the view being obstructed, and plaintiff being hard of hearing had no reason to suppose that the train was within 80 rods of the crossing.—*Pittsburg, C. & St. L. Ry. Co. v. Martin*, 82 Ind. 476.

[e] (Sup. 1891)

Plaintiff on approaching the crossing of defendants' railroad, at the only point from which he could see an approaching train, until close to the crossing, looked and listened, and, not seeing or hearing any train, proceeded with his team walking, continuing to look and listen, until he was close to the crossing, when a train, without giving any of the signals required by law, or other warning, came rapidly, frightening his horses. Plaintiff attempting to hold them was thrown down and injured by the horses and wagon passing over him. *Held*, that

defendant was not exonerated from liability for failing to give signals of the approach of the train by the fact that plaintiff's horses were frightened by the lawful sounding of the whistle as a signal for the crossing of another highway, as well as by the moving train; and because it did not appear that the horses were docile, or that plaintiff could have heard the signals if sounded and would have stopped, and could have controlled his horses at that distance.—*Terre Haute & I. R. Co. v. Brunker*, 128 Ind. 542, 26 N. E. 178.

[f] (App. 1892)

Rev. St. 1881, § 4020, providing that, where a locomotive engine approaches a highway crossing, the whistle shall be sounded and the bell rung continuously until the engine shall have passed the crossing, does not apply to a train of cars without an engine, but those in charge of such a train will not be relieved from the obligation of taking other proper precautions.—*Ohio & M. Ry. Co. v. McDaniel*, 5 Ind. App. 108, 31 N. E. 836.

[g] (App. 1893)

While a passenger train was standing on the further track, plaintiff's intestate, seeing a switch engine without a light standing on the other track, where he had observed it nearly an hour before, stepped upon the track, and, his attention being directed towards the passenger train, was run over and killed by the switch engine, which suddenly started without any signal. *Held*, that a verdict for plaintiff should not be disturbed.—*Ohio & M. Ry. Co. v. Hill*, 7 Ind. App. 255, 34 N. E. 646.

A railroad company is guilty of actionable negligence in suddenly starting and rapidly moving an engine across a street without light and without signal or warning.—*Id.*

[h] (Sup. 1894)

It was negligence for a railway company to occupy a street crossing with a train for 15 minutes, to the exclusion of public travel, and then, after the engineer had left his post, to start the train without warning persons who had been waiting in the rain for a chance to cross, including school children, who had long been permitted to pass through standing trains at that point.—*Cleveland, C., C. & St. L. Ry. Co. v. Keely*, 138 Ind. 600, 37 N. E. 406.

[i] (Sup. 1894)

The fact that decedent might have heard the one blast of the whistle blown by the engine which caused his death, if in fact he did not hear it, does not excuse the lack of two or more blasts and ringing of the bell.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Burton*, 130 Ind. 357, 37 N. E. 150, 38 N. E. 594.

[j] (App. 1897)

It is negligence to back an engine and cars across a street in a town at the rate of eight miles an hour, with no one on the cars, and without sounding the whistle, ringing the bell, or giving other warning.—*Lake Shore & M. S.*

Ry. Co. v. Boyts, 45 N. E. 812, 16 Ind. App. 640.

[k] (App. 1898)

It is negligence to run a train across a public street in a populous city without signals or warning of its approach.—*Aurelius v. Lake Erie & W. R. Co.*, 49 N. E. 857, 19 Ind. App. 584.

[l] (App. 1904)

The action of a railroad in running a train at a speed of 60 miles an hour through a village without ringing a bell, or sounding a whistle, or giving any signal of its approach to a crossing, is negligence.—*Evansville & T. H. R. Co. v. Clements*, 70 N. E. 554, 32 Ind. App. 659.

[m] (App. 1904)

In an action against a railroad company for injuries caused by a collision of defendant's cars with plaintiff's team and wagon at a crossing, it appeared that the crossing was clearly visible for a distance of several hundred feet, and the road along which plaintiff approached the crossing was visible from a distance of from 900, to 1,200 feet. Plaintiff approached the track at a slow walk to a point 200 feet from the crossing, where he stopped, looked, and listened, and then drove ahead, without again looking back, onto the crossing, where his wagon was struck by a train which was being pushed backward; the train and plaintiff moving in the same direction until plaintiff turned to cross the railroad. An ordinance of the city in which the accident occurred limited the speed of trains to five miles an hour, required the bell to be sounded, and that when running backward a watchman should be stationed at the rear end, and all the requirements of this ordinance were violated by the train which struck plaintiff. *Held*, that the railroad company was guilty of negligence, as a matter of law.—*Baltimore & O. S. W. R. Co. v. Reynolds*, 71 N. E. 250, 33 Ind. App. 219.

[n] (App. 1904)

The failure of employes in charge of a train to give signals of its approach to a highway crossing is not excused by showing that an employe, on discovering a traveler's peril, signaled the engineer, and that the train was immediately stopped.—*Cleveland, C., C. & St. L. Ry. Co. v. Carey*, 71 N. E. 244, 33 Ind. App. 275.

A municipal ordinance which prohibits a railroad company from sounding any whistles, but expressly provides that it shall not be prohibited from giving signals necessary for the protection of life and property, in no way affects the duty on the part of the company to give the signals of the approach of trains to a crossing prescribed by Acts 1879, p. 173, c. 77, as amended in 1881 (*Laws 1881*, p. 590, c. 85), and carried into *Burns' Ann. St. 1901*, § 5307.—*Id.*

The failure of the employes of a company operating a train to give signals of its ap-

proach to a highway crossing, thereby inducing a traveler to approach within an unsafe proximity to the crossing when the train passed, causing his horse to become unmanageable, is negligence rendering it liable for the injuries sustained.—*Id.*

Where, because of the location of an engine backing a train in the direction of a crossing, signals by the engineer could not have been heard at the crossing, it was the duty of the employes in charge of the train to give warning in some other way of the train's approach.—*Id.*

The object of requiring railroad companies to give signals of the approach of trains to highway crossings is not merely to prevent collisions with travelers, but to enable them to avoid the danger arising from coming in close proximity to passing trains.—*Id.*

[o] (App. 1904)

In an action against a railroad company for injuries at a crossing, a complaint, alleging that defendant was running a freight train in the city, that at a certain street the train was stopped and divided so as to open the street, that while plaintiff was crossing the tracks along the line of the sidewalk a section of the train was carelessly and negligently, suddenly, and violently pushed backwards without the ringing of the bell or signal of any kind, and without any one at the rear of the train to warn travelers, which resulted in plaintiff's injury, an ordinance of such city forbidding the moving of any train backward without a lookout at the rear and the ringing of the bell stated a cause of action.—*Pittsburgh, C., C. & St. L. Ry. Co. v. McNeil*, 34 Ind. App. 310, 69 N. E. 471.

A city ordinance requiring the engine bell to be ringing when a train is running backwards within the city limits, and a "lookout" to be stationed at the rear end of such train to avoid accidents, is violated by those in charge of a freight train, which is cut in two at a street crossing, pushing a portion of the train backward over the crossing without warning, in order to couple it with the section on the opposite side of the crossing.—*Id.*

[p] (Sup. 1905)

The action of a railroad in kicking a string of detached cars, with much force, and without any notice or warning, over the crossing of a public street, is actionable negligence, with respect to a pedestrian who is struck and run over by the cars.—*Chicago Terminal Transfer R. Co. v. Walton*, 74 N. E. 988, 165 Ind. 642.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG.: R. R. §§ 988-1001, 1003.

See, also, 33 Cyc. pp. 956-970; note, 3 L. R. A. (N. S.) 778.

§ 313. — Violations of statutes or ordinances.

Pleading, see post, § 344.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

[a] The failure of a railroad company to ring the bell and blow the whistle on approaching a crossing, as required by statute, is negligence per se.—(Sup. 1885) *Chicago & E. I. R. Co. v. Boggs*, 101 Ind. 522, 51 Am. Rep. 761; (1885) *Cincinnati, H. & D. R. Co. v. Butler*, 103 Ind. 31, 2 N. E. 138; (1891) *Baltimore & O. & C. R. Co. v. Walborn*, 127 Ind. 142, 26 N. E. 207; (App. 1893) *Cincinnati, I., St. L. & C. Ry. Co. v. Grames*, 8 Ind. App. 112, 34 N. E. 613, 37 N. E. 421; (Sup. 1905) *Greenawaldt v. Lake Shore & M. S. Ry. Co.*, 165 Ind. 219, 74 N. E. 1081; (App. 1905) *New York, C. & St. L. R. Co. v. Robbins*, 76 N. E. 804, 38 Ind. App. 172.

[b] (Sup. 1891)

Where the servants of a railway company approach a crossing without ringing the bell as required by statute, they are guilty of such negligence as renders the company liable for the death of a person crossing the track at a street crossing, if the deceased was without fault or negligence.—*Baltimore, O. & C. Ry. Co. v. Walborn*, 127 Ind. 142, 26 N. E. 207.

[c] (App. 1893)

A violation of a city ordinance requiring trainmen to sound the engine bell on approaching a street crossing, and keep it ringing till the crossing is passed, is negligence per se.—*Louisville, N. A. & C. Ry. Co. v. Davis*, 33 N. E. 451, 7 Ind. App. 222.

[d] (App. 1896)

Rev. St. 1894, § 5308 (Rev. St. 1881, § 4021), makes a railroad company liable in damages to any person who shall be injured in person or property by reason of its omission of the signals required to be given at highway crossings by section 5307, Rev. St. 1894 (Rev. St. 1881, § 4020), and a failure to give such signals is negligence per se.—*Pittsburg, C., C. & St. L. Ry. Co. v. Shaw*, 15 Ind. App. 173, 43 N. E. 957.

[e] (Sup. 1901)

The failure on the part of a railroad company and its servants to obey a city ordinance making it the duty of persons in charge of a moving locomotive to ring a bell attached thereto, and providing that no train shall be run backward without a watchman on the rear thereof, is negligence per se, and the company is liable for injuries resulting therefrom, unless excused by the contributory negligence of the injured party.—*Baltimore & O. S. W. Ry. Co. v. Peterson*, 59 N. E. 1044, 156 Ind. 364.

[f] (App. 1904)

Violation by a railroad company of city ordinance enacted under Burns' Ann. St. 1894, § 3541, subd. 42, authorizing cities to regulate the speed of trains and provide for the safety of citizens from the running of trains, requiring it to have a watchman upon the rear car of a train running backwards, limiting the speed of trains, and requiring the ringing of the bell, is negligence per se.—*Baltimore & O.*

S. W. R. Co. v. Reynolds, 71 N. E. 250, 33 Ind. App. 219.

[g] (App. 1908)

The requirement that railroad companies give signals of the approach of a train to a highway crossing is to notify travelers on the highway of the presence of the locomotive that they may protect themselves at the crossing, and, if the traveler knows of the approach of the locomotive before he attempts to cross and in time to avoid a collision, the failure to sound the signals is immaterial.—*Baltimore & O. S. W. R. Co. v. Abegglen*, 41 Ind. App. 603, 84 N. E. 566.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1002, 1004, 1005.

See, also, 33 Cyc. pp. 967-970; note, 59 O. C. A. 5.

§ 314. Obstruction of view or hearing.

Duty of traveler where view or hearing is obstructed, see post, § 328.

Questions for jury, see post, § 350.

[a] (App. 1904)

It is not negligence with respect to a traveler on a crossing for a railroad to maintain buildings on its right of way reasonably necessary for the prosecution of its business.—*Evansville & T. H. R. Co. v. Clements*, 70 N. E. 554, 32 Ind. App. 659.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 965.

See, also, 33 Cyc. p. 966.

§ 315. Rate of speed.

Instructions, see post, § 351.

Pleading, see post, § 344.

Proximate cause of injury, see post, § 337.

Questions for jury, see post, § 350.

Validity of act regulating speed, see ante, § 223.

Willful injury, see post, § 339.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1006-1012.

See, also, 33 Cyc. pp. 971-977.

§ 316. — In general.

[a] (Sup. 1880)

The rate of speed at which a train is running at a crossing may be considered by the jury as an element in determining the question of negligence.—*Terre Haute & I. R. Co. v. Clark*, 73 Ind. 168.

[b] (Sup. 1883)

The company is not bound to stop its trains nor slacken their speed, on approaching public crossings, and a traveler who attempts to cross must be held to be aware of this rule, and act with reference to it.—*Ohio & M. Ry. Co. v. Walker*, 113 Ind. 196, 15 N. E. 234, 3 Am. St. Rep. 638.

[c] (Sup. 1883)

It is proper to charge that the jury must determine from all the circumstances whether the rate of speed of the train at the crossing was unreasonably high; that a very high rate of speed might be allowable in a thinly-settled part of the country, where but few persons have occasion to cross the track, while the same rate of speed through a city or village, where many persons have occasion to cross the track, might be so dangerous as to constitute negligence.—Chicago, St. L. & P. R. Co. v. Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218.

[d] (Sup. 1906)

The frequent use of a rural highway crossing where no impediment of progress is shown does not of itself make the running of trains thereover at a high rate of speed negligence.—Lake Shore & M. S. Ry. Co. v. Barnes, 166 Ind. 7, 76 N. E. 629, 3 L. R. A. (N. S.) 778.

There being no statute regulating the rate of speed at which a railroad train may pass over a highway crossing in the country, it is not negligence per se for such railroads to run their trains over country crossings at any speed they choose consistent with the safety of the persons and property in their charge.—Id.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1006-1008.
See, also, 33 Cyc. p. 971.

§ 317. — Violations of statutes or ordinances.

Pleading, see post, § 344.

[a] (Sup. 1875)

It is negligence to run a train of cars in a city with twice the rapidity allowed by a city ordinance, and without ringing the bell, sounding the whistle, or giving any signal of approach.—St. Louis & S. E. Ry. Co. v. Mathias, 50 Ind. 65.

[b] (Sup. 1892)

The fact that defendant and others had never been prosecuted for violations of a city ordinance regulating the speed of trains in the city limits, and that practically the same had become obsolete, constituted no defense to an action for injuries received at a crossing, caused by its violation.—Cleveland, C., C. & I. Ry. Co. v. Harrington, 131 Ind. 426, 30 N. E. 37.

[c] (Sup. 1893)

The fact that a city ordinance forbids the running of trains in certain parts of the city in excess of a certain rate of speed does not authorize the railroad company to run its trains in parts of the city not specified in the ordinance "at any rate of speed necessarily required by the business of the company," as it is the duty of such company to run its trains in a city in such manner as to have due regard to the safety of the people who cross its track, according to the circumstances of each case.—Chicago, St. L. & P. R. Co. v. Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218.

[d] (App. 1896)

Evidence that a train was being run through a city at a rate of speed prohibited by ordinance shows negligence.—Shirk v. Wabash R. Co., 14 Ind. App. 126, 42 N. E. 650.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1009-1012.
See, also, 33 Cyc. p. 976.

§ 318. Means of controlling trains.

[a] (Sup. 1875)

It is negligence to run a train of cars when, because of the coldness of the weather, all the employes on the train are upon the engine, and the only means used for checking or stopping the train are such as can be commanded and used by the engineer.—St. Louis & S. E. Ry. Co. v. Mathias, 50 Ind. 65.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 1013.
See, also, 33 Cyc. p. 977.

§ 319. Precautions as to persons seen at or near crossing.

Frightening animals by signals, see ante, § 305.
Instructions, see post, § 351.
Questions for jury, see post, § 350.
Right to rely on precautions, see post, § 330.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1014-1019.
See, also, 33 Cyc. pp. 977-979.

§ 320. — In general.

[a] (Sup. 1893)

A statement by train hands to the driver of a vehicle that the train would not pull out for some time to come is not an assurance against any contingency except the moving of the train; and in an action for personal injuries sustained by being thrown from a wagon while driving over the railroad crossing, owing to the fact that plaintiff's horse was frightened by the sudden escape of steam from the safety valve, the company cannot be held liable on the theory that it was negligence to invite the driver to cross the track, where there is no evidence that the train hands were aware that the steam pressure was at the point of escaping through the safety valve.—Louisville, N. A. & C. Ry. Co. v. Schmidt, 134 Ind. 16, 33 N. E. 774.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1014-1016, 1019.
See, also, 33 Cyc. p. 977.

§ 321. — Children.

[a] (Sup. 1888)

In an action for the killing of plaintiff's son, evidence that the boy, engaged in hauling wheat, was reclining, apparently asleep on the wagon slowly approaching up hill toward the railroad; that he was well acquainted with the crossing where trains were visible from the

road for 1,000 feet; that the engineer, not seeing any driver, gave the danger signals, and, when he apprehended that the wagon would not be halted, used every endeavor to stop the train, in which he succeeded so far that the train ran past the crossing only about 50 yards,—does not show either willful injury or negligence on the part of the railroad.—*Indiana, B. & W. Ry. Co. v. Wheeler*, 115 Ind. 253, 17 N. E. 563.

[b] (Sup. 1900)

A boy 9 years old, not being presumed to be non sui juris, a complaint in an action brought by him to recover for injuries received by being struck by defendant's locomotive at a street crossing, alleging that the engineer saw him on the track in time to stop the engine before reaching him, and that he was injured without his negligence, was insufficient; it not appearing that the boy was not aware of his danger, or that the engineer was not warranted in presuming that he would step from the track in time to avoid injury.—*Cleveland, C. C. & St. L. Ry. Co. v. Klee*, 56 N. E. 234, 154 Ind. 430.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 1017.

See, also, 33 Cyc. p. 979.

§ 323. Contributory negligence of person injured.

Admissibility of evidence, see post, § 347.

Contributory negligence of owner or driver of vehicle imputable to occupant, see NEGLIGENCE, § 93.

Contributory negligence of parent or custodian imputable to child, see NEGLIGENCE, §§ 94-96.

Injury avoidable notwithstanding contributory negligence, see post, § 338.

Instructions, see post, § 351.

Negating in pleading, see post, § 344.

Presumptions and burden of proof, see post, § 346.

Questions for jury, see post, § 350.

Sufficiency of evidence, see post, § 348.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1020-1089.

See, also, 33 Cyc. pp. 981-1041.

§ 324. — Care in going on or near tracks in general.

[a] (Sup. 1886)

Where a person about to cross a railroad has knowledge that the crossing is peculiarly dangerous he must exercise the most rigid prudence and extraordinary caution.—*Indiana, B. & W. Ry. Co. v. Greene*, 6 N. E. 603, 106 Ind. 279, 55 Am. Rep. 736.

[b] (Sup. 1890)

Where a woman was injured by a horse which she was riding taking fright at a hand car left in the road, the fact that she knew of the position of the hand car does not neces-

sarily prove that she was guilty of contributory negligence in trying to pass it.—*Ohio & M. Ry. Co. v. Trowbridge*, 126 Ind. 391, 26 N. E. 64.

[c] (Sup. 1892)

The law requires that a person approaching a railway crossing on a public highway shall use ordinary care to avoid injury.—*Cleveland, C. C. & I. Ry. Co. v. Harrington*, 30 N. E. 37, 131 Ind. 426.

[d] (App. 1893)

Plaintiff left his horse standing unhitched at the sidewalk about 30 feet away from the crossing, where it had frequently been left standing before, while plaintiff went to the door of a store a few feet away. When the horse became frightened by the steam of an approaching train, plaintiff took hold of it, before it moved from the place where it had been left, and held on to it until he was dragged some distance. *Held*, that plaintiff was not guilty of contributory negligence, though a city ordinance made it unlawful to leave a horse standing unhitched on a street.—*Louisville, N. A. & C. R. Co. v. Davis*, 7 Ind. App. 222, 33 N. E. 451.

[e] (App. 1894)

A railroad crossing is a place of danger, and one who does not exercise every sense or faculty to protect himself from possible injury before attempting to cross cannot be said to have exercised due care. Self-preservation is the first and greatest law of nature, and ordinarily it will lead to the employment of all the precautions which the situation naturally suggests to an individual in danger of harm. It implies, not only the doing those things which an ordinarily prudent man would do under like circumstances, but the doing of every practicable and available thing within his power which the law says he should do. And it is no excuse that he did all that an ordinarily prudent man would have done under like circumstances, unless the things done were all the law declares an ordinarily prudent man would have done. It is the law that measures the duty, for a prudent man may do that which the law forbids, or he may omit to do that which the law enjoins, nevertheless the doing of the one or the omission of the other is negligence. The most prudent men are not always exempt from carelessness, and, when actually negligent, the law attaches the same consequences to their conduct as to similar conduct in others.—*Cincinnati, I., St. L. & C. Ry. Co. v. Grames*, 34 N. E. 613, 37 N. E. 421, 8 Ind. App. 112.

[f] (Sup. 1895)

Where one approaches a railroad grade crossing, it is his duty to proceed with caution, and, if he attempts to cross, he must assume that there is danger, and act with ordinary care.—*Smith v. Wabash R. R. Co.*, 40 N. E. 270, 141 Ind. 92.

[g] The care to be exercised by a traveler on a highway approaching a railroad crossing is not diminished by reason of the enactment of Acts 1899, p. 58 (section 359a, Burns' Ann. St. 1901), making contributory negligence an affirmative defense.—(App. 1904) *Pittsburgh, C. & St. L. Ry. Co. v. West*, 34 Ind. App. 95, 69 N. E. 1017; (1905) *Same v. Reed*, 36 Ind. App. 67, 75 N. E. 50.

[h] (App. 1904)

Recovery cannot be had for death of a person killed in collision of his team with a train at a crossing, though signals were not given, where he, when at any point within 40 feet of the track, could have heard or seen the train; *Burns' Rev. St. 1901, § 359a*, making contributory negligence a matter of defense, in no way relieving a traveler of his duty.—*Pittsburgh, C. & St. L. Ry. Co. v. West*, 69 N. E. 1017, 34 Ind. App. 95.

[i] (App. 1905)

The fact that a married woman is riding with her husband, who has entire control of the team while attempting to cross a railroad track, does not relieve her of the duty of exercising care for her own safety in avoiding danger from passing trains.—*New York, C. & St. L. R. Co. v. Robbins*, 76 N. E. 804, 38 Ind. App. 172.

[j] (App. 1907)

A traveler approaching a railroad crossing, upon a public highway, is required to use ordinary care to avoid injuries; such care being that which a reasonable and prudent man would, or should, use under the same or similar circumstances.—*Baltimore & O. S. W. Ry. Co. v. Rosborough*, 40 Ind. App. 14, 80 N. E. 869.

[k] (App. 1908)

A traveler approaching a railroad crossing must exercise the same vigilance to protect himself that the operatives in charge of an approaching train must exercise to avoid injuring him, and a failure to exercise such vigilance on the part of either is negligence in the party thus failing to do his duty.—*Lake Shore & M. S. Ry. Co. v. Brown*, 41 Ind. App. 435, 84 N. E. 25.

[l] (App. 1908)

One crossing a street on which trains and street cars are operated is bound to know that the crossing is a place of danger, and to avoid being guilty of contributory negligence he is required to exercise such care as an ordinarily cautious person would use under similar circumstances to avoid injury.—*Lowden v. Pennsylvania Co.*, 41 Ind. App. 614, 82 N. E. 941.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1020-1025, 1028.

See, also, 33 Cyc. pp. 981-992; notes, 3 L. R. A. (N. S.) 196, 4 L. R. A. (N. S.) 521.

§ 325. — Care required of children and others under disability.

Questions for jury, see post, § 350.

Sufficiency of evidence, see post, § 348.

[a] (Sup. 1891)

A child seven years old is not guilty of negligence precluding a recovery by her father for her death in crossing the track where it appeared that the train, which was being run backward and which ran over the child, was obscured from view by reason of another train on the track nearest to her, and the train nearest backed off the street, giving an opportunity to cross.—*Louisville, N. A. & C. Ry. Co. v. Rush*, 26 N. E. 1010, 127 Ind. 545.

[b] (Sup. 1891)

Mental absorption or reverie induced by grief or business will not excuse the omission of the duty to look and listen before crossing a railroad track.—*Mann v. Belt Railroad & Stockyard Co.*, 26 N. E. 819, 128 Ind. 138.

[c] (Sup. 1894)

Where a boy 11 years old has been standing in the rain 15 minutes while a train was switched back and forth across a street, finally coming to a stop with an opening of coupling directly opposite where he stood, it is not negligence for him to pass between the coupled cars, he having seen the engineer leave his engine, and being directed to pass through such opening by the flagman in charge of the crossing.—*Cleveland, C., C. & St. L. Ry. Co. v. Keely*, 138 Ind. 600, 37 N. E. 406.

[d] (App. 1895)

A child 12 years of age and of average intelligence for that age must be presumed to have known that it was dangerous to cross a railroad track in front of a moving train, and that care must be used to avoid being struck.—*Shirk v. Wabash R. Co.*, 42 N. E. 656, 14 Ind. App. 126.

In an action for injuries in a crossing accident, though the jury found that plaintiff was but 12 years of age and a child of immature years, she was not entitled to recover where it appeared that she stepped on the track immediately in front of a moving train which she could have seen if she had looked or heard if she had listened.—*Id.*

In an action against a railroad company for injuries to a 12 year old child at a public crossing, it appears that the train was being run at a negligent rate of speed, but that the bell was rung and whistle blown as it approached the crossing; that plaintiff, when within five feet of the track, could have seen the train approaching. *Held*, that the plaintiff was guilty of contributory negligence.—*Id.*

[e] (Sup. 1904)

A complaint for the wrongful death of an infant by a locomotive at a street crossing, which alleges that decedent was waiting to cross the railroad tracks as soon as a freight train moving in the opposite direction from the loco-

motive, and obscuring the view and drowning the noise thereof, should move off of the crossing, and that as soon as this happened decedent started to cross the track, without notice or warning of the approach of the locomotive, and without fault or carelessness on his part, when he was injured, etc., does not exhibit contributory negligence rendering it demurrable.—*Cleveland, C. & St. L. Ry. Co. v. Miles*, 70 N. E. 985, 162 Ind. 646.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1029-1036.

See, also, 33 Cyc. pp. 992-996.

§ 326. — Use of defective or obstructed crossings.

[a] (App. 1897)

One who is driving over a railroad crossing is not required to use extraordinary care to avoid injury from defects in the crossing, but he is required to be careful in proportion to the danger of which he has knowledge.—*Seybold v. Terre Haute & I. R. Co.*, 46 N. E. 1054, 18 Ind. App. 367.

A special verdict in an action for personal injuries, based on *Horner's Rev. St. 1897, § 2903* (*Rev. St. 1894, § 5153*), requiring a railroad company constructing its tracks over a highway to restore it to its former condition, and not impair its usefulness or safety, found that the company had raised the highway 7 feet, and left it with a width of from 12 to 15 feet, with unguarded sloping sides and a sloping surface, and a ridge in the center; that, at the time of the injury, it was covered with snow and ice; that, when injured by the sliding of the rear wheels of his wagon down one side of the embankment, plaintiff was on top of a load of wood, and was trying to stop the slipping by using the brake; that his horses were gentle; but that the wagon tires were old and rounded off at the edges, and plaintiff knew the condition of the road. *Held* to show that plaintiff was not guilty of contributory negligence.—*Id.*

[b] (Sup. 1900)

A complaint for injuries alleged that the defendant negligently permitted its train to obstruct a street over which plaintiff desired to pass to reach a point where "pressing business" demanded his attention; that the obstruction was of such an extent that he could not pass it without great inconvenience, and, in order to pass over defendant's tracks, he got upon a flat car and in the darkness of the night leaped to the ground, and was injured. *Held*, that the complaint was demurrable on the ground that it showed contributory negligence on plaintiff's part, though defendant's employes in charge of the train violated *Burns' Rev. St. 1894, § 2291*, (*Rev. St. 1881, § 2170*; *Horner's Rev. St. 1897, § 2170*), requiring the opening of trains standing at crossings.—*McCullum v. Cleveland, C. & St. L. Ry. Co.*, 55 N. E. 1024, 154 Ind. 97.

[c] (Sup. 1908)

Since, by virtue of *Burns' Rev. St. 1901, § 5153*, a railway is imperatively enjoined on in-

tersecting an established highway to restore the highway to its former state, or in a sufficient manner not to necessarily impair its usefulness, a railway, and not a traveler on the highway, assumes the risk to travel resulting from the former's failure to observe such statutory duty, and the traveler is answerable only for his conduct in dealing with the defective conditions as he finds them.—*Chicago, I. & L. Ry. Co. v. Leachman*, 69 N. E. 253, 161 Ind. 512.

One driving across a railway, the approaches to which were defectively constructed, was not negligent as a matter of law in attempting to cross, though he knew it to be unsafe for one to ride in the wagon loaded as his was, and knew that the only way in which he could safely go over the crossing was to leave the wagon and walk on the ground, where he had encountered such crossing frequently before, and by the observance of certain precautions had always safely avoided danger by riding and driving in his wagon, and, on the occasion in question, lightened his load by causing his family to get out, set the brakes, and locked the wheels of his wagon, and stood up the better to manage and guide his team down the embankment.—*Id.*

A railroad company being bound by *Burns' Ann. St. 1901, § 5153, cl. 5*, to restore a highway, after constructing a crossing over the same, to its former state or in a sufficient manner not unnecessarily to impair the usefulness of the highway and to afford security for life and property, assumed risk was no defense to an action for personal injuries alleged to have been caused by the railroad's negligence in the construction and maintenance of certain approaches to a highway crossing.—*Id.*

[d] (App. 1904)

In an action against a railroad for death the complaint alleged that deceased was crossing the tracks of defendant, and had reached one of the two parallel tracks, when a passenger train stopped on the further track, barring the further progress of the deceased, and compelling him to stop on the nearest track; that the engine of the passenger train made a loud noise, and that another train on the track on which deceased stood, bearing no light and giving no signals, ran over him. *Held*, that it did not appear that deceased was chargeable with negligence.—*Chicago & E. R. Co. v. La Porte*, 71 N. E. 166, 33 Ind. App. 691.

[e] (Sup. 1907)

Where a traveler voluntarily and with a full appreciation of the danger uses a defective crossing, he assumes the risk of injury.—*Pittsburgh, C. & St. L. Ry. Co. v. Simons*, 168 Ind. 333, 79 N. E. 911.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1037-1042.

See, also, 33 Cyc. pp. 996-999.

§ 327. — Duty to stop, look, and listen. Children and others under disability, see ante, § 325.

Evidence, see post, § 346.

Instructions, see post, § 351.

Questions for jury, see post, § 350.

Sufficiency of evidence, see post, § 348.

[a] (Sup. 1870)

It is the duty of any one before attempting to pass over a railway crossing to use the senses of sight and hearing, where available, to guard himself from injury, and where the use of either of these faculties would have given sufficient warning to enable him to avoid danger, injury is conclusive proof of contributory negligence.—*Bellefontaine Ry. Co. v. Hunter*, 33 Ind. 335, 5 Am. Rep. 201.

[b] (Super. 1871)

A traveler upon the highway who fails to look out for approaching railroad trains is guilty of negligence, and cannot recover for injuries received by a collision with a passing train.—*Stout v. Indianapolis & St. L. R. Co.*, Wils. 80.

[c] A traveler on a public highway which crosses the railroad track, upon approaching such crossing, is bound to exercise care and caution, by looking and listening for approaching trains, so as to avoid the danger of a collision.—(Sup. 1875) *Toledo, W. & W. Ry. Co. v. Shuckman*, 50 Ind. 42; (1893) *Indianapolis, D. & W. Ry. Co. v. Wilson*, 33 N. E. 793, 134 Ind. 95; (App. 1893) *Grand Rapids & I. R. Co. v. Cox*, 35 N. E. 183, 8 Ind. App. 29.

[d] (Sup. 1875)

In an action against a railroad company for an injury causing the death of a person while passing over the track of the defendant at a highway crossing, it was held that it was error to instruct the jury that it was the duty of the deceased "to make such use of his eyes and ears and all his faculties as would enable him to avoid danger, provided the managers of the railroad train were doing their duty; if he did that he was free from blame."—*Toledo, W. & W. Ry. Co. v. Shuckman*, 50 Ind. 42.

It is the duty of a person about to cross a railroad track to use his faculties to his utmost ability in proportion to the danger impending, whether the managers of the railroad train are doing their duty or otherwise.—*Id.*

[e] (Sup. 1880)

A man driving a team need not stop still before crossing a railroad track.—*Terre Haute & I. R. Co. v. Clark*, 73 Ind. 168.

[f] (Sup. 1886)

A person about to cross a railroad track, to be free from negligence, must take such precaution as could reasonably be expected of an ordinarily prudent person under like circumstances, but there may be circumstances which excuse the taking of the usually necessary precaution of looking and listening. No one is guilty of negligence who is deceived by appearances likely to deceive an ordinarily prudent man.—*Chicago & E. I. R. Co. v. Hedges*, 105 Ind. 398, 7 N. E. 801.

[g] (Sup. 1888)

Where deceased drove on the track rapidly, and could have seen and heard the approaching train in time if he had looked and listened, he will be deemed negligent.—*Cones v. Cincinnati, I., St. L. & C. Ry. Co.*, 114 Ind. 328, 16 N. E. 638.

[h] (Sup. 1889)

Where, in an action against a railroad company for the death of a person on the track, the jury found that the intestate could have seen the approaching train in time to have avoided the injury if he had looked, and that there was nothing to prevent his seeing the train when it was two hundred feet distant from the crossing, if he had given attention and looked in that direction when he was nine feet away from the main track, the fact that he stepped on the track immediately in front of a moving train raised the presumption that he either did not look, or that he deliberately took the risk of attempting to cross notwithstanding the approach of the train, and in either case a recovery could not be had.—*Chicago & E. I. Ry. Co. v. Hedges*, 20 N. E. 530, 118 Ind. 5.

[i] (Sup. 1890)

When a person crossing a railroad track is injured by a passing train, he must show affirmatively, by a preponderance of the evidence, that he looked and listened before attempting to cross the track, and that he was not guilty of contributory negligence, though the train was behind time, and running faster than usual.—*Cincinnati, I., St. L. & C. Ry. Co. v. Howard*, 124 Ind. 280, 24 N. E. 892, 19 Am. St. Rep. 96, 8 L. R. A. 593.

[j] (Sup. 1890)

Where one approaching a railroad crossing neglects to avail himself of every opportunity to look and listen, and carelessly ventures upon the track and is injured, such conduct is of itself sufficient to defeat a recovery.—*Louisville, N. A. & C. Ry. Co. v. Stommel*, 126 Ind. 35, 25 N. E. 863.

[k] (Sup. 1891)

In an action against a railroad company for the death of a person in a crossing accident, it appeared that for a quarter of a mile from a crossing defendant's cars were visible, but the view of the track at the time of the accident was obstructed by a freight train on the siding. Deceased was familiar with the locality, and knew it to be dangerous, and was approaching in a wagon with her husband, who managed the horses. About 70 rods from the crossing the whistle sounded and the bell rang, and when within 200 feet the engineer saw the wagon and whistled, and at about 150 feet from the crossing the husband seemed to check his horses, inducing a belief on the engineer's part that he was going to stop; but the husband urged his horses forward, and the train ran into and killed both husband and wife. The wife was not prevented or restrained from looking or listening, and nothing was done by her to warn her

husband, nor did she look or listen. *Held*, that it could not be assumed that there was no contributory negligence on her part or that there was any fact excusing her failure to exercise such care as the law requires.—*Miller v. Louisville, N. A. & C. Ry. Co.*, 128 Ind. 97, 27 N. E. 339, 25 Am. St. Rep. 416.

[i] (Sup. 1891)

The presence of a railroad track, on which a train may at any time pass is notice of danger, and it is the duty of a person about to cross the road on a public highway to exercise caution in so doing, and to look both ways for approaching trains, if the surroundings are such as to admit of such a precaution.—*Mann v. Belt Railroad & Stockyard Co.*, 26 N. E. 819, 128 Ind. 138.

In an action against a railroad company for personal injuries, it appeared that plaintiff was driving on a highway toward its crossing with defendant's road, and that he was familiar with the locality; that when 250 feet from the railroad he looked along the same to the east, for a distance of a quarter of a mile, and, seeing no train, started to cross on a trot, and was injured by a train from the east; and that, if he had looked towards the east when 100 feet from the track, he would have had an unobstructed view for nearly half a mile. *Held*, that plaintiff was guilty of contributory negligence.—*Id.*

[m] (Sup. 1892)

One approaching a railroad crossing is not free from contributory negligence if he looks from a given point, and then without further observation passes upon the track.—*Thornton v. Cleveland, C., C. & St. L. Ry. Co.*, 31 N. E. 185, 131 Ind. 492.

Plaintiff started to cross a railroad at a highway crossing from a point 155 feet distant, at about the time he well knew an east-bound train should be passing. He looked westward before starting. A west-bound train was standing on the east side of the crossing, and plaintiff, thinking, from the movements of those in charge of it, that the east-bound train had passed, and that it was about to start, looked towards it, and after carefully listening, and failing to hear the whistle and bell which the east-bound train was bound and used to sound before reaching the crossing, stepped onto the tracks, and was struck by it, and injured. *Held*, that he was guilty of contributory negligence in not looking both ways on crossing.—*Id.*

[n] (Sup. 1895)

The belief that all passenger trains stopped at a depot before reaching a railroad crossing will not excuse neglect to look and listen for a train before driving on the crossing.—*Smith v. Wabash R. Co.*, 141 Ind. 92, 40 N. E. 270.

Failure to look and listen before driving on a crossing is not excused by the fact that a train had recently passed in the same direction, where plaintiff had time after the passing of

such train to cross the track and drive a block and return and recross the track, and was injured while attempting to cross for the third time.—*Id.*

In attempting to cross a railroad track, a traveler must listen for signals, and notice signs put up as warnings.—*Id.*

[o] (Sup. 1895)

One who drives his horse in a trot against a passenger train at a crossing with which he is familiar, and where he could have seen the approaching train at any time after he was within 75 yards of the crossing, cannot recover for the damages caused by the collision.—*Engler v. Ohio & M. Ry. Co.*, 142 Ind. 618, 42 N. E. 217.

[oo] (App. 1895)

The law does not require a traveler upon a highway in all instances to stop and look and listen for an approaching train; nor does the law fix any particular point or distance from the crossing at which he must stop.—*Lake Shore & Michigan Southern Ry. Co. v. Anthony*, 38 N. E. 831, 12 Ind. App. 126.

[p] (App. 1895)

One who, although having a clear view for 20 feet before reaching the crossing of a railroad track for 300 feet in the direction of an approaching train, goes on the crossing without stopping to look and listen for a train, is guilty of such contributory negligence as will prevent a recovery for personal injuries sustained by being struck by a train, though there may have been some negligence on the part of those in charge of it.—*Louisville, N. A. & C. Ry. Co. v. Stephens*, 13 Ind. App. 145, 40 N. E. 148.

[pp] (Sup. 1896)

Where plaintiff, who approached a railway crossing along a highway which ran parallel with the railway track, and from which the approaching train was visible at the distance of 800 feet from any point on the highway within 200 feet of the crossing, failed to look for the train at any time before attempting to cross the track, as a matter of law he cannot recover for injuries received in a collision, though the defendant railway company failed to give the signal of its approach required by statute.—*Miller v. Terre Haute & I. R. Co.*, 144 Ind. 323, 43 N. E. 257.

[q] (App. 1896)

Where there was no obstruction to the view, the fact that the train by which deceased was killed followed an engine within the interval of one minute, giving the statutory signals, does not excuse deceased for failing to look and listen, where she crossed the track immediately after the passage of the engine, without looking for any trains following in the direction from which the engine approached; and she was guilty of contributory negligence as a matter of law.—*Baltimore & O. R. Co. v. Talmage*, 15 Ind. App. 203, 43 N. E. 1019.

[qq] (App. 1897)

Plaintiff was riding in the daytime in a cutter, with the owner and driver of the team. When 20 or 30 feet west of a railroad crossing, near a station, with which plaintiff was familiar, they could have seen a car 60 or 80 feet south of the crossing. Though plaintiff knew a train was at the station, he did not, after getting within 30 feet of the track, look for approaching cars. The horses were driven on the track on a trot, and were struck by a car going north, eight miles an hour. It did not appear that at any time plaintiff listened for approaching cars. *Held*, that it was not shown that plaintiff was free from negligence.—*Lake Shore & M. S. Ry. Co. v. Boyts*, 16 Ind. App. 640, 45 N. E. 812.

Where a guest has the same opportunity as the driver, it is his duty when approaching a railroad crossing to look and listen to avoid danger if practicable, and he has the burden of establishing affirmatively freedom from contributory negligence.—*Id.*

[r] (App. 1898)

A person approaching a railroad crossing, known by him to be dangerous, must exercise care in proportion to the danger to be avoided, must use his senses, listen for signals or the noise of approaching trains, observe signs put up as warnings, and look for trains where there is a view of the track; if he is injured at a crossing the fault is *prima facie* his own, and he must show affirmatively that his own negligence did not contribute to the injury; and in approaching the crossing he must assume that there is danger and act with ordinary care and prudence on that assumption.—*Hancock v. Lake Erie & W. R. Co.*, 51 N. E. 369, 21 Ind. App. 10.

[rr] (App. 1899)

Plaintiff was on the front seat of the second carriage from the hearse, at the head of the funeral procession, on the side next to an approaching railroad train. She watched for a train whenever it would have been possible to see one approaching, and "paid attention" where it would have been impossible to see one, and none could be seen. The funeral director, walking ahead to the track to look for a train, was told by the flagman, who beckoned for the procession to move on, that the train would stop for water. The hearse and first carriage crossed the track, the flagman continuing to signal the procession to proceed. When the driver of plaintiff's carriage first discovered the approaching train, about 20 feet away, the horse was on the track. Being unable to turn back, he struck the frightened horse with the whip, causing it to shy, and jerk the carriage just beyond the engine, and throw plaintiff over the side of the carriage, causing an injury. *Held*, that the evidence justified the jury in finding plaintiff free from contributory negligence.—*Peirce v. Jones*, 53 N. E. 431, 22 Ind. App. 163.

[s] (App. 1901)

The mere existence of a railroad track is sufficient warning of the danger to render a person driving thereon in front of a train without looking or listening guilty of contributory negligence.—*Cleveland, C. & St. L. Ry. Co. v. Penketh*, 60 N. E. 1095, 27 Ind. App. 210.

[ss] (Sup. 1902)

A traveler attempting to cross the track in front of an approaching train is negligent, as a matter of law, in failing to look and listen, unless there is a flagman who has signaled the traveler to cross the tracks; but the question whether he is required to stop is usually a mixed question of law and fact.—*Malott v. Hawkins*, 63 N. E. 308, 159 Ind. 127.

A traveler on a highway, about to cross a railroad track, is bound to use ordinary care to select an effective place to look and listen for approaching trains; but it is not ordinarily possible, as a matter of law, to fix the precise number of feet from the crossing where he must look and listen.—*Id.*

[t] (App. 1902)

The road along which plaintiff was traveling crossed defendant's track at an acute angle, and at the time the train was 1,000 feet and plaintiff 50 feet from the crossing. Plaintiff was driving at the rate of three miles an hour, and at that point there was nothing to prevent her from seeing the approaching train had she looked. When the locomotive was 660 feet away, it commenced sounding the alarm whistle, and continued to do so until it reached the crossing. There was nothing to prevent the noise of the train being heard. Plaintiff had good eyesight and hearing, and was familiar with the crossing. She testified that she watched both ways, and listened for the train, but did not hear it until she got to the track, when her horse became frightened, and she did not remember what she did until struck. *Held*, that plaintiff's failure to look and observe the train at a point where she could have seen it in time to have avoided the danger was negligence per se precluding recovery.—*Chicago, I. & L. Ry. Co. v. Reed*, 63 N. E. 878, 29 Ind. App. 94.

[tt] (Sup. 1903)

Burns' Rev. St. 1901, § 359a, providing that in personal injury cases the defense of contributory negligence must be proved by the defendant, does not relieve one injured at a railway crossing from the effect of contributory negligence in failing to look and listen.—*Wabash R. Co. v. Keister*, 67 N. E. 521, 163 Ind. 609.

[u] (App. 1903)

Where plaintiff's intestate attempted to cross a railroad crossing with which he was familiar at a time when two trains were due, the railroad's failure to side-track one of the trains at a station before reaching the crossing, according to its custom, of which intestate had knowledge, and the failure of the operatives of

such train to ring the bell or blow the whistle before reaching the crossing, by reason of which intestate was struck and killed, did not exempt him from the exercise of ordinary care of looking and listening before attempting to cross the track.—*Rich v. Evansville & T. H. R. Co.*, 66 N. E. 1028, 31 Ind. App. 10.

[uu] (Sup. 1904)

A pedestrian who stood on or near a railroad track at a crossing at which there were two or more tracks, and, while awaiting the passing of a train on one of the other tracks, was struck by another train moving toward the crossing on the track upon or near which he was standing, and which, while in plain view, he failed to observe, although he had ample time to do so, because of watching the movements of the other train, and of the fact that the air was full of dust, was guilty of such contributory negligence as to preclude a recovery for his injuries.—*Quinn v. Chicago & E. R. Co.*, 70 N. E. 526, 162 Ind. 442.

Railroad crossings are places of extraordinary danger, in passing over which all persons competent to exercise care for their protection and safety are required by law to use their faculties of sight and hearing, when such use is possible, and to act upon the presumption that engines or trains may be expected to pass at any moment.—*Id.*

[v] (App. 1904)

In an action against a railroad company for injuries caused by a collision of defendant's cars with plaintiff's team and wagon at a crossing, where plaintiff approached the track at a slow walk to a point 200 feet from the crossing, and stopped and listened, and then drove ahead, without again looking back, onto the crossing, where his wagon was struck by the train, the evidence considered, and *held* to show that plaintiff was guilty of contributory negligence.—*Baltimore & O. S. W. R. Co. v. Reynolds*, 71 N. E. 250, 33 Ind. App. 219.

[vv] (App. 1904)

Whether a traveler approaching a railroad crossing must stop, in addition to looking and listening, before he attempts to cross, depends on the facts of each particular case.—*Nichols v. Baltimore & O. S. W. R. Co.*, 33 Ind. App. 229, 70 N. E. 183, 71 N. E. 170.

[w] (Sup. 1905)

The rule requiring a traveler to stop, look, and listen when approaching a railroad crossing is not arbitrary as to the distance at which such precaution should be taken, but the traveler must use a place reasonably calculated to afford full opportunity for seeing and hearing.—*Greenawaldt v. Lake Shore & M. S. Ry. Co.*, 165 Ind. 219, 74 N. E. 1081.

[ww] (App. 1905)

Burns' Ann. St. 1901, § 359a, making contributory negligence a matter of defense does not change the rule that one about to cross a

railroad track must look and listen.—*Southern Ry. Co. v. Davis*, 72 N. E. 1053, 34 Ind. App. 377.

[x] A traveler, on approaching a railroad highway crossing, must exercise ordinary care before crossing, and should stop, look in both directions, and listen, if ordinary care requires it.—(App. 1906) *New York, C. & St. L. R. Co. v. Robbins*, 38 Ind. App. 172, 76 N. E. 804; (1909) *Grand Trunk Western Ry. Co. v. Reynolds*, 90 N. E. 94.

[xx] (App. 1907)

Failure of a person crossing a railroad track to look for an approaching train, while within from 10 to 13 feet of the crossing, does not, ipso facto, constitute contributory negligence.—*Baltimore & O. S. W. Ry. Co. v. Rosborough*, 40 Ind. App. 14, 80 N. E. 869.

[y] (App. 1908)

It is the duty of one approaching a railway crossing to be on the alert, look both ways, and use his sense of hearing, and, if necessary, to stop, look both ways, and listen to ascertain for himself whether or not a train is approaching, and whether he can safely cross the tracks. If his view is obstructed so that he cannot see in a certain direction, it is his duty to use all the more carefully his sense of hearing, and to look out and listen for any and all warnings that would notify him of the approaching train, to determine whether he can safely cross.—*Cleveland, C. & St. L. Ry. Co. v. Wuest*, 41 Ind. App. 210, 83 N. E. 620; *Id.*, 41 Ind. App. 711, 84 N. E. 1123.

[yy] (App. 1908)

A pedestrian at a railroad crossing was struck by a train. He was in full possession of all his faculties, and familiar with the crossing, and knew he was approaching it when 50 feet away. When 10 feet away the engine that struck him was 150 feet away, and had he then looked carefully he could have seen it, and avoided the accident. *Held*, that he was guilty of contributory negligence as a matter of law.—*Lake Shore & M. S. Ry. Co. v. Brown*, 41 Ind. App. 435, 84 N. E. 25.

[z] (App. 1909)

A person approaching a railroad crossing must act with reasonable care and prudence to avoid injury; but the law does not prescribe when or where he must look and listen before crossing the track.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Lynch*, 43 Ind. App. 177, 87 N. E. 40.

[zz] (App. 1909)

The duty of a traveler attempting to cross a railroad track to look and listen is one which in the exercise of ordinary care cannot be evaded, and, while there is no absolute duty on his part to stop, he must exercise ordinary care commensurate with the known danger. Judgment (1908) 85 N. E. 369, modified on applica-

tion for rehearing.—*Cleveland, C., C. & St. L. Ry. Co. v. Houghland*, 88 N. E. 623.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1043-1058.

See, also, 33 Cyc. pp. 1000-1018; note, 3 L. R. A. (N. S.) 391; note, 90 Am. Dec. 780; note, 51 Am. Rep. 360.

§ 328. — Duty where view or hearing obstructed.

Children and others under disability, see ante, § 325.

Instructions, see post, § 351.

Questions for jury, see post, § 350.

Sufficiency of evidence, see post, § 348.

[a] (Sup. 1880)

One who approached the railroad crossing in a covered wagon with no opening except in front, without stopping to look or listen, and drove his team in a trot for more than 40 yards from the crossing, was guilty of contributory negligence.—*Terre Haute & I. R. Co. v. Clark*, 73 Ind. 168.

[b] (Sup. 1881)

Where the driver of a vehicle stopped, looked, and listened, and continued to look and listen as he approached a railroad crossing where a collision occurred, and it appeared that the track at the crossing was obscured by being laid in a deep cut, the driver was not guilty of negligence as a matter of law in failing to leave his team when he approached the crossing, and go upon the track to see that there was no danger before undertaking to drive his team across.—*Pittsburg, C. & St. L. Ry. Co. v. Wright*, 80 Ind. 236.

[c] (Sup. 1882)

Where, in an action against a railroad company for injuries by collision at a highway crossing, it appeared that plaintiff could not hear the train because there was no signal and could not see the track because of obstructions and did not know there was a train within five miles in any direction, an instruction was properly refused that, though defendant did not sound the whistle for 80 rods continuously before crossing a highway, the plaintiff was not entitled to recover if he could have seen the cars before he entered on the track, and, if he could not see the train until near the track, there was a greater necessity for him to stop, if necessary, and look in the direction in which the train was coming before driving on the track.—*Pittsburg, C. & St. L. Ry. Co. v. Martin*, 82 Ind. 476.

In a personal injury suit against a railroad company for injuries received at a crossing, where it appeared that defendant failed to give warning of the approach of the train to a crossing, it was proper to refuse to charge that if plaintiff's view of the train was obstructed it was his duty to look and satisfy himself that no train was coming, and that if he failed to do so, but by doing so could have seen the train, he could not recover.—*Id.*

[d] (Sup. 1885)

Where a crossing is particularly dangerous, and requires extraordinary effort to ascertain whether it is safe to attempt to cross, one familiar with the locality and the danger surrounding it must use care proportioned to the probable danger.—*Cincinnati, H. & I. R. Co. v. Butler*, 103 Ind. 31, 2 N. E. 138.

[e] (Sup. 1887)

Plaintiff could have seen an approaching train at any time, except in a space of about seven rods, a short distance from the track, and the track was elevated so that a team could be stopped at any moment before crossing. The evidence as to giving the signals was conflicting. *Held*, that plaintiff was negligent.—*Indiana, B. & W. Ry. Co. v. Hammock*, 113 Ind. 1, 14 N. E. 737.

[f] (Sup. 1890)

It is proper to instruct the jury that if there were any obstructions to sight or hearing in the direction of the approaching train, as the plaintiff neared the crossing, the obstructions required increased care on his part on approaching the crossing. The care must be in proportion to the increase of the danger that may come from the use of the highway at such a place.—*Cincinnati, I., St. L. & C. Ry. Co. v. Howard*, 124 Ind. 280, 24 N. E. 892, 19 Am. St. Rep. 96, 8 L. R. A. 503.

[g] (Sup. 1890)

If a railroad crossing is particularly dangerous, and requires extraordinary effort to ascertain whether it is safe to attempt to pass over it, one familiar with the locality and danger must use care proportioned to the probable danger.—*Louisville, N. A. & C. Ry. Co. v. Stommel*, 126 Ind. 35, 25 N. E. 863.

[h] (Sup. 1894)

A finding that plaintiff's view and hearing of an approaching train were cut off 375 feet before reaching the tracks; that he proceeded slowly until his horses passed to the end of a box car, when he checked them, looked north 100 feet, which was as far as he could see, without seeing or hearing the approaching train, and then started forward, and, when he had passed the west side of the car, looked north, and saw the train approaching at 45 or 50 miles an hour, and instantly endeavored to stop his horses, then 10 feet from defendant's main track,—does not show contributory negligence.—*Pittsburgh C., C. & St. L. Ry. Co. v. Burton*, 139 Ind. 357, 37 N. E. 150, 38 N. E. 594.

[i] (App. 1894)

A special verdict found that plaintiff with a companion in a team, on approaching a railroad having two tracks, 8 feet apart, the further one of which was concealed from view, except at the crossing, by the houses which came within a few feet of the track, and by box cars standing on the rear track, through which was a passageway of only 16 feet, stopped the team 50 feet from the track

for a minute, and looked and listened for a train; that they then approached the track at a walk, all the time looking and listening, one for trains coming in one direction and the other in the opposite direction; that they heard and saw nothing to indicate the presence of an engine till the horse was struck by a train moving 30 miles an hour. *Held*, that plaintiff was not guilty of contributory negligence.—*Cincinnati, I., St. L. & C. Ry. Co. v. Grames*, 8 Ind. App. 112, 34 N. E. 613, 37 N. E. 421.

It is incumbent upon a traveler on a highway riding in a wagon and about to cross a railroad track who cannot see or hear an approaching train on account of obstructions which are known to him to use greater precaution to protect himself from injury than where the view is unobstructed, and the opportunity for using the senses of sight and hearing is unimpaired. The greater the danger, the greater the precaution required of him. He must not only do what an ordinarily prudent man would do under like circumstances, but he must exercise such care and diligence as are commensurate with the danger which confronts him.—*Id.*

[J] (Sup. 1896)

One who, knowing that trains frequently passed each other at a crossing, goes on the track while it is obscured by the smoke of a train which has just passed, and is struck by a train running in the opposite direction, which he was unable to see, because of the smoke, is guilty of negligence.—*Oleson v. Lake Shore & M. R. Co.*, 143 Ind. 405, 42 N. E. 736, 32 L. R. A. 149.

[K] (App. 1898)

One who, on a clear still day, when approaching a dangerous railroad crossing, with which he is familiar, and from which trains cannot be seen until the track is reached, drives a spirited team of horses on a slow trot up to the track without stopping to listen, is guilty of contributory negligence.—*Towers v. Lake Erie & W. R. Co.*, 48 N. E. 1046, 18 Ind. App. 684.

[L] (App. 1898)

Plaintiff was riding in the daytime in a covered buggy with the owner and driver of the team. When 25 feet from the crossing, the cars could have been seen approaching for 700 feet, but at a greater distance the view was obstructed. At points 270 feet and 65 feet south of the track plaintiff and the driver looked and listened for a train, and then proceeded across the track, where they were struck by a train not giving any warning of its approach, except a whistle one-half mile away for the station. A number of persons in full view of plaintiff were gesticulating to warn her of her danger, but she did not see them. *Held*, that she was guilty of contributory negligence.—*Aurelius v. Lake Erie & W. R. Co.*, 49 N. E. 857, 19 Ind. App. 584.

[M] (App. 1898)

Where the view of a traveler on approaching a crossing is in any manner obstructed, he

is negligent in going on the track without stopping, looking, and listening for the train.—*Hancock v. Lake Erie & W. R. Co.*, 51 N. E. 369, 21 Ind. App. 10.

[N] (Sup. 1900)

A traveler who attempts to drive over a dangerous railroad crossing without looking for approaching trains before placing himself in a situation of danger from which he can neither safely advance nor retreat, is guilty of contributory negligence as a matter of law, though he cannot see such trains, by reason of obstructions, without going in advance of his team to look; and he is not excused from taking such precautions by the failure of persons in charge of a train to give the signals required by statute.—*Chicago & E. R. Co. v. Thomas*, 58 N. E. 1040, 155 Ind. 634.

[O] (App. 1901)

Plaintiff, while riding a bicycle, approached defendant's tracks at a speed of four miles an hour, and attempted to cross the same about two feet from the end of a car which was projected upon the street. When in front of the car it was pushed against her by another car bumping into it. The car which set it in motion approached noiselessly, and there was no guard at the crossing. Plaintiff saw the engine which pushed such car a block away, before crossing, but cars stationed on other tracks obstructed her view of the moving car. *Held*, that, though plaintiff did not stop and alight, she was not guilty of contributory negligence.—*Cleveland, C., C. & St. L. Ry. Co. v. Penketh*, 60 N. E. 1095, 27 Ind. App. 210.

[P] (App. 1902)

A traveler on a highway who attempted to cross three parallel railroad tracks, on the first of which were cars which obstructed a view of the others, without stopping to look and listen after passing these cars, relying solely on the absence of warning bells, which were usually rung, and who was struck by a train on the third track which could have been seen and heard if he had looked and listened, will be deemed guilty of contributory negligence, as a matter of law.—*Cleveland, C., C. & St. L. Ry. Co. v. Heine*, 62 N. E. 455, 28 Ind. App. 163.

[Q] (App. 1904)

A pedestrian approaching a railroad crossing is not excused from looking and listening for an approaching train because of buildings placed by the railroad on its right of way obstructing the pedestrian's view.—*Evansville & T. H. R. Co. v. Clements*, 70 N. E. 554, 32 Ind. App. 659.

A railroad track on the level with the highway is in itself a warning of danger, and if a traveler's view is obstructed, he is admonished of that danger, and must exercise caution commensurate therewith.—*Id.*

[R] (App. 1904)

A complaint in an action against a railroad company for injuries received by a traveler at

a crossing which alleged that, by reason of obstructions, persons approaching the crossing could not see more than 10 feet along the tracks; that plaintiff and her husband drove towards the crossing in a walk, looking and listening for trains; that within 10 or 15 feet of the tracks they stopped the horse, and looked and listened for trains; that, on failing to see or hear any, they drove on, looking and listening, and when on the crossing, defendant, without giving any signals, pushed a freight train on them, causing the injuries complained of—showed that plaintiff and her husband approached the crossing with due caution.—*Cleveland, C., C. & St. L. Ry. Co. v. Carey*, 71 N. E. 244, 33 Ind. App. 275.

[s] (App. 1904)

The quantum of care required of a traveler in crossing a railroad track with which he is familiar is prescribed as matter of law, and, if there be any physical infirmities or obstructions of any kind, greater precautions must be used than usual in ordinary cases.—*Pittsburgh, C., C. & St. L. Ry. Co. v. West*, 34 Ind. App. 95, 69 N. E. 1017.

[t] (Sup. 1909)

That plaintiff knew there was a railroad crossing to be encountered on the highway she was traveling did not indicate that she was negligent in traveling the highway on a dark, rainy night, with the side curtains on the buggy, under the rule that the use of the highway and the crossing by plaintiff and the railroad company was reciprocal.—*Chicago & E. R. Co. v. Fretz*, 90 N. E. 76.

The look and listen rule did not apply to a person approaching a railroad crossing on a dark, rainy night in a closed carriage, while traveling along an unfamiliar highway, of the presence of which crossing she did not know and was not warned.—*Id.*

[u] (App. 1909)

A traveler approaching a railroad crossing must take into account the presence of known obstructions which cut off the view, and he must exercise ordinary care under the circumstances.—*Cleveland, C., C. & St. L. Ry. Co. v. Moore*, 90 N. E. 93.

In an action for injuries to a team and wagon at a crossing, the driver testified that his view was obstructed until he was on the first track. There was no evidence that he used the slightest care to ascertain if a train was approaching before driving on the first track. He testified that he listened and heard nothing; but the physical facts contradicted his statement. After he reached the first track, he looked and saw a train coming, 300 feet distant. The train that caused the injury was on a track 40 feet distant, and on the horse seeing the engine it became frightened and ran against it and was killed. *Held* to show, as a matter of law, the driver's contributory negligence.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1057-1070.

See, also, 33 Cyc. pp. 1018-1026.

§ 329. — Knowledge of danger.

[a] (Sup. 1898)

A traveler on a public highway is bound to know that there may be peril in attempting to cross a railway track, as such track is itself an admonition of danger, on which he must act with at least ordinary prudence.—*Cleveland, C., C. & St. L. Ry. Co. v. Miller*, 49 N. E. 445, 149 Ind. 490.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 1026.

See, also, 33 Cyc. p. 1007.

§ 330. — Reliance on precautions on part of railroad company.

Instructions, see post, § 351.

Questions for jury, see post, § 350.

[a] (Sup. 1889)

Negligence of a railway company in failing to sound the whistle and ring the bell before crossing a street is not of itself sufficient to authorize a recovery, as it must further appear that the plaintiff in getting on the track was not guilty of negligence which contributed to his injury.—*Ohio & M. Ry. Co. v. Hill*, 18 N. E. 461, 117 Ind. 56.

[b] (Sup. 1889)

If a railway company maintain for years a gate and flagman at a busy street crossing, in accordance with a city ordinance, the absence of the flagman, and his permitting the gate to remain open, constitute an affirmative assurance to one having knowledge of such practice that the crossing is safe at the time, and therefore the latter cannot be said, as a matter of law, to be guilty of contributory negligence in attempting to cross without taking the precautions usually required to discover approaching trains.—*Pennsylvania Co. v. Stegemeier*, 118 Ind. 305, 20 N. E. 843, 10 Am. St. Rep. 136.

[c] (Sup. 1890)

In an action for injuries received at a railroad crossing, it is reversible error to instruct the jury that if the view is obstructed, and no signals of an approaching train are given, it is not contributory negligence to assume that no train is advancing within the distance at which such signals are required by law to be given, and that, if such signals were not given, that was a circumstance tending to show want of contributory negligence.—*Cincinnati, I., St. L. & C. Ry. Co. v. Howard*, 124 Ind. 280, 24 N. E. 802, 19 Am. St. Rep. 96, 8 L. R. A. 593.

[d] (Sup. 1891)

A person who is familiar with a railway crossing cannot recover for injuries caused by being struck by an engine, where it appears that before entering the crossing she did not look for approaching trains, which could have been seen, for a distance of 100 feet when she was within 25 feet of the track, and for a distance of 300 feet when within 10 feet

of the track; and the fact that she looked at the watchman stationed at the crossing, who gave her no notice of the approaching train, does not excuse her from the exercise of care on her part.—*Cadwallader v. Louisville, N. A. & C. Ry. Co.*, 128 Ind. 518, 27 N. E. 161.

[e] (**App.** 1892)

Where a railroad company constructs its road upon a highway, and erects embankments along the side, obstructing the view and impairing the usefulness of the highway, contrary to Rev. St. 1881, § 3903, cl. 5, and an engineer, approaching at an unusual hour, fails to give the statutory signals in time to enable a person driving along the road to take his horses to a safe distance, and the horses become frightened and run away, the driver's failure to stop and listen, although he knew the horses were afraid of the cars, is not negligence as matter of law.—*Hoggatt v. Evansville & T. H. R. Co.*, 3 Ind. App. 437, 29 N. E. 941.

[f] (**App.** 1893)

Plaintiff was not required to forego travel on a railroad crossing on a highway merely because the railroad company had rendered it highly dangerous, but he had the right to presume that the company's servants would apprise him of an approaching train by giving the statutory signals.—*Evansville & Terre Haute R. Co. v. Marohn*, 34 N. E. 27, 6 Ind. App. 646.

[g] One approaching a railroad track, who without excuse fails to look or listen for trains, when, by looking, he could have seen a train coming, cannot recover for injuries from a collision with the train, though those in charge of the train failed to give any signals of its approach.—(**App.** 1893) *Grand Rapids & I. R. Co. v. Cox*, 35 N. E. 183, 8 Ind. App. 29; (1901) *Cleveland, C., C. & St. L. Ry. Co. v. Penketh*, 60 N. E. 1095, 27 Ind. App. 210; (1902) *Chicago, I. & L. Ry. Co. v. Reed*, 63 N. E. 878, 29 Ind. App. 94; (1904) *Evansville & T. H. R. Co. v. Clements*, 70 N. E. 534, 32 Ind. App. 659; (1905) *New York, C. & St. L. R. Co. v. Robbins*, 76 N. E. 804, 38 Ind. App. 172.

[h] (**App.** 1893)

A man approaching a railroad crossing is required to look and listen, for the reason that it is the part of a prudent man to do so, because a due regard for his own safety requires it. If, however, the facts and circumstances under which he approaches it are such as to mislead him, and such as would naturally create in his mind a sense of security and belief that there is no danger to such an extent that a man of prudence would ordinarily act upon it, then the reason for the precautions fails. This exception to the general rule does not mean that the traveler is relieved from the exercise of due care, but it simply means that the quantum of care required from the traveler may be lessened by the acts and conduct of the railroad company, which create and justify

in his mind the belief that he can safely dispense with a portion of that diligence ordinarily required.—*Grand Rapids & I. R. Co. v. Cox*, 35 N. E. 183, 8 Ind. App. 29.

[i] (**App.** 1894)

A person going along a highway who drives upon a railroad track at a place known to him to be peculiarly dangerous because of the obstructions which impair and hinder the free use of his senses of sight and hearing, simply relying upon the servants of the railroad company performing their duty in blowing the whistle and ringing the bell, does not show himself in the eyes of the law to have been diligent and prudent.—*Cincinnati, I., St. L. & C. Ry. Co. v. Grames*, 34 N. E. 613, 37 N. E. 421, 8 Ind. App. 112.

[j] (**Sup.** 1895)

One approaching a railroad crossing has no right to rely for his protection solely on the custom of the company to have a flagman at the crossing.—*Smith v. Wabash R. Co.*, 141 Ind. 92, 40 N. E. 270.

[k] (**App.** 1895)

The fact that a railroad train when it approached a street crossing was violating a city ordinance which was one of the causes which brought about an injury to a pedestrian did not relieve the pedestrian from the duty of exercising due care.—*Shirk v. Wabash R. Co.*, 42 N. E. 656, 14 Ind. App. 126.

[l] (**App.** 1896)

Where a gate at a railroad crossing was left open while a train was passing, and no flagman was seen, and no signal of danger displayed, a traveler had a right to presume that it was safe to cross.—*Indianapolis Union Ry. Co. v. Neubacher*, 16 Ind. App. 21, 43 N. E. 576, 44 N. E. 669.

[m] A traveler on a highway, who vigilantly uses his senses, before attempting to cross railroad tracks, to avoid danger, but who is unable to see or hear approaching trains, may assume that an approaching train will give the usual, and especially the statutory, signals.—(**Sup.** 1897) *Baltimore & O. S. W. Ry. Co. v. Conoyer*, 48 N. E. 352, 49 N. E. 452, 149 Ind. 524; (1902) *Malott v. Hawkins*, 63 N. E. 308, 159 Ind. 127.

[n] (**App.** 1902)

Where signal bells were maintained at a street crossing for the purpose of warning travelers, the failure to give the signals raised the presumption of safety, and such failure was merely a circumstance which could properly be taken into consideration in determining the question of whether the traveler exercised the degree of care required, and, though there was a failure to give the signals, he was still required to look for an approaching locomotive, if by looking he could have seen it, and he was required to listen, if by listening he could have heard it, and his failure to do so was negli-

gence.—*Cleveland, C., C. & L. Ry. Co. v. Heine*, 62 N. E. 455, 28 Ind. App. 163.

Where a railroad company, without any legal duty resting on it to do so, established and maintained bells at a highway crossing to warn travelers of approaching trains, and decedent knew of the bells, he had a right to presume that the way was clear when the bells were not rung; but such presumption is to be considered only as a circumstance in determining whether he exercised the degree of care required.—*Id.*

[o] (App. 1904)

The failure of a railroad company to ring the bell or blow the whistle does not relieve a person approaching a crossing of the duty to exercise ordinary care, but such failure may be considered by the jury as bearing on the question of such person's negligence.—*Cleveland, C., C. & St. L. Ry. Co. v. Carey*, 71 N. E. 244, 33 Ind. App. 275.

[p] (App. 1904)

Though failure of a railroad train to sound the whistle or ring its bell for a railroad crossing is negligence per se, it does not excuse a traveler from using ordinary care in crossing the track.—*Pittsburgh, C., C. & St. L. Ry. Co. v. West*, 34 Ind. App. 95, 69 N. E. 1017.

[q] (App. 1904)

Where a city ordinance makes it unlawful for persons managing a train of cars to cause it to be run backwards in or through the city without providing a watchman on the rear end thereof, one traveling on a street in the city has a right, in the absence of some warning or evidence to the contrary, to assume that the railroad will obey the ordinance and cause the bell to be rung to give warning of the movement of the train.—*Pittsburgh, C., C. & St. L. Ry. Co. v. McNeil*, 69 N. E. 471, 34 Ind. App. 310.

[r] (App. 1905)

The failure of the servants of a railroad company to give the required signals on approaching a street crossing, and to provide a watchman, did not relieve a person struck while attempting to cross from the necessity of exercising ordinary care for his own safety.—*Van Winkle v. New York, C. & St. L. R. Co.*, 73 N. E. 157, 34 Ind. App. 476.

[s] (App. 1906)

Failure to sound a whistle should be taken into consideration, with all other facts, by the jury in determining the question of contributory negligence in the case of a collision at a highway crossing.—*New York, C. & St. L. R. Co. v. Robbins*, 38 Ind. App. 172, 76 N. E. 804.

[t] (App. 1907)

The failure of a railroad company to obey city ordinances may be considered not only with reference to the negligence of the company, but it also has a bearing upon the con-

tributory negligence of a person who was injured while crossing the railroad track.—*Baltimore & O. S. W. Ry. Co. v. Rosborough*, 40 Ind. App. 14, 80 N. E. 869.

A person crossing a railroad track has the right to presume that the railroad company will not run its cars in violation of an ordinance, and that its watchman, who was on duty, would warn him if danger was impending.—*Id.*

[u] (App. 1907)

The failure of a railroad company's signal to give warning of a train approaching a public crossing raises the presumption of safety to a person who is about to cross the track and may be considered in connection with the question of contributory negligence.—*Cleveland, C., C. & St. L. Ry. Co. v. Schneider*, 40 Ind. App. 38, 80 N. E. 985.

[v] (Sup. 1909)

A pedestrian has the right, within reasonable limits, to assume that a railroad company will obey the law; and, while this does not relieve him from the exercise of due care, it may be a feature in determining whether due care was exercised.—*Cleveland, C., C. & St. L. Ry. Co. v. Lynn*, 171 Ind. 589, 85 N. E. 999, 86 N. E. 1017.

[w] (Sup. 1909)

If plaintiff was familiar with the custom of defendant railroad company to close its gates at a street crossing when a train was approaching, and found the gates open when he approached the crossing, and was not warned of danger, he could assume that no train was approaching, and that it was safe to cross the track; the open gates being an assurance that there was no danger, upon which he could rely.—*Evansville & T. H. R. Co. v. Berndt*, 172 Ind. 607, 88 N. E. 612.

[x] (App. 1909)

While a traveler approaching a crossing with no knowledge of an approaching train may rely to some extent on the statutory signals to warn him of the train's approach, he may not do so where he has actual knowledge of such approach. Judgment (1908) 85 N. E. 369, modified on application for rehearing.—*Cleveland, C., C. & St. L. Ry. Co. v. Houghland*, 88 N. E. 623.

[y] (App. 1909)

A person crossing a railroad track at grade may presume that the railroad company will run its trains according to law and with proper regard to the safety of persons crossing the track.—*Southern Indiana Ry. Co. v. Drennen*, 88 N. E. 724.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1071-1074.

See, also, 33 Cyc. pp. 1027-1033.

§331. — Effect of directions of railroad employes.

Opinion evidence as to rate of speed, see EVIDENCE, § 474.

[a] (Sup. 1887)

Where the plaintiff knows that a train is on its way to its destination, and has stopped temporarily at a crossing, but is likely to move at any instant, the attempt to pass between the cars of the train is contributory negligence, which the direction of one of defendant's brakemen to do so, will not excuse.—*Lake Shore & M. S. Ry. Co. v. Pinchin*, 112 Ind. 592, 13 N. E. 677.

[b] (App. 1906)

Where a flagman at a railroad crossing beckoned to one driving to proceed across the tracks, he had a right to rely on the assurance that he would incur no danger from approaching trains.—*Lake Erie & W. R. Co. v. Fike*, 74 N. E. 636, 35 Ind. App. 534.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1075-1078.

See, also, 33 Cyc. pp. 1034-1036.

§332. — Crossing near standing trains or cars.

Penalties for violation of regulations, see ante, § 254.

[a] (Sup. 1903)

Plaintiff's decedent was going to defendant's station to board a train, which was approaching on the main track, and was killed in passing over a side track at a regular crossing place. Detached freight cars were standing on the siding, and the death was caused by an engine suddenly backing against them, without warning. *Held* the mere failure of decedent to look towards the engine before crossing the track was not negligence as matter of law.—*Stoy v. Louisville, E. & St. L. Consol. R. Co.*, 66 N. E. 615, 160 Ind. 144.

[b] (App. 1906)

Where one driving started across railroad tracks in front of an engine attached to a train, he assumed the risk of his horse becoming frightened at noises made in the ordinary handling of a train.—*Lake Erie & W. R. Co. v. Fike*, 74 N. E. 636, 35 Ind. App. 554.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 1079.

See, also, 33 Cyc. p. 1036.

§333. — Crossing near approaching trains or cars.

At places other than crossing, see post, § 381. Questions for jury, see post, § 350.

[a] (Sup. 1870)

Where a person about to cross a railroad track on a public highway is apprised of an approaching train by the noise, and ventures upon the track from a miscalculation of his

danger, the error is his, and the company is not answerable for his erroneous calculation.—*Bellefontaine R. Co. v. Hunter*, 33 Ind. 335, 5 Am. Rep. 201.

[b] (Sup. 1888)

The company is not bound to stop its trains nor slacken their speed on approaching public crossings, and a traveler who attempts to cross must be *held* to be aware of this rule, and act with reference to it.—*Ohio & M. Ry. Co. v. Walker*, 113 Ind. 196, 15 N. E. 234, 3 Am. St. Rep. 638.

[c] (Sup. 1892)

When a traveler approaches a railroad with the intention of crossing it, he is bound to know that to attempt to cross near and in front of a moving train involves more or less of danger. If he is so heedless of his personal safety that he braves the danger, or so careless that he does not use the senses nature has given him to look and listen that he may learn if there is danger, only one inference, that of negligence, can be drawn from his conduct.—*Shoner v. Pennsylvania Co.*, 28 N. E. 616, 29 N. E. 775, 130 Ind. 170.

[d] (Sup. 1892)

A person who voluntarily and unnecessarily attempts to cross a railroad track at a crossing in front of an approaching train is guilty of contributory negligence, and, having been struck and killed by the train, there can be no recovery against the railroad company for his death, though its agents were culpably negligent in the management of the train.—*Korraday v. Lake Shore & M. S. Ry. Co.*, 131 Ind. 261, 29 N. E. 1069.

It does not excuse one who attempts to cross in front of a locomotive which he sees approaching at no great distance that the speed was 18 miles an hour at a place where a municipal ordinance limited it to 10 miles.—*Id.*

[e] (App. 1894)

When a person riding in a covered wagon along a road which crosses a railroad track at an angle looks and listens, and, while he is looking ahead, and is very near the crossing, a train, out of time, comes up to the crossing from behind the wagon at the rate of 50 miles an hour, without any signal, he is not blamable for driving across the track in front of the train, instead of stopping or turning out in some other direction, even though he ought, by the exercise of ordinary care, to have seen the train when he was within 90 feet of the crossing. *Pittsburgh, C., C. & St. L. Ry. Co. v. Burton*, 139 Ind. Sup. 357, 37 N. E. 150, 38 N. E. 594, followed.—*Chicago, St. L. & P. R. Co. v. Butler*, 10 Ind. App. 244, 38 N. E. 1.

[f] (Sup. 1897)

Where plaintiff, while crossing a number of railway tracks, on seeing a train approaching on one of the tracks in front of her, turned, and, on starting back, saw a train approaching on another track, and, thinking that she could

pass over in front of it before it would reach her, deliberately attempted to cross the track, and was struck and injured, such injury was the result of her own negligence.—*Sutherland v. Cleveland, C., C. & St. L. Ry. Co.*, 47 N. E. 624, 148 Ind. 308.

[g] (App. 1899)

In an action to recover for injuries sustained at a railway crossing, where the jury find, in answer to interrogatories, that complainant had notice of the approach of the train in time to have turned his team around and avoided the accident, and failed to do so, such facts constitute contributory negligence.—*Baltimore & O. S. W. Ry. Co. v. Musgrave*, 55 N. E. 496, 24 Ind. App. 295.

[h] (App. 1900)

One injured by being struck by a locomotive at a crossing cannot recover therefor where it appears that, after he saw the approaching train in time to stop in a place of safety, he voluntarily went on the track in front of the engine, though the train was being run at a rate of speed prohibited by ordinance.—*Lake Erie & W. R. Co. v. Pence*, 55 N. E. 1036, 24 Ind. App. 12.

[i] (Sup. 1904)

Special findings in an action for the death of plaintiff's intestate at a railway crossing accident showed that decedent, as he approached the track, at and after a point 45 feet distant therefrom, had a clear view in the direction from which the train was approaching for 1,100 feet. He was traveling at the rate of 3 or 4 miles an hour, and the train, which was at that time 450 feet distant, was approaching at the rate of 30 miles an hour. There was a signboard at the crossing, marked "Railroad Crossing," which could be read at a distance of 60 to 75 feet. The statutory signal was not given by the train, but there was no evidence that decedent could have heard such signal, had it been given. Decedent first discovered the train when 18 feet distant from the track, and was struck and killed while urging his horses in an endeavor to cross in front of it. Held that, even though it be considered that the decedent exercised ordinary care after discovering the train in endeavoring to cross in front thereof, yet he was guilty of contributory negligence in placing himself in the perilous position, and plaintiff could not recover.—*Wabash R. Co. v. Keister*, 67 N. E. 521, 163 Ind. 609.

Where a traveler negligently attempted to cross a railway track when a train was approaching and was injured as a result of his negligence, the fact that, after placing himself in a position of danger, he exercised the utmost care to escape injury, would not entitle him to recover.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1080-1083.

See, also, 33 Cyc. p. 1038.

§ 334. — Acts in emergencies.

[a] (Sup. 1832)

When a railroad company by its own negligence misleads a traveler on the highway and puts him in peril of his life, and the traveler from the excitement of such peril and in his honest efforts to escape makes a mistake and is injured, such an error of judgment is not contributory negligence.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Martin*, 82 Ind. 476.

[b] (App. 1893)

Where plaintiff saw an approaching train, apparently about 50 or 60 feet away, when his horse's feet were almost on the track, and he was about 10 feet from it, being in such imminent danger, his attempt to cross ahead of the train, rather than to back, was not negligence per se.—*Grand Rapids & I. R. Co. v. Cox*, 8 Ind. App. 29, 35 N. E. 183.

[c] (Sup. 1894)

When one driving a buggy and an ordinarily gentle team approaches a crossing after his view of the line has been obstructed for more than a block, and, having looked and listened, passes a box car standing out into the highway on a side track, and sees a train coming at the rate of 45 or 50 miles an hour, he is not blamable for the failure of his attempt to stop and turn out his team, then within 10 feet of the track, and frightened; nor for having got them into a place where they became unmanageable from fright; nor for attempting to turn them away from, rather than towards, the train.—*Pittsburg, C., C. & St. L. Ry. Co. v. Burton*, 139 Ind. Sup. 357, 37 N. E. 150, 38 N. E. 594.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 1027.

See, also, 33 Cyc. p. 1038.

§ 335. — Effect in general.

Willful or wanton injury, see post, § 339.

[a] The fact that a railroad company is guilty of negligence in running a train, approaching a crossing, does not excuse a traveler on the highway from using due and ordinary care to avoid a collision.—(Sup. 1875) *Toledo, W. & W. Ry. Co. v. Shuckman*, 50 Ind. 42; (App. 1895) *Louisville, N. A. & C. Ry. Co. v. Stephens*, 13 Ind. App. 145, 40 N. E. 148; (1896) *Baltimore & O. R. Co. v. Talmage*, 15 Ind. App. 203, 43 N. E. 1019.

[b] The duty of a traveler, approaching a railroad track, to exercise care, to use his eyes and ears, and to prevent injury to himself, in order to avoid the imputation of negligence, is not excused by the failure of those in charge of an approaching train to give the proper or statutory signals.—(Sup. 1875) *St. Louis & S. E. Ry. Co. v. Mathias*, 50 Ind. 65; (1890) *Louisville, N. A. & C. Ry. Co. v. Stommel*, 126 Ind. 35, 25 N. E. 863; (1896) *Miller v. Terre Haute & I. R. Co.*, 144 Ind. 323, 43 N. E. 257.

[c] (Sup. 1875)

It is the duty of a person, about to cross a railroad track, to look in each direction for an approaching train; and a failure to so look, if injury results, will not be excused because the train of the railroad company may have been running faster than allowed by a city ordinance.—*St. Louis & S. E. Ry. Co. v. Mathias*, 50 Ind. 65.

[d] (Sup. 1885)

The fact that an approaching train failed to give the statutory signal will not excuse one who sustains injury at a crossing if he neglect the diligent use of all available means to prevent such injury.—*Cincinnati, H. & I. R. Co. v. Butler*, 103 Ind. 31, 2 N. E. 138.

[e] (Sup. 1892)

A municipal ordinance, limiting the rate of speed of trains, does not relieve a person at a street crossing from exercising ordinary care.—*Korraday v. Lake Shore & M. S. Ry. Co.*, 131 Ind. 261, 29 N. E. 1069.

[f] (Sup. 1900)

A complaint alleging that defendant, knowing that it had run its engine against plaintiff while on its track, and was dragging him, negligently failed to stop the same before plaintiff was injured without his fault, which it could have done, states a good cause of action, though it does not deny plaintiff's negligence in being on the track, since such negligence was the remote condition, and not the proximate cause of the injury.—*Cleveland, C., C. & St. Ry. Co. v. Klee*, 56 N. E. 234, 154 Ind. 430.

[g] (App. 1908)

A traveler on a highway approaching a railroad crossing must use his senses of sight and hearing to protect himself from danger, and, if the situation is such that he could see or hear an approaching train in time to avoid collision, it will be presumed, if he is killed by collision with the train, either that he did not look or listen for its approach, or that he failed to heed what he saw or heard, and his administrator is therefore not entitled to recover, not because the negligence of the railroad company was not a proximate cause of the death, but because the traveler's negligence was a concurring proximate cause contributing thereto.—*Wamsley v. Cleveland, C., C. & St. L. Ry. Co.*, 41 Ind. App. 147, 82 N. E. 490, 83 N. E. 640.

[h] (App. 1908)

It is the duty of one going upon a railroad track at a crossing to use care and caution in proportion to the known danger, and such as a person of ordinary prudence similarly situated would be presumed to use under similar circumstances, and, if he fails to do so, and the failure contributes in the slightest degree to his injury, he cannot recover, no matter how careless or negligent the railway company may have been.—*Cleveland, C., C. & St. L. Ry. Co. v.*

Wuest, 41 Ind. App. 210, 83 N. E. 620; *Id.*, 41 Ind. App. 711, 84 N. E. 1123.

[i] (App. 1908)

That a railway company negligently failed to signal for a highway crossing, by reason of which decedent drove his team within about two feet of the track before he discovered the train approaching at the rate of about 45 miles an hour, that decedent could not turn the team to the right or left, and that he lost his presence of mind, and, while attempting to cross, was struck by the train, shows that his death was caused by his own negligence; it not appearing that he would not have been saved had he stopped his team when he discovered the train, or that he could not have backed the team, or that the company's negligence caused him to lose his presence of mind.—*Baltimore & O. S. W. R. Co. v. Abegglen*, 41 Ind. App. 603, 84 N. E. 566.

[j] (App. 1908)

Decedent continued to approach a railroad crossing at which he was killed, after having heard the whistle of a train, knowing that he could not see the train owing to a dense fog prevailing, and thereafter took no precautions to stop his vehicle and carefully listen for the train before permitting his son to drive on the track. *Held*, that decedent was negligent as a matter of law, and that his negligence proximately contributed to the accident.—*Cleveland, C., C. & St. Ry. Co. v. Houghland*, 85 N. E. 369.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1028, 1084, 1086-1088.

See, also, 33 Cyc. p. 1038.

§ 337. Proximate cause of injury.

Contributory negligence as proximate cause, see ante, § 335.

Instructions, see post, § 351.

Pleading, see post, § 344.

Sufficiency of evidence, see post, § 348.

[a] (Sup. 1880)

Where an ordinance requires a railway company to keep a watchman at a street crossing, the omission so to do is not negligent, unless it is the proximate cause of an injury.—*Pennsylvania Co. v. Hensil*, 70 Ind. 569, 36 Am. Rep. 188.

[b] (App. 1892)

The failure to give a signal required by law on approaching a crossing will not make the company liable for injuries sustained by any one at the crossing, unless it is shown that such failure was the cause of the injury.—*Leavitt v. Terre Haute & I. R. Co.*, 5 Ind. App. 513, 31 N. E. 860, 32 N. E. 866.

[c] (Sup. 1893)

In an action against a railroad company for personal injuries caused by horses taking fright at a box car standing on the highway

at a crossing, where it appears the horses were frightened both by the car on the crossing and by a noise at the car, for which neither plaintiff nor defendant is responsible, defendant is liable.—*Cleveland, C., C. & I. Ry. Co. v. Wynant*, 134 Ind. 681, 34 N. E. 569.

[d] (Sup. 1896)

Where, in constructing a crossing, the railroad company so encroached on the highway as to reduce its width from 60 to 13 feet, and allowed a ditch, washout, and broken culvert to remain in the highway, and the person driving decedent was, by reason thereof, unable to turn his horse so as to avoid a train, a charge that "negligence may be the proximate cause of an injury, of which it is not the sole or immediate cause. If the defendant negligently encroached upon and maintained obstructions in the highway at the crossing, which, concurring with the movement of a passing train, produced the collision resulting in the death of decedent, then such negligence would be the 'proximate cause' of such collision, within the meaning of that term, as used in these instructions,"—is proper.—*Lake Shore & M. S. Ry. Co. v. McIntosh*, 140 Ind. 261, 38 N. E. 476.

[e] (Sup. 1896)

The negligence of a railway company in blocking a street crossing with its train for an unreasonable length of time is not the proximate cause of injuries received by a pedestrian from a fall caused by a defect in the street while making a detour to pass around the train.—*Enochs v. Pittsburgh, C., C. & St. L. Ry. Co.*, 44 N. E. 658, 145 Ind. 635.

[f] (Sup. 1897)

Though the failure of a railroad company to give the statutory signals at crossings is negligence, still, to entitle an injured person to recover, he must show that such negligence was the proximate cause of his injuries, and that he was free from contributory negligence.—*Baltimore & O. S. W. Ry. Co. v. Conoyer*, 48 N. E. 352, 49 N. E. 452, 149 Ind. 524.

[g] (App. 1899)

While the fact that a railroad company was running its train through a city, at the time an accident occurred, at a speed beyond the limit fixed by ordinance, constitutes negligence, the complainant, in order to recover, must show that such negligence was the proximate cause of the accident.—*Lake Erie & W. R. Co. v. Mikesell*, 55 N. E. 488, 23 Ind. App. 395.

[h] (App. 1899)

Failure of a railroad company to ring the bell and sound the whistle on approaching a crossing, as required by statute, did not render them liable to a person injured at the crossing if such negligence did not cause the injury.—*Cleveland, C., C. & St. L. Ry. Co. v. Baker*, 54 N. E. 814, 24 Ind. App. 152.

[i] (App. 1899)

While a railway company is negligent in failing to give the statutory signals on approaching a crossing, and in running its train through a city at a speed beyond the limit fixed by ordinance, such negligence will not render the company liable for injuries, where the special findings show that such negligence was not the proximate cause of the injury, but plaintiff's team was frightened by the headlight of the engine, plaintiff knowing of the approach of the train.—*Baltimore & O. S. W. Ry. Co. v. Musgrave*, 55 N. E. 496, 24 Ind. App. 295.

[j] (App. 1900)

Where a locomotive negligently run through a town at a high and dangerous rate of speed strikes a person at a crossing, and hurls his body a distance from the track, where it strikes and injures the plaintiff, the latter cannot recover from the company, as his injury was not the proximate result of the negligent running of its locomotive.—*Evansville & T. H. R. Co. v. Welch*, 58 N. E. 88, 25 Ind. App. 308, 81 Am. St. Rep. 102.

[k] (App. 1904)

A complaint in an action against a railway company for injuries to a traveler at a highway crossing which alleged that, by reason of obstructions, persons approaching the tracks could not see more than 10 feet along the tracks; that plaintiff and her husband approached the crossing, looking and listening for trains; that within 10 or 15 feet of the tracks they stopped the horse, and looked and listened for trains; that, on failing to see or hear any, they drove on, looking and listening, and, when on the crossing, defendant without giving any signals, pushed a freight train so near to them as to cause the horse to become unmanageable, causing the conveyance to be upset, and the injury complained of—showed that the defendant's negligence in failing to give signals was the proximate cause of the injury.—*Cleveland, C., C. & St. L. Ry. Co. v. Carey*, 71 N. E. 244, 33 Ind. App. 275.

[l] (App. 1905)

In order to render a railroad liable for its neglect in maintaining a crossing at a highway, it is not necessary that the precise injury which in fact occurred should have been foreseen, but it is sufficient if it was to be reasonably expected that injury might occur to other persons using the crossing in an ordinarily careful manner.—*Evansville & I. R. Co. v. Allen*, 73 N. E. 630, 34 Ind. App. 636.

Where a railroad failed to perform its duty in the construction and maintenance of a highway crossing, either by failing to erect guards, digging a pit, or otherwise, it was liable for injuries proximately caused by its neglect in any such respect, although some other cause, such as the stumbling and falling of a horse, concurred in causing the injury.—*Id.*

[m] (App. 1905)

Plaintiff's intestate approached a city railroad crossing provided with gates as required by ordinance. The gates were closed for a train on the track nearest to intestate, but were raised before the train had passed the crossing. She thereupon walked toward the train, and, after it had passed, was killed by a train on the next track not more than 20 feet from the place where she stopped to allow the first train to pass, and running at an unlawful rate of speed. The jury specially found that she did not look or listen for the second train after she left the place where she waited for the first train; that she could not have seen the second train at any time while she was within 10 feet from the nearest rail of the track on which it ran, had she looked, because the view was obstructed by the first train, but that she could have seen the train after she left the place where she stopped. It was also found that crossing bells were ringing continuously, but not that such bells were caused to ring alone by the second train. *Held*, that defendant's negligence in opening the gate in violation of the ordinance, and in running the second train at an excessive speed, was the proximate cause of intestate's death.—*Smith v. Michigan Cent. R. Co.*, 73 N. E. 928, 35 Ind. App. 188.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1090-1095.

See, also, 33 Cyc. pp. 1042-1047.

§ 338. Injury avoidable notwithstanding contributory negligence.

[a] (Sup. 1900)

Where, in an action for injuries at a railroad crossing, plaintiff's capacity to exercise care was in issue, an instruction that if plaintiff was standing on defendant's track, and his attention was diverted from the engine approaching him from behind, and if he was seen by defendant's servants in time to stop the engine, by the exercise of ordinary care, before striking him, and they failed to do so, defendant was guilty of negligence, was erroneous, in that it eliminated the question of plaintiff's capacity to know of the danger, and to step from the track on signal.—*Cleveland, C., C. & St. L. Ry. Co. v. Klee*, 56 N. E. 234, 154 Ind. 430.

[b] (App. 1909)

Where defendant's engineer must have seen decedent's peril on the track at a crossing in time to have stopped the train and avoided striking decedent, but instead ran over and killed him, the railroad company was responsible under the last clear chance rule.—*Southern Indiana Ry. Co. v. Drennen*, 88 N. E. 724.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1096-1099.

See, also, 33 Cyc. pp. 1047-1049.

§ 339. Willful or wanton acts and gross negligence.

Instructions, see post, § 351.

Pleading, see post, § 344.

Questions for jury, see post, § 350.

Sufficiency of evidence, see post, § 348.

[a] (Sup. 1860)

In an action against a railroad company for causing the death of plaintiff's intestate by running its cars over him while crossing the railroad track upon a public highway, if the deceased's own negligence and want of ordinary care contributed to his death the company was not liable, although guilty of negligence, unless that negligence was so gross as to imply a willingness to inflict the injury.—*Evansville & C. R. Co. v. Lowdermilk*, 15 Ind. 120; *Ohio & M. R. Co. v. Gullett*, Id. 487.

[b] (Sup. 1860)

In an action for the death of plaintiff's decedent, caused by his being struck by defendant's train while crossing its tracks on a highway, the want of such care as very prudent men take of their own concerns does not constitute such gross negligence as would render the company liable, if deceased by his own negligence contributed to his death.—*Evansville & C. R. Co. v. Lowdermilk*, 15 Ind. 120.

[c] (Sup. 1838)

In an action for the killing of plaintiff's son, evidence that the boy, engaged in hauling wheat, was reclining, apparently asleep, on the wagon, slowly approaching up hill toward the railroad, and that he was well acquainted with the crossing, where trains were visible from the road for 1,000 feet, and that the engineer, not seeing any driver, gave the danger signals, and, when he apprehended that the wagon would not be halted, used every endeavor to stop the train, in which he succeeded so far that the train ran past the crossing only about 50 yards, does not show either willful injury or negligence on the part of the railroad.—*Indiana, B. & W. Ry. Co. v. Wheeler*, 115 Ind. 253, 17 N. E. 563.

[d] (Sup. 1891)

In an action for injuries to plaintiff owing to his horse becoming frightened at the blowing off of steam and the sounding of a whistle by a locomotive, the court instructed that if the servants of defendant seeing plaintiff as he was about to approach the crossing could have avoided any injury by the exercise of even ordinary care, but, disregarding their duty in that respect, recklessly and purposely caused the whistle to sound, or the steam to be blown off, intending to injure the plaintiff by frightening his horse, or under such circumstances as implied a willingness to inflict injury, the injuries if any were inflicted were willingly and wantonly done, in which case plaintiff could recover even though he were himself negligent in his own conduct at the time, provided that such agents and servants were in the regular course of their employment at the time and in the line of their business.

Held, that the instruction was proper.—*Indianapolis Union Ry. Co. v. Boettcher*, 28 N. E. 551, 131 Ind. 82.

[e] (*Sup.* 1898)

The facts found failed to establish that the injury resulting in the death of plaintiff's intestate was willfully inflicted where they disclosed that defendant's train was running at a speed of 35 miles an hour, and was 1,200 or 1,300 feet from a certain highway crossing when the covered buggy in which decedent was riding on the highway was discovered by the fireman, 150 feet from the crossing, moving towards it at a slow gait; that he observed the vehicle until it was struck; that when the engine was 90 feet and the buggy 4 or 5 feet from the crossing the fireman signaled the engineer, who forthwith applied the air brakes, shut off the steam, and reversed the engine, but was unable to stop until after colliding with decedent's buggy.—*Cleveland, C., C. & St. L. Ry. Co. v. Miller*, 49 N. E. 445, 149 Ind. 490.

[f] (*App.* 1898)

No willful injury of plaintiff is charged by complaint alleging that defendant caused its train to approach and pass over the crossing at a speed of 25 miles an hour, in known and purposed violation of the speed ordinance of the city; that it willfully failed and omitted to sound the whistle for the crossing, and willfully omitted to maintain a flagman at the crossing; that the flagman was willfully away from his post of duty, and willfully failed to warn plaintiff of the approach of the train; that defendant willfully caused the train to come close to plaintiff while about to cross the track; and then and thereby willfully, and in known and purposed violation of the statute, frightened her horse, and thereby willfully and illegally, as aforesaid, caused him to quickly turn and upset the buggy, causing plaintiff's injury, which was received by her without any fault on her part.—*Hancock v. Lake Erie & W. R. Co.*, 51 N. E. 369, 21 Ind. App. 10.

[g] (*App.* 1906)

Plaintiff was struck and injured at a railway crossing by defendant's passenger train, which approached and passed over the crossing at a speed of from 50 to 60 miles per hour. The highway at the point in question, including the crossing at that season of the year, was used by from 100 to 125 teams daily. As the train approached the whistle was sounded one-fourth of a mile north of the crossing and the bell was rung continuously from that time until the train passed over the crossing. The engineer did not see plaintiff at any time before the collision occurred, and did not know of his presence in the vicinity of the track, and the fireman did not discover plaintiff until he was just about to enter on the track, too late to take steps to stop the engine and avert the accident. Plaintiff approached the crossing from a canning factory, driving at a brisk trot, which was continuously maintained until the

horses slowed down of their own volition as they proceeded to go on the crossing. *Held*, that such facts were insufficient to establish a willful injury on the part of the railway company.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Ferrell*, 39 Ind. App. 515, 78 N. E. 988, 80 N. E. 425.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1085, 1100, 1101.

See, also, 33 Cyc. pp. 1049-1051.

§ 340. Acts or omissions of employes or others.

Pleading, see post, § 344.

[a] (*Sup.* 1888)

A railroad company is not liable for injuries caused by horses taking fright at a box car, which was not encroaching on the road, but which was afterwards moved upon it by persons for whose acts the company was not responsible, unless the cars had been left there for an unreasonable time.—*Cleveland, C., C. & I. Ry. Co. v. Wynant*, 114 Ind. 525, 17 N. E. 118, 5 Am. St. Rep. 644.

[b] (*App.* 1901)

Employes of a railroad company, who after their day's work is completed take a hand car and start for town on private business, are not acting within the scope of their employment, so that the company is not liable for their running into a person at a highway crossing.—*Harrell v. Cleveland, C., C. & St. L. Ry. Co.*, 60 N. E. 717, 27 Ind. App. 29.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1102-1104.

§ 341. Actions for injuries.

Grounds for new trial, see NEW TRIAL, § 70. Responsiveness of answer to question, see WITNESSES, § 248.

View and inspection by jury, see TRIAL, § 28.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1105-1219.

See, also, 33 Cyc. pp. 1052-1143.

§ 344. — Pleading.

Allegations as to scope of employment, of negligent servant, see MASTER AND SERVANT, § 329.

In justices' courts, see JUSTICES OF THE PEACE, § 91.

Motion to make more definite and certain, see PLEADING, § 367.

Pleading ownership and operation of road, see ante, § 268.

[a] (*Sup.* 1864)

In an action against a railroad company for injuries received at a crossing, the complaint averring "that plaintiff was passing the track of said road with necessary care at the usual known place of crossing, and, while he was passing said track, the said defendant,

with carelessness and gross negligence, and without giving any warning whatever, caused one of her engines to run upon said track with great speed, and without any signal whatever, and the said plaintiff, being on said track, crossing the same with his cattle and carriage, and said engine, so carelessly and without signal run as aforesaid, was caused to come into collision, etc., and without any fault on his part," whereby he was injured, sufficiently alleges negligence on the part of defendant.—*Ohio & M. R. Co. v. Davis*, 23 Ind. 553, 85 Am. Dec. 477.

[aa] (Sup. 1876)

In an action by an administrator against a railroad, a paragraph of the complaint charging negligence in the construction of the railroad at a crossing over a certain public highway and in the running of a train on defendant's road, by which the injuries to plaintiff's intestate were caused, *held* good.—*Bonnell v. Allen*, 53 Ind. 130.

[b] (Sup. 1876)

A paragraph of complaint by an administrator against a railroad company, charging gross negligence in the construction of a crossing of the railroad over a certain public highway, and that such negligence and defective construction of said crossing caused injuries which resulted in the death of the plaintiff's intestate, is sufficient.—*Indianapolis & St. L. R. Co. v. Stout*, 53 Ind. 143.

[bb] (Sup. 1878)

In an action by an administrator against a railroad company for killing his intestate at a crossing in a populous part of a city, an allegation that the defendant was running the train "at a recklessly and grossly negligent and dangerous rate of speed, to wit, at the rate of 40 miles an hour," in violation of an ordinance limiting the rate to 6 miles an hour, does not sufficiently charge willful injury to exclude the conceded contributory negligence as a defense.—*Pennsylvania Co. v. Sinclair*, 62 Ind. 301, 30 Am. Rep. 185.

[c] (Sup. 1881)

A complaint for personal injuries at a railway crossing, which avers that there was no fault or negligence in the plaintiff, sufficiently shows lack of contributory negligence, in the absence of an affirmative showing thereof elsewhere in the complaint.—*Louisville, N. A. & C. Ry. Co. v. Head*, 80 Ind. 117.

[cc] (Sup. 1881)

Where, in an action for the destruction of plaintiff's horses, harness, and wagon in a railroad crossing collision, the complaint charged that the railroad approaching the crossing for a long distance lay in a deep cut, and was also concealed by a growth of underbrush and timber on both sides, and that, as W. was lawfully attempting to drive plaintiff's team across the track defendant carelessly and negligently ran her locomotive against and upon the same, to plaintiff's

damage; that the train was running at an unlawful rate of speed, and, when approaching the crossing, defendant's agents negligently failed to give any alarm or signal, and that the injury was caused by the careless acts of defendant, as alleged, and without negligence on the part of W. or the plaintiff, it stated a cause of action.—*Pittsburg, C. & St. L. Ry. Co. v. Wright*, 80 Ind. 182.

[d] (Sup. 1882)

Where, in an action against a railroad company for injuries at a crossing, the complaint averred that, as plaintiff reached the crossing, defendant negligently caused a locomotive with cars attached to approach the crossing and to pass at a great and unusual speed without proper care, and negligently and carelessly omitted, while so approaching, to give any reasonable or timely signal by ringing the bell or sounding the whistle at a reasonable and proper distance from the crossing, by reason whereof plaintiff was unaware of its approach, and by reason of such negligence and without any fault a collision occurred, it was sufficient as against a demurrer for the want of facts.—*Pittsburg, C. & St. L. Ry. Co. v. Martin*, 82 Ind. 476.

In a personal injury suit against a railway company for injuries received at a crossing, a complaint alleging that defendant negligently caused its train to pass the crossing at an unusual speed, and negligently failed to give warning of its approach, was sufficient as to defendant's negligence.—*Id.*

[dd] (Sup. 1885)

In a complaint against a railroad company for injuries caused by the negligence of such company at a crossing, it must be shown by proper averment that such negligence was the proximate cause of the injury. And this is not shown by an averment that the company, with gross negligence, caused its locomotive "to rapidly approach" said crossing without giving warning.—*Pittsburgh, C. & St. L. Ry. Co. v. Conn*, 104 Ind. 64, 3 N. E. 636.

[e] (Sup. 1886)

A complaint against a railroad company for an injury at a crossing, to be good without an averment of freedom from contributory negligence, must show that the injury was willfully inflicted; and, where the facts stated do not show that the act was intentional, and done recklessly, with a willingness to inflict the injury, the complaint is bad on demurrer.—*Louisville, N. A. & C. Ry. Co. v. Bryan*, 107 Ind. 51, 7 N. E. 807.

[ee] (Sup. 1888)

A complaint which avers that plaintiff was on a crossing of a public street, and in a street along which a railroad track was laid, shows that he was not a trespasser, and is good without alleging that he was willfully run upon, if it contains a general allegation that he was free from fault.—*Ohio & M. Ry. Co. v. Walker*, 113 Ind. 196, 15 N. E. 234, 3 Am. St. Rep. 638.

[f] (Sup. 1889)

In an action against a railroad company for negligently and unlawfully leaving a car standing on the highway, at which plaintiff's horse became frightened, and caused her personal injuries, it is unnecessary to explain in the complaint how the horse came to be frightened, or to allege that there was anything unusual about the car calculated to produce such a fright. The general allegation that defendant's employes carelessly and negligently placed and allowed the car to remain in the position (describing it) in which it was when the accident occurred, is sufficient, without specifying which of the employes were negligent.—Pittsburg, C. & St. L. R. Co. v. Kit-ley, 118 Ind. 152, 20 N. E. 727.

[ff] (Sup. 1889)

A complaint for injuries, caused by plaintiff's horse taking fright at defendant's cars, alleging that defendant "unlawfully, negligently, and carelessly placed one of its box cars upon and partially across a public highway," etc., is not bad on demurrer for failure to state that the car was permitted to remain on the highway an unreasonable time.—Cleveland, C., C. & I. Ry. Co. v. Wynant, 119 Ind. 539, 20 N. E. 730.

[g] (Sup. 1892)

A complaint for personal injuries received at a railroad crossing, which shows that plaintiff was an infant driving a two horse team, is not subject to demurrer, as showing contributory negligence, where the age of plaintiff is not given.—Louisville, E. & St. L. R. Co. v. Pritchard, 131 Ind. 564, 31 N. E. 358, 31 Am. St. Rep. 451.

[gg] (Sup. 1892)

In an action against a railroad company for injuries received at a crossing, plaintiff need not allege affirmatively the precautions taken to avoid injury, but an averment that the injury occurred without his fault is sufficient, and, if defendant desires a more particular statement of facts, its remedy, if any, is by motion to make the complaint more specific.—Pennsylvania Co. v. Horton, 132 Ind. 189, 31 N. E. 45.

[h] (App. 1892)

A complaint alleged that a railroad company negligently caused its train to pass rapidly along its track, over a crossing, and in so doing negligently omitted to give any signal of its approach; that while said train was "being run along said track and over said crossing in the negligent and careless manner aforesaid, the same ran against and upon said plaintiff and his horse and wagon, striking against and colliding with them with great force and violence;" and, after describing the injuries inflicted, that "the foregoing injuries were occasioned by the negligence and carelessness of the defendant." *Held*, that the complaint was bad on demurrer, because it did not aver that the alleged injury was caused by the acts or omissions alleged to have been negligent.—Ohio & M. Ry. Co. v. Engrer, 4 Ind. App. 261, 30 N. E. 924.

[hh] (App. 1892)

In an action against a railroad company to recover damages for personal injuries occasioned by plaintiff's falling through a cross walk negligently maintained by defendant, a complaint which alleges that defendant's tracks passed along one street and intersected at right angles another street; that under the portion of said track used by foot passengers in crossing was a ditch, covered at the street intersection with planks; that defendant carelessly suffered a portion of said sidewalk to remain open and dangerous; and that plaintiff while crossing on the sidewalk, where the same crossed defendant's side track, and at the point where it had negligently permitted said ditch to remain open, fell into said opening, and was injured,—is not demurrable on the ground that it fails to show that the injury to plaintiff occurred in the street at a point where it was defendant's duty to maintain a safe crossing.—Pennsylvania Co. v. Frund, 4 Ind. App. 469, 30 N. E. 1116.

[i] (App. 1892)

A complaint alleged that plaintiff was struck by a train while crossing defendant's railroad track with his team at night; that when plaintiff approached the track he stopped, looked, and listened, but, by reason of defendant's negligence in not giving any signals as the train approached the highway crossing, plaintiff did not hear or see the train; and that the accident was without any fault or negligence on his part. *Held*, that the complaint did not show that plaintiff was chargeable with contributory negligence.—Ohio & M. Ry. Co. v. McDaniel, 5 Ind. App. 108, 31 N. E. 836.

[ii] (Sup. 1893)

In an action against a railroad company for personal injuries sustained by an infant nine years old, the complaint alleged that at a place where the railroad crosses a public highway defendant's servants negligently detached the engine from a moving train and ran it across the highway, leaving the train to follow without any person in charge thereof to give warning of its approach. That plaintiff was not guilty of negligence, but waited till the engine had passed, and then started across the track, not observing or having time to observe that the train was following, and was injured by it. *Held*, that the complaint is bad, since it affirmatively shows that plaintiff was negligent in failing to take time to observe whether the train was approaching or not, notwithstanding the general allegation that he was free from fault.—Indianapolis, D. & W. Ry. Co. v. Wilson, 134 Ind. 95, 33 N. E. 793.

[j] (Sup. 1893)

The rule that an employe who sues his employer for injuries sustained because of defective machinery must aver that he did not have knowledge of the defect does not apply where a person rightfully crossing the public street falls into a ditch wrongfully left unguarded by a railway company under a duty to construct a safe cross-

ing.—Ohio & M. Ry. Co. v. Levy, 32 N. E. 815, 34 N. E. 20, 134 Ind. 343.

[jj] (Sup. 1893)

In an action against a railroad company for personal injuries resulting from a collision with one of defendant's trains while crossing its track on a city street with a wagon, an allegation that defendant's train was run across the street, where persons were constantly passing, at a dangerous speed, of 50 miles an hour, sufficiently charges the company with negligence.—Chicago, St. L. & P. R. Co. v. Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 210.

In such an allegation that defendant's servants, when approaching the crossing with the train, did not attempt to check it, but negligently ran it at such dangerous speed, sufficiently informs defendant of the facts charged as constituting negligence.—Id.

[k] (App. 1893)

In an action against a railroad company and a city for injuries through falling down an embankment at the intersection of a railroad track with a city street, the complaint alleged that the railroad company, under an ordinance, raised its track, which had for years been on a level with the street, three feet above the sidewalk; that defendants placed wooden steps from the track to the sidewalk, unprotected, and without any light to reveal their location in the nighttime, and left the sidewalk for a year, when plaintiff, in the nighttime, not knowing of the change of grade, fell down the embankment at the steps, and was seriously injured. *Held*, that the complaint states a good cause of action against the railroad company, whether its liability is joint or separate, since the negligence charged does not consist of the placing of the steps, nor wholly of leaving the steps unprotected or unlighted, but in failing to restore the highway to its former state, as the railroad company was obliged to do under Rev. St. 1881, § 3903.—Cincinnati, H. & I. R. Co. v. Claire, 6 Ind. App. 390, 33 N. E. 918.

[kk] (App. 1893)

In an action against a railroad company for damage to plaintiff's horse, caused by its fright at escaping steam, where the complaint alleges that defendant's train was approaching a city street crossing at an unlawful speed, without giving any signal of its approach, and, when about to cross the street, defendant's servants in charge of the locomotive "willfully caused a large amount of steam" to escape therefrom with a loud and unusual noise, "which was calculated to, and did, frighten" plaintiff's horse, the gist of the complaint is negligence, and the allegations of willfulness are surplusage.—Louisville, N. A. & C. R. Co. v. Davis, 7 Ind. App. 222, 33 N. E. 451.

A complaint alleging that defendant's train was approaching a city street crossing at an unlawful speed without giving any signal of its approach, and when plaintiff was about to cross the street defendant's servants in charge of the

locomotive "willfully caused a large amount of steam" to escape therefrom with a loud and unusual noise, "which was calculated to and did frighten" plaintiff's horse, charged simple, and not willful, negligence.—Id.

[l] (Sup. 1894)

A complaint averring generally that deceased was not negligent is not bad for the added special averment that he was "unable to see or hear any engine or train of cars in motion on account of said obstructions," though this was not equivalent to an allegation that he neither could nor did see or hear the train.—Pittsburgh, C., C. & St. L. Ry. Co. v. Burton, 139 Ind. 357, 37 N. E. 150, 38 N. E. 504.

[ll] (App. 1894)

In an action against a railroad company, a complaint alleging that defendant negligently and without giving any signal ran a train over a highway crossing at the rate of 50 miles an hour, just as plaintiff was about to drive across, and negligently and maliciously caused steam to escape from the engine at the time, by reason of which negligent acts plaintiff's horse became frightened and ran away, injuring plaintiff, is good, since it counts upon the defendant's negligence in failing to give the statutory signals, and not upon common-law negligence in allowing the steam to escape.—Chicago, St. L. & P. R. Co. v. Butler, 10 Ind. App. 244, 38 N. E. 1.

[m] (Sup. 1895)

A complaint which, after reciting the negligent construction and maintenance by a railway company of a crossing, and other negligent acts, alleges "that by reason of the unlawful negligence and wrongful acts and omissions of the defendant, as herein set out, the said deceased was run over and upon by said train at said crossing," sufficiently alleges that the injuries were in consequence of defendant's negligent construction and maintenance of the crossing.—Lake Shore & M. S. Ry. Co. v. McIntosh, 140 Ind. 261, 38 N. E. 476.

[mm] (Sup. 1896)

In an action against a railroad company for injuries sustained in a crossing accident, the complaint was insufficient where it did not allege that plaintiff could have heard the signals if they had been given, nor that he could have avoided the accident if he had heard them before going on the track.—Baltimore & O. S. W. Ry. Co. v. Young, 45 N. E. 479, 146 Ind. 374.

A complaint alleging that a train could not be seen by one on the highway till reaching the intersection; that plaintiff was familiar with the regular time of trains, and that it was not time for a train, and he did not know that one would then pass; that, as he was carefully driving along the highway, he listened and looked carefully for a train, but heard none; that no signal was given, and he drove upon said crossing, whereupon a train, running 60 miles an hour, without any notice or warning ran against and upon him in his wagon, inflicting the injuries complained of, "through no fault or negligence

on his part,"—sufficiently alleges negligence and absence of contributory negligence, but not proximate cause.—Id.

[n] (App. 1896)

Where, in an action against a railway company, the negligence relied on is the breach of a city ordinance, it is sufficient to state in the complaint the existence of the ordinance, without setting out a copy thereof, as a part of the complaint.—Lake Erie & W. R. Co. v. Hancock, 15 Ind. App. 104, 43 N. E. 659.

In an action against a railway company for personal injuries caused by the alleged negligence of defendant in running its train over a street crossing at a rate of speed prohibited by a city ordinance, a complaint alleging that, without any negligence on the part of plaintiff, defendant's train, by reason of its negligence, came in close proximity to the horse driven by plaintiff, while plaintiff was attempting to cross the tracks, and frightened said horse, and caused him to upset the buggy and throw plaintiff to the ground, does not sufficiently allege plaintiff's freedom from contributory negligence.—Id.

[nn] (App. 1896)

There is no difference between railroad-crossing cases and any others where the gist of the action is negligence as to the pleading and proof of contributory negligence.—Hartzell v. Louisville, N. A. & C. Ry. Co., 44 N. E. 315, 15 Ind. App. 417.

[o] (Sup. 1897)

A complaint which alleges that defendant negligently allowed lumber to be piled on its right of way, obstructing the view of the track, but not alleging that decedent's view was thereby obstructed, and that the train was running at an unauthorized speed, and that no signals were given, without alleging that such acts of negligence were the cause of injury to the decedent, with an allegation that one of defendant's trains killed the said decedent, states no cause of action.—Chicago & E. R. Co. v. Thomas, 46 N. E. 73, 147 Ind. 35.

A complaint which alleges an injury while passing over the crossing without carelessness or negligence, and while using due care, is insufficient to show want of contributory negligence.—Id.

[oo] (Sup. 1899)

It is proper to overrule a motion to paragraph a complaint charging negligence of a railroad company at a crossing and also averring that plaintiff's team was seen at the crossing by the fireman when the locomotive was 400 feet distant therefrom, and that the fireman thereupon notified the engineer, who could have stopped the train by reversing the engine, but who failed to stop or check its speed, since the latter allegations do not amount to a charge of willful injury, but are merely averments of negligence.—Baltimore & O. S. W. Ry. Co. v. Young, 54 N. E. 791, 153 Ind. 163.

[ooo] (App. 1899)

Where the theory of the complaint against a railroad company to recover for an injury is that the company was negligent in running its train through a city in violation of an ordinance, the statements concerning the ordinance and its violation are material allegations.—Lake Erie & W. R. Co. v. Mikesell, 55 N. E. 488, 23 Ind. App. 395.

In an action to recover for death of plaintiff's child, killed at a railway crossing, it is not sufficient to aver, by way of recital, that defendant was running its train through the city faster than four miles an hour, in violation of an ordinance some eight years before; but it must be directly averred that an ordinance was in force, and that it limited the speed of trains to four miles, and that the particular train was running beyond such rate.—Id.

[p] (App. 1899)

A complaint in an action to recover for injuries sustained at a railway crossing is sufficient when it alleges that defendant was running its train through the city, at the time the accident occurred, at a speed beyond the limit fixed by ordinance; that the statutory signals on approaching the crossing were not given; and that the accident occurred by reason of such negligence on the part of the defendant; and that plaintiff was exercising due care.—Baltimore & O. S. W. Ry. Co. v. Musgrave, 55 N. E. 496, 24 Ind. App. 295.

[pp] (Sup. 1900)

Where, in an action for injuries to a child at a railroad crossing, the violation of a city ordinance was merely one of the several elements of defendant's negligence as charged in the complaint, the complaint was not objectionable for failure to show that such violation was the proximate cause of plaintiff's injury.—Cleveland, C., C. & St. L. R. Co. v. Klee, 56 N. E. 234, 154 Ind. 430.

A complaint for injuries received by plaintiff in a city street at a railroad crossing, alleging the violation of a city ordinance as one of the elements of defendant's actionable negligence, was not demurrable for failure to show that such violation was the proximate cause of plaintiff's injury.—Id.

A complaint alleging that plaintiff, a boy 9 years old, was of such immature age and experience that he did not appreciate the danger of being struck by defendant's engine at a street crossing, and was incapable of negligence, is not demurrable for a failure to allege that plaintiff was free from contributory negligence.—Id.

[ppp] (App. 1900)

A complaint which alleges that plaintiff was injured at a crossing by reason of the negligence of defendant in operating its trains at a speed greater than that allowed by ordinance, and without any fault or negligence on his part, is not demurrable for the reason that it does not allege that, if said train had not been operated at such prohibited rate of speed, plaintiff would

not have been injured.—*Lake Erie & W. R. Co. v. Pence*, 55 N. E. 1036, 24 Ind. App. 12.

[q] (App. 1900)

A complaint against a railroad company for the wrongful killing of plaintiff's team at a crossing alleged that along the side of the track from which plaintiff was approaching there were a number of houses and other obstructions, extending to within 21 feet of the track, obstructing the view along the track in the direction from which the train was coming; that the plaintiff was himself without fault; that he looked and listened till his team was on the track, and it was impossible to stop it; that he stopped his team just before entering on the track; and that he looked and listened from that point, but the train was not visible. *Held*, that contributory negligence was sufficiently negated by the allegations.—*Peirce v. Ray*, 56 N. E. 776, 24 Ind. App. 302.

[qq] (App. 1900)

A complaint averred that plaintiff, in approaching on horseback, on a dark night, a railway crossing, looked and listened for approaching trains, and, on seeing or hearing none, proceeded to cross the tracks; that after crossing the main track he discovered that the crossing was blocked by a train on a side track; that there was no light or watchman at the crossing, and plaintiff did not see the standing cars until his horse suddenly stopped; that, before he could turn his horse to go back, defendant negligently ran an engine over the main track, without giving any signals or displaying any headlight; that when he first discovered the approaching train he was on the main track, and becoming confused by the near approach of the train, and his horse becoming frightened, he could not escape, though he used every effort to do so, until he was struck and injured. *Held*, to sufficiently state a cause of action against defendant, as it alleges plaintiff's freedom from fault, and defendant's negligence as proximately causing the injury.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Carlson*, 56 N. E. 251, 24 Ind. App. 559.

[qqq] (App. 1900)

A complaint in an action against a railroad for personal injuries alleged that plaintiff stopped his horse on reaching defendant's railroad crossing, to listen for the approach of a train; that there was part of a freight train standing on one of the tracks; that one of defendant's employes in charge of the train motioned to plaintiff to cross; that thereupon plaintiff attempted to cross the tracks, when the train was suddenly and negligently started, creating noise and confusion, which frightened plaintiff's horse, and caused the injury complained of. *Held*, that the complaint was insufficient on demurrer, since no facts were pleaded showing that such employé was acting within the scope of his duties, nor showing in what respect there was negligence in starting the train.—*Pittsburg, C., C. & St. L. Ry. Co. v. Adams*, 56 N. E. 101, 25 Ind. App. 164.

[r] (App. 1900)

Where a complaint for injuries received by plaintiff's being struck by defendant's train at a crossing avers that by reason of defendant's negligence, and without any fault or negligence on plaintiff's part, the locomotive struck plaintiff's team while crossing the track, the complaint was not objectionable for failure to allege plaintiff's freedom from contributory negligence.—*Cleveland, C., C. & St. L. Ry. Co. v. Griffin*, 58 N. E. 503, 26 Ind. App. 368.

[rr] (App. 1901)

A complaint alleging that, as plaintiff came on the crossing defendant's engine negligently approached it without warning, and struck plaintiff's team, does not show that such negligence caused the accident.—*Cincinnati H. & D. R. Co. v. Voght*, 60 N. E. 797, 26 Ind. App. 665.

[rrr] (App. 1902)

A complaint which alleged that plaintiff, without negligence on his part, was struck by an engine backing; that it was dark, and a strong wind was blowing; that before crossing the track he stopped and listened for the gong at the crossing; that the gong did not ring, and he did not see any approaching train; that the defendant had negligently allowed the gong to be out of repair; that the engine was running at a speed of 15 miles an hour; that the bell was not rung, and that no watchman was stationed at the crossing to give warning,—was sufficient.—*Cleveland, C., C. & St. L. Ry. Co. v. Coffman*, 64 N. E. 233, 66 N. E. 179, 30 Ind. App. 462.

[s] (App. 1902)

In an action against a railroad, the complaint showed that a plank crossing maintained by the road was worn, and that in walking over "said crossing," not knowing its condition, a board broke, whereby plaintiff was thrown to the ground, and "by reason thereof" injured. *Held*, that a contention that it was not shown by the complaint that the defendant was negligent at the time of the injury, or that the injury occurred on account of the defective condition of the sidewalk, or that the defendant's alleged negligence was the proximate cause of the plaintiff's injury, was of no merit.—*Wabash R. Co. v. De Hart*, 65 N. E. 192, 32 Ind. App. 62.

Where a complaint in an action against a railroad for injuries owing to the defective condition of a sidewalk maintained by it on its right of way avers that the sidewalk was on the southwesterly side of a street, a contention that the complaint did not show the sidewalk to be in the street was of no merit.—*Id.*

[ss] (App. 1903)

Where a complaint in an action for the death of a traveler at the railroad crossing alleged facts showing that decedent was guilty of negligence, it was insufficient, notwithstanding Acts 1899, p. 58, c. 41, providing that in such case the plaintiff shall not be required to allege or prove freedom from contributory negligence.

—*Rich v. Evansville & T. H. R. Co.*, 66 N. E. 1028, 31 Ind. App. 10.

[sss] (App. 1904)

In an action against a railroad company for personal injuries caused by a collision at a crossing between defendant's train and plaintiff's wagon, a statement that defendant's cars and locomotive were run over plaintiff and his team, and that his injuries were caused wholly through the fault and negligence of defendant in the operation of said cars and locomotive, and without any fault or negligence on the part of plaintiff, is a sufficient allegation of negligence, in the absence of a motion to make more specific.—*Baltimore & O. S. W. R. Co. v. Reynolds*, 71 N. E. 250, 33 Ind. App. 219.

In an action against a railroad company for personal injuries from an accident at a crossing, the second paragraph of the complaint charged that the injuries were caused by violation of an ordinance restricting the speed of trains, requiring trains being operated backward to have a watchman on the rear car, and requiring the bell to be rung, etc. The following paragraph alleged that defendant purposely and willfully ran its train against plaintiff's vehicle, and this was followed by an allegation that the crossing was located in a densely populated portion of the city, and that defendant was at the time guilty of a violation of the ordinance, as alleged in the preceding paragraph. *Held*, that the repetition of the averments of the second paragraph would be regarded as giving the conditions and circumstances under which the act of willfulness was committed, and not as a statement that the willful act consisted entirely of a violation of the ordinance, so as to nullify the allegations of willfulness.—*Id.*

In an action against a railroad company for personal injuries from an accident at a crossing, a paragraph of the complaint alleging that the injuries were caused by defendant's violation of a city ordinance requiring it to keep a watchman on the rear car of a train being operated backwards, to ring the bell, and not run at more than a stated rate of speed, was sufficient, without stating plaintiff's conduct at the time, in order that the court might determine from the facts pleaded whether or not the violation of the ordinance was the proximate cause of the injuries, inasmuch as the question of whether this was true was for the jury.—*Id.*

[t] (App. 1904)

Since *Burns' Ann. St.* 1901, § 359a, makes contributory negligence a matter of defense, a complaint in an action for the death of one run over by a train was not insufficient for failing to allege that he took precautionary measures in starting across the tracks.—*Chicago & E. R. Co. v. La Porte*, 71 N. E. 166, 33 Ind. App. 691.

[tt] (App. 1904)

Where a complaint for personal injuries sustained in a railroad crossing accident alleges the company's failure to give the signals and warnings of the approach of a train as required by

statute, it is not necessary to expressly describe such failure as negligence, it constituting negligence per se.—*Pennsylvania Co. v. Fertig*, 70 N. E. 834, 34 Ind. App. 459.

A complaint for personal injuries sustained in a railroad crossing accident alleged plaintiff's approach to the crossing in a vehicle drawn by a horse, the obstruction of his view of the track by intervening objects as he approached the crossing, the precipitous character of the descent on the opposite side of the track, and the approach of a train, without giving the statutory signals, which he did not discover until he was on the track. It also alleged that the only possible escape was to go forward quickly, which plaintiff did; that when his buggy left the track the locomotive barely missed it; and that his horse became frightened at the train, plunged forward rapidly and viciously, became unmanageable, upset his buggy, and threw him violently to the ground. *Held*, that the complaint showed that the company's negligence was the proximate cause of the injury.—*Id.*

[ttt] (Sup. 1905)

In an action against a railroad company for injuries at a crossing, the complaint alleged that, while plaintiff was unavoidably delayed by the conduct of her horse, defendant negligently ran a train over the track without giving the statutory signals, whereby plaintiff was deceived and caught on the crossing, and her horse killed, and she injured. *Held*, that the complaint sufficiently showed that the negligence charged was the proximate cause of the injury.—*Greenawaldt v. Lake Shore & M. S. Ry. Co.*, 74 N. E. 1081, 165 Ind. 219.

[u] (App. 1905)

In an action for injuries at a railroad crossing, a paragraph of the complaint alleging that the engine and cars could have been stopped within the space of a foot, and that those in charge of the engine could have seen plaintiff, had they been on the lookout, was insufficient to charge a willful injury, without an allegation that defendant's employees did see plaintiff, or that they knew he was on the track at the time.—*Van Winkle v. New York, C. & St. L. R. Co.*, 73 N. E. 157, 34 Ind. App. 476.

In an action for injuries to plaintiff at a railroad crossing, it was alleged that he was aged and infirm, with impaired sight and hearing; that, as he approached defendant's railroad crossing, he observed a long freight train approaching on the south track, and that, while waiting very near to the north track for this train to cross he was struck by an engine and two cars backing toward him on such track, which when he approached the crossing were standing still; that he was engrossed in watching the freight train, which made considerable noise; and that, though he could easily have been seen by the servants of defendant in charge of the train which struck him, it approached without warning, etc. *Held*, that the complaint disclosed that plaintiff was guilty of contributory negligence, as a matter of law, and was therefore demurrable.—*Id.*

[uu] (App. 1906)

In an action against a railroad for negligently causing the death of plaintiff's decedent while attempting to drive over a crossing, a complaint alleging that defendant, by its servants, negligently drove the train at an excessive and dangerous rate of speed; that the whistle was not sounded, as required by statute, and that the bell was not rung; and that the accident was caused by the "negligence of said defendants and its said servants as aforesaid"—was not demurrable as proceeding on the theory that all the acts of negligence charged combined caused the accident.—*New York C. & St. L. R. Co. v. Robbins*, 76 N. E. 804, 38 Ind. App. 172.

[uuu] (Sup. 1906)

A complaint, in an action for injuries to plaintiff at a railroad crossing, charging that defendant negligently ran its train over the Michigan road crossing, situated, etc., at a reckless and dangerous rate of speed, without making any attempt to stop or check the train, and that such road was at the time the main highway between two places, and that a great many persons were constantly traveling thereon and crossing the track, was insufficient to characterize the crossing as so extrahazardous as to require the railroad company to restrict the speed of its trains in passing over the same.—*Lake Shore & M. S. Ry. Co. v. Barnes*, 76 N. E. 629, 166 Ind. 7, 3 L. R. A. (N. S.) 778.

[v] (Sup. 1906)

It cannot be assumed that plaintiff, who was injured at a railroad crossing, was guilty of contributory negligence in driving a spirited team, as such question is a matter of defense.—*Baltimore & O. S. R. Co. v. Slaughter*, 167 Ind. 330, 79 N. E. 186, 7 L. R. A. (N. S.) 597, 119 Am. St. Rep. 503.

Where, in an action for injuries to plaintiff by his team becoming frightened at a hand car left on a farm crossing, plaintiff was not guilty of contributory negligence in driving the mule that became frightened, and the complaint alleged that defendant's negligence in leaving the hand car on the crossing was the efficient cause of the accident, and that the mule that took fright was "well broken and not fractious or balky," the complaint was not objectionable for failure to aver that the mule was an animal of ordinary gentleness.—*Id.*

Where plaintiff was injured by his team becoming frightened at a hand car placed on a farm crossing, whether the act of placing the car within the limits of the crossing was so calculated to frighten passing teams as to render it negligent to do such an act was a mixed question of law and fact which was presented by the issue formed on the allegation that the act was negligently done.—*Id.*

Where, in an action for injuries to plaintiff by his team becoming frightened at an obstruction on a farm crossing maintained by defendant railroad company, the complaint charged that defendant carelessly and negligently placed a

hand car lengthwise on the crossing, and carelessly and negligently obstructed the free use of the crossing by such hand car, and that the accident and injuries alleged were caused by and were the direct result of the negligence charged, the complaint was not demurrable because it did not aver that the hand car and articles thereon were calculated to frighten teams of ordinary gentleness.—*Id.*

[vv] (App. 1906)

In an action to recover for the death of an intestate who was run into by defendant's train while crossing a railroad track, it is not necessary to allege freedom from contributory negligence under Acts 1899, p. 59 (*Burns' Ann. St. 1901, § 359a*).—*Southern Indiana Ry. Co. v. Corps*, 37 Ind. App. 586, 76 N. E. 902.

In an action for death in a crossing accident, the complaint alleged that intestate knew nothing of the extra train which caused his death, and in a few lines preceding such statement it was alleged that the warning bell at such crossing did not ring at the approach of the train, that intestate's ignorance of the train was caused by the failure to blow the whistle or ring the bell, and that the failure to ring the bell was an invitation to the public to approach the track. Defendant contended that the complainant did not allege that intestate was unaware of the approach of the train when he went on the track, and that his ignorance was not connected with any time relating to the accident, and that it did not appear that his being unaware of the train was caused by the failure to blow the whistle or ring the bell, and that there was no allegation that he was misled by the failure of the crossing bell to ring, nor that, had the bell rung, he would have been warned of the approach of the train. *Held*, that the contentions were without merit.—*Id.*

An allegation that intestate approached the crossing and that the locomotive struck plaintiff's team and wagon on the crossing sufficiently showed that plaintiff had driven on the track.—*Id.*

Burns' Ann. St. 1901, § 5153, requires a railroad on crossing a highway to restore it to its former state, or in a sufficient manner not to impair its usefulness. *Held* that, where a complaint in an action for death in a crossing accident alleged negligence on the part of defendant in establishing its road below the grade of the highway, so that one approaching the same in a vehicle could not stop near the track, and in permitting an embankment to remain in such a position as to obstruct the view of approaching trains, the fact that the complaint further showed that intestate went upon the track and was injured in a collision with a train did not show that the violation of the statutory duty was not the proximate cause of the injuries.—*Id.*

In an action for death in a crossing accident, a complaint alleging that intestate was unaware of the approach of the train, and without any fault on his part the locomotive struck his

team, etc., sufficiently alleged freedom from contributory negligence.—Id.

[vvv] (Sup. 1907)

In an action for the death of a person from injuries on a railroad crossing, plaintiff was bound to aver facts disclosing a legal duty owed by the defendant, and the negligent performance or negligent failure to perform such duty, in order to state a cause of action requiring the defendant to answer.—Chicago, I. & L. Ry. Co. v. McCandish, 167 Ind. 648, 79 N. E. 903.

In an action for death of plaintiff's intestate while on a railroad grade crossing, the complaint averred that decedent saw defendant's train coming, and stopped on a side track between certain standing cars to await the passage of the train; that a car was negligently switched onto the side track so as to cause the two sections of cars on the switch to come together, by which intestate was killed. The complaint did not allege intestate's destination, or that he intended to pass over the crossing, nor that he was on the highway at the time he was injured. *Held*, that the complaint was fatally defective for failure to show that decedent was a traveler at the time he was injured, and in that ordinary use of the highway which entitled him to the exercise of ordinary care on the part of the railroad company.—Id.

[w] (App. 1907)

In an action for injuries sustained by plaintiff in a collision between a train and her vehicle at a street crossing, the complaint alleged that plaintiff listened to ascertain whether an electric bell at the crossing was ringing to give warning of the approach of trains; that the bell was not ringing, but that plaintiff approached the track, carefully observing and listening for an approaching train, without negligence on her part, and that defendant had negligently allowed the bell to become broken, so that it would not ring; and that plaintiff's injuries were caused by such negligence. *Held*, that a demurrer on the ground that the complaint showed that plaintiff relied solely on the electric bell, and failed to look and listen, which failure constituted contributory negligence, was properly overruled.—Cleveland, C., C. & St. L. Ry. Co. v. Schneider, 40 Ind. App. 38, 80 N. E. 985.

[ww] (App. 1908)

In an action for injuries at a railroad crossing, a paragraph of the complaint charging negligence in that defendant approached the crossing with its engine at a high and dangerous rate of speed, in violation of an ordinance of the town, and that plaintiff was injured was fatally defective when it did not allege that defendant's negligence was the proximate cause of the injury.—Lake Erie & W. R. Co. v. Moore, 42 Ind. App. 32, 81 N. E. 85, 84 N. E. 506.

In an action for injuries at a railroad crossing, in which negligence was based on the violation of a town ordinance, a complaint is demurrable which does not show that the street and

the crossing were within the corporate limits of the town.—Id.

[www] (App. 1908)

In an action for death at a railroad crossing, the complaint charged that defendant negligently ran one of its locomotives against the vehicle in which decedent was riding, that defendant negligently failed to blow the whistle 80 rods from the crossing and to ring the bell continuously, negligently ran the locomotive and car attached thereto at a high and dangerous rate of speed, to wit, 60 miles an hour, while approaching the crossing and negligently failed to give any signal or warning or to take any precaution whatever to protect people at the crossing or guard against accidents, but ran against the buggy and negligently killed decedent. *Held*, that the complaint, while redundant in charges of negligence, sufficiently charged that the running of the locomotive at the rate of 60 miles an hour across the highway without giving signals or warning of its approach was the proximate cause of decedent's death.—Cleveland, C., C. & St. L. Ry. Co. v. Houghland, 85 N. E. 369.

[x] (Sup. 1909)

A complaint, in an action against a railroad company for injuries in a collision at a street crossing, which shows that defendant's track crossed the street from the north in a southwesterly direction, where the tracks were straight for a considerable distance to the north, and at such an angle that a watchhouse on the north side of the street obstructed the view of the tracks to the north from about 20 feet west of the tracks up to a point about 8 or 9 feet west of the tracks; that plaintiff started to cross the tracks from the north side of the street about 20 feet from the west track; and that, when he came to the corner of the watchhouse, he stopped and looked to the northeast up the track for 250 feet for approaching trains, and also listened, but did not see or hear a train on the west track; that he saw and heard a train on the east track going north to the north of said street; that on looking to the south, and for trains in that direction, he took two or three steps towards the tracks, and just as he got one of his feet over the west track, a train running at from 20 to 35 miles per hour, in excess of the municipal speed ordinance, without ringing the bell, struck him; and that, if signals had been given, he would have been warned; and that if the speed ordinance had been observed, he would have crossed the track without injury—does not, as a matter of law, show that he was guilty of contributory negligence.—Cleveland, C., C. & St. L. Ry. Co. v. Lynn, 86 N. E. 1017, 85 N. E. 999, 171 Ind. 589.

[xx] (Sup. 1909)

In an action against a railroad company for personal injuries at a street crossing because of the company's violation of an ordinance, etc., in not keeping the gates closed, the complaint must allege that the proximate cause of the injury was the violation of the ordinance, in order to make out a prima facie case.—Evansville & T. H. R. Co. v. Berndt, 172 Ind. 697, 88 N. E. 612.

Even if plaintiff, in an action against a railroad company for injuries at a street crossing, was bound to negative contributory negligence, allegations of the complaint that plaintiff was proceeding with due care and caution when injured were sufficient against a demurrer.—Id.

[xxx] (App. 1909)

A complaint alleging that, while attempting to cross the track plaintiff's decedent was struck and killed by defendant's locomotive, that defendant's servants negligently failed to signal, etc., and that as a result of defendant's negligence decedent met his death, sufficiently charged the cause of the injury and defendant's fault, as against the objection that there was no averment that, had the statutory signals been given, they could have been heard and the injury avoided.—Chicago, I. & L. Ry. Co. v. Stepp, 88 N. E. 343.

In an action against a railroad for death of one struck by a train at a crossing, a complaint directly charging defendant with negligence and alleging that by reason of the negligence of defendant's servants in failing to sound the whistle and ring the bell deceased was injured, etc., was sufficient to withstand a demurrer, though not charging by direct averment that, when the servants failed to discharge their particular duty, they were in the employ of and acting for defendant.—Id.

[y] (App. 1909)

A complaint for death at a railroad crossing alleged: That decedent was driving carefully and slowly; that, as he approached the track, he looked and listened for approaching trains and saw none; that he was unable to see the track in the direction from which the train approached which struck him on account of obstructions, until he was within 20 feet of the track, and, when he reached this point, he saw the engine approaching about 100 feet distant and was then unable to stop his horse in time to avoid collision. *Held*, that the complaint did not show that decedent was negligent.—Southern Indiana Ry. Co. v. Drennen, 88 N. E. 724.

[yy] (App. 1909)

A complaint alleged that defendant operated a railroad across a sidewalk; that the outer rails of two of the tracks were laid in the walk so as to leave a dangerous opening between them, which was calculated to catch and hold the foot of a pedestrian, and defendant negligently failed to place any block between the tracks, though it was its duty to keep the street in a safe condition for travel; that while decedent was walking upon the tracks, his foot was caught and held in the opening left between the rails, from which he was unable to extricate it, and, while he was so held, defendant became aware of his situation, and negligently, without warning, ran an engine over him at an unlawful rate of speed, killing him. *Held*, that the complaint alleged acts showing negligence by defendant in constructing and maintaining a defective crossing, in violation of Acts 1895, p. 233, c. 114, Burns' Ann. St. 1908, § 5250, requiring railroads to

properly grade and plank its tracks across sidewalks.—Pittsburg, C., C. & St. L. Ry. Co. v. Reed, 88 N. E. 1080.

The complaint sufficiently showed that defendant's negligence was the proximate cause of intestate's death.—Id.

[yyy] (App. 1909)

In an action for death at a railroad crossing, a complaint, alleging that decedent was traveling westward on the highway, and that defendant at the time negligently ran one of its electric cars over the crossing so that as a consequence, and solely by defendant's negligence, defendant ran its car against decedent's buggy, killing him, sufficiently alleged that decedent was on the highway at the time he was struck.—Indianapolis & Northern Traction Co. v. Newby, 90 N. E. 29.

[z] (Sup. 1909)

In an action for injuries at a railroad crossing at night, an allegation that plaintiff and her companion, in traveling in the direction in which they were going, were compelled to cross the railroad at a specified point was an averment of an after-discovered condition and not an admission that she had notice before the accident that the road she was traveling crossed the railroad tracks, especially in view of a further allegation that neither plaintiff nor her companion had any knowledge of the location of the crossing, and that both were unfamiliar therewith.—Chicago & E. R. Co. v. Fretz, 90 N. E. 76.

Under Burns' Ann. St. 1908, § 362, making contributory negligence a matter of defense, a complaint for injuries in a collision at a railroad crossing was not defective for failure to aver that plaintiff stopped, looked, and listened before attempting to cross the track.—Id.

[zz] (Sup. 1910)

Allegations in a complaint for death at a railway crossing showing obstruction to the sight and hearing of the approach of a train, that the train which struck decedent was running very fast, and that no signals or warning were given does not show that, by using ordinary care, he could have discovered the train's approach.—Cleveland, C., C. & St. L. Ry. Co. v. Starks, 92 N. E. 54.

Allegations that one killed at a railway crossing was traveling along a public highway in a vehicle when struck by a train sufficiently shows that he was an ordinary traveler, for whose safety the railway company was bound to use ordinary care.—Id.

[zzz] (App. 1910)

In an action against a railroad company for negligently causing intestate's death at a highway crossing, the complaint alleged that the night of the accident was dark and stormy, and as intestate drove his team upon the crossing going north, a train going east at a high rate of speed struck the team and wagon, killing intestate and the horses and destroying the wagon solely by reason of being struck by the train:

that decedent was killed and the team and wagon injured solely by the company's negligence; that the engine did not have a headlight, or sound the whistle or ring the bell for the crossing; that intestate could not see the train approaching because of the darkness, and could not hear it because of the wind blowing in the opposite direction, but could have seen it in time to have avoided injury if it had carried a headlight, and could have heard it had the whistle been sounded or the bell continuously rung within 80 rods, and not more than 100 rods, from the crossing; that because of the company's aforesaid negligence in failing to have a headlight and sound the whistle and ring the bell intestate was lured into said place of danger and killed, and the team and wagon destroyed. *Held*, that the complaint sufficiently alleged that defendant's negligence proximately caused the injury.—*Chicago & E. R. Co. v. Ginther*, 90 N. E. 911.

FOR CASES FROM OTHER STATES.

SEE 41 CENT. DIG. R. R. §§ 1107-1112.
See, also, 33 Cyc. pp. 1053-1061.

§ 345. — Issues, proof, and variance.

[a] (App. 1892)

In an action for damages by reason of defendant's engine running into plaintiff's horse and buggy, the complaint alleged that the injury occurred while plaintiff was driving over and across the railroad crossing and the railroad track and switch. *Held*, that evidence that plaintiff had crossed over the crossing to a point on the same where the hind wheels were about six feet beyond the track, when his horse commenced backing, etc., supports the allegation in the complaint, in that defendant's track is not the entire crossing; and the fact that plaintiff's buggy had passed over the north rail is not a contrary showing to the allegation.—*Leavitt v. Terre Haute & I. R. Co.*, 5 Ind. App. 513, 31 N. E. 860, 32 N. E. 866.

In such action, evidence that the engineer, after reversing his engine, caused it to move slowly over the track to the point where the accident occurred, is not a variance from an allegation in the complaint that the engineer reversed his engine and "started" in the direction of the crossing at a rapid rate of speed.—*Id.*

[b] (Sup. 1893)

A complaint, in an action to recover for personal injuries, alleged that at the time of the accident defendant's train was running across a street in a city at a dangerous, reckless, and unusual rate of speed of 50 miles an hour, where a great many persons were passing and crossing. *Held*, that the negligence charged was running the train over a street, where many people were passing and crossing, at a dangerous speed, and that such complaint did not base its right of action on the theory that defendant was not in the habit of running its trains at such a rate of speed.—*Chicago, St. L. & P. R. Co. v. Spilker*, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218.

[c] (App. 1896)

Where, in an action for personal injuries, the gist of the negligence alleged by plaintiff was that defendant did or omitted to do acts which induced plaintiff to go upon a railroad crossing when it was unsafe by reason of an approaching train, and violated the city ordinances as to maintaining gates and concerning the rate of speed at which trains should run, a general verdict for plaintiff is supported by evidence that defendant did not maintain gates at the crossing, and that its failure to do so was negligence.—*Indianapolis Union Ry. Co. v. Neubacuer*, 16 Ind. App. 21, 43 N. E. 576, 44 N. E. 669.

In an action by one injured at a crossing by a train of defendant, where it appears that all the trains at the crossing in question were operated by defendant, and that it was just as responsible for one as the other, the fact that a train other than the one described in the complaint committed the wrongful act is immaterial, if defendant permitted it to be done at all, and the consequences ensued which are charged in the complaint.—*Id.*

[d] (Sup. 1906)

Where plaintiff alleged that a hand car by which his team became frightened was negligently left by defendant's employés on a farm crossing, and the proof disclosed that the car was not within the traveled way of the crossing, the variance was immaterial.—*Baltimore & O. S. W. R. Co. v. Slaughter*, 167 Ind. 330, 79 N. E. 186, 7 L. R. A. (N. S.) 597, 119 Am. St. Rep. 503.

[e] (App. 1909)

In an action for injuries to a horse and wagon at a crossing, plaintiff must aver and prove his freedom from contributory negligence.—*Cleveland, C. C. & St. L. Ry. Co. v. Moore*, 90 N. E. 93.

FOR CASES FROM OTHER STATES.

SEE 41 CENT. DIG. R. R. §§ 1113-1116.
See, also, 33 Cyc. pp. 1061-1065.

§ 346. — Presumptions and burden of proof.

As to ownership and operation of road, see ante, § 270.

Instructions, see post, § 351.

[a] (Sup. 1886)

The fact that a person traveling on a highway comes in collision with a train on a railroad crossing is of itself sufficient to suggest a presumption of contributory negligence against him in a suit for compensation.—*Indiana, B. & W. Ry. Co. v. Greene*, 6 N. E. 603, 106 Ind. 279, 55 Am. Rep. 736.

In an action against a railway company, to recover damages for the death of plaintiff's husband at a railroad crossing, it must be made to appear that the deceased was without contributory negligence; and, where there is no direct evidence, the facts and circumstances must

be such as to at least justify the inference that such was the case.—Id.

[b] Where a person crossing a railroad at a grade crossing is injured by a collision with a train, the fault is *prima facie* his own, and he must affirmatively show that his fault or negligence did not contribute to the injury before he is entitled to recover therefor.—(Sup. 1887) *Indiana, B. & W. Ry. Co. v. Hammock*, 14 N. E. 737, 113 Ind. 1; (1890) *Cincinnati, I., St. L. & C. Ry. Co. v. Howard*, 24 N. E. 892, 124 Ind. 280, 8 L. R. A. 593, 19 Am. St. Rep. 96; (1890) *Louisville, N. A. & C. Ry. Co. v. Stommel*, 126 Ind. 35, 25 N. E. 863; (1895) *Smith v. Wabash R. R. Co.*, 40 N. E. 270, 141 Ind. 92; (1896) *Oleson v. Lake Shore & M. S. Ry. Co.*, 42 N. E. 736, 143 Ind. 405, 32 L. R. A. 149.

[c] (Sup. 1887)

Persons who could have avoided injury at a crossing by exercising the opportunity to look for an approaching train, will be regarded as having made the attempt to cross after having seen the train approach.—*Indiana, B. & W. Ry. Co. v. Hammock*, 14 N. E. 737, 113 Ind. 1.

[d] (Sup. 1890)

The presumption of negligence which prevails where passengers are injured while on the trains of the carrier does not obtain where injuries are received at a railroad crossing.—*Terre Haute & I. R. Co. v. Clem*, 23 N. E. 965, 123 Ind. 15, 7 L. R. A. 588, 18 Am. St. Rep. 303.

[e] (Sup. 1893)

In an action against a railway for injuries sustained by collision at a public crossing, it is not necessary to show that the company had notice of the condition and surroundings of the crossing.—*Chicago, St. L. & P. R. Co. v. Spilker*, 33 N. E. 280, 34 N. E. 218, 134 Ind. 380.

[f] When a traveler on a highway is injured at its intersection with a railroad, by being struck by a train, the fault is *prima facie* his own, and the law assumes that he actually saw what he could have seen had he looked, and heard what he could have heard had he listened.—(Sup. 1895) *Smith v. Wabash R. R. Co.*, 40 N. E. 270, 141 Ind. 92; (App. 1894) *Cincinnati, I., St. L. & C. Ry. Co. v. Grames*, 34 N. E. 613, 37 N. E. 421, 8 Ind. App. 112; (Sup. 1902) *Malott v. Hawkins*, 63 N. E. 308, 159 Ind. 127; (App. 1904) *Pittsburgh, C., C. & St. L. Ry. Co. v. West*, 34 Ind. App. 95, 69 N. E. 1017; (1905) *Southern Ry. Co. v. Davis*, 72 N. E. 1053, 34 Ind. App. 377; (1907) *Baltimore & O. S. W. Ry. Co. v. Rosborough*, 40 Ind. App. 14, 80 N. E. 869.

[g] (App. 1896)

The presumption that one who was hurt at a railroad crossing by a passing train was negligent is overcome by the return of a general verdict, and its approval by the trial court; and if defendant urges that the verdict is wrong, because plaintiff was guilty of contributory neg-

ligence, the burden is on him to establish the assertion.—*Indianapolis Union Ry. Co. v. Neubacher*, 16 Ind. App. 21, 43 N. E. 576, 44 N. E. 669.

[h] (App. 1896)

In an action against a railroad company for injuries occasioned by collision at a street crossing, the plaintiff must allege and prove that the injury was incurred without his own negligence contributing thereto, and he has the burden of showing not only the negligence of defendant, but his own freedom from negligence.—*Lake Shore & M. S. Ry. Co. v. Boyts*, 45 N. E. 812, 16 Ind. App. 640.

[i] (Sup. 1898)

Where a person approaching a railway crossing on a highway can, by looking or listening, see or hear an approaching train in time to avoid injury, in the event he is injured, under such circumstances, by a collision, the law assumes that he neither looked nor listened, or that, if he did either, he did not heed what he saw or heard.—*Cleveland, C., C. & St. L. Ry. Co. v. Miller*, 49 N. E. 445, 149 Ind. 490.

[j] (Sup. 1898)

Where a person is injured by a train at a highway crossing, the fault is *prima facie* his own, and he must show affirmatively that, by diligently listening and looking, he could not have seen or heard the train at any time or place as he approached the crossing, and before too near to it to avoid the accident.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Frazee*, 50 N. E. 576, 150 Ind. 576, 65 Am. St. Rep. 377.

[k] (App. 1902)

A want of knowledge on the part of the railroad of the defective condition of a crossing which it was its duty to maintain is *prima facie* negligence.—*Wabash R. Co. v. De Hart*, 65 N. E. 192, 32 Ind. App. 62.

Evidence of an accident due to the defective condition of a crossing is *prima facie* evidence of negligence in a railroad required to maintain it.—Id.

[l] (App. 1904)

Under *Burns' Rev. St. 1901, § 359a*, providing that the burden of proof of contributory negligence in an action for injuries is on the defendant, an instruction that the law presumes that the injuries to plaintiff's decedent, of which he died, if he died from injuries received by a collision with defendant's engine at a railway crossing, were brought about by his own negligence, was error.—*Nichols v. Baltimore & O. S. W. R. Co.*, 33 Ind. App. 229, 70 N. E. 183, 71 N. E. 170.

No independent presumption of contributory negligence attaches to plaintiff in a crossing case from the mere fact that the injuries occurred at a crossing, which operates in behalf of defendant to establish the fact of contributory negligence, the burden of proof of which is placed on defendant by *Burns' Ann. St. 1901, § 359a*.—Id.

[m] (App. 1908)

Where, in an action for injuries at a railroad crossing, plaintiff's evidence alone shows contributory negligence, there can be no recovery, though the burden of showing contributory negligence is on the defendant.—*Van Winkle v. New York, C. & St. L. R. Co.*, 73 N. E. 157, 34 Ind. App. 476.

[n] (App. 1905)

Under Burns' Ann. St. 1901, § 359a, providing that in actions for personal injuries it shall not be necessary for plaintiff to allege or prove want of contributory negligence, but contributory negligence shall be matter of defense, it is presumed, in an action for injuries caused by collision with a train at a railroad crossing, that the person injured exercised ordinary care, and, if it was necessary for him to do so, stopped, looked, and listened; and the burden of establishing that he did not exercise ordinary care is on the railroad, and so continues throughout the case.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Reed*, 75 N. E. 50, 36 Ind. App. 67.

[o] (Sup. 1906)

Where a complaint against a railroad for injuries to plaintiff at a crossing does not allege that the statutory signals were not given, or that there were obstructions to the sight or hearing, it is presumed the signals were given, and that the track was straight, open, and visible for more than 80 rods in both directions.—*Lake Shore & M. S. Ry. Co. v. Barnes*, 166 Ind. 7, 76 N. E. 629, 3 L. R. A. (N. S.) 778.

[p] (App. 1906)

It is not presumed that the noise made by a moving train is sufficient for an ordinarily prudent person to hear and avoid a collision at a highway crossing.—*New York, C. & St. L. R. Co. v. Robbins*, 38 Ind. App. 172, 76 N. E. 804.

The presumption is that a traveler will not knowingly or voluntarily attempt to cross a railroad in view of imminent danger.—*Id.*

[q] (App. 1908)

If the situation of a traveler on a highway crossing a railroad is such that he could see or hear an approaching train in time to avoid collision, it will be presumed against him either that he did not look or listen for its approach, or that, if he did, he failed to heed what he saw or heard.—*Wamsley v. Cleveland, C., C. & St. L. Ry. Co.*, 41 Ind. App. 147, 82 N. E. 490, 83 N. E. 640.

In an action for injuries in a crossing accident, the burden is on the company to prove that the traveler was negligent in failing to see the approaching train, unless the facts showing such negligence must be proved in order to establish the negligence charged in the complaint.—*Id.*

[r] (App. 1908)

In an action against a railroad for injuries to a pedestrian struck by a train at a railroad

crossing, the burden of proving plaintiff's negligence is, under Acts 1899, p. 58, c. 41, on defendant.—*Lowden v. Pennsylvania Co.*, 41 Ind. App. 614, 82 N. E. 941.

[s] (Sup. 1909)

Since a railroad company, sued for injuries in a collision at a crossing, has under the statute the burden of proving contributory negligence, the inference on that subject which the complaint admits of must be in favor of plaintiff.—*Cleveland, C., C. & St. L. Ry. Co. v. Lynn*, 171 Ind. 589, 85 N. E. 999, 86 N. E. 1017.

[t] (Sup. 1909)

Under Act Feb. 17, 1899 (Acts 1899, p. 58, c. 41), placing upon defendant in personal injury actions the burden of proving contributory negligence, in an action against a railroad company for injuries at a grade crossing from its negligence, plaintiff need not allege and prove his freedom from contributory negligence, that being a matter of defense, unless the complaint affirmatively showed contributory negligence on its face.—*Evansville & T. H. R. Co. v. Berndt*, 172 Ind. 697, 88 N. E. 612.

While the burden was upon the railroad company to prove contributory negligence, in an action for personal injuries at a grade crossing, if plaintiff's negligence affirmatively appeared from the evidence, he could not recover.—*Id.*

[u] (App. 1909)

In an action against a railroad company for injuries at a highway crossing, the burden is on defendant to show contributory negligence; the presumption being that the person injured exercised due care.—*Grand Trunk Western Ry. Co. v. Reynolds*, 90 N. E. 94.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1117-1123.

See, also, 33 Cyc. pp. 1006-1072; note, 4 L. R. A. (N. S.) 344.

§ 347. — Admissibility of evidence.

Admissions as evidence, see EVIDENCE, § 242.

Best and secondary evidence, see EVIDENCE, § 171.

Documentary evidence, see EVIDENCE, § 359.

Habits of person injured, see NEGLIGENCE, § 132.

Negative evidence, see EVIDENCE, § 586.

Opinion evidence, see EVIDENCE, § 471.

Res gestæ, see EVIDENCE, §§ 121-123.

[a] (Super. 1873)

In an action against a railroad company for injuries due to the unsafe condition of a public crossing, evidence as to the custom of railroad companies in constructing street crossings will not preclude an inquiry into the fact whether the particular crossing in controversy was properly constructed and kept in sufficient repair to make a safe passage way over the railroad.—*Hurley v. Jeffersonville, M. & I. R. Co.*, Wils. 295.

[b] (Sup. 1875)

Where a party is killed by an engine in a city, in a suit against the company to recover damages on the ground of negligence in running the engine at too great a speed, an ordinance of the city limiting the speed of trains to six miles an hour within the corporate limits is proper evidence to go to the jury on the question of negligence. Such an ordinance is adopted as a police regulation to secure the safety of persons in the city, and the disregard of the requirement shows a heedless, if not a reckless, spirit, on the part of the engine driver, that renders it highly probable he was unmindful of other precautionary measures that the time, place, and circumstances imperatively demanded.—*St. Louis & S. E. Ry. Co. v. Mathias*, 50 Ind. 65.

[c] (Sup. 1880)

In an action against a railroad company for injuries sustained by being run over at a city crossing, the plaintiff alleged in his complaint, and offered evidence, that the whistle was not sounded as the train approached the crossing. *Held*, that the defendant might produce in evidence a city ordinance prohibiting the use of the whistle.—*Pennsylvania Co. v. Hensil*, 70 Ind. 560, 36 Am. Rep. 188.

[d] (Sup. 1881)

In an action for personal injury sustained by a traveler upon a city street by collision with a railway train at a crossing, evidence of the absence of the flagman customarily stationed there to the plaintiff's knowledge is competent.—*Pittsburgh, C. & St. L. Ry. Co. v. Yundt*, 78 Ind. 373, 41 Am. Rep. 580.

[e] (Sup. 1888)

In an action for injuries caused by horses taking fright at a certain object at a crossing, evidence that other horses had taken fright from the same cause is irrelevant.—*Cleveland, C. & I. Ry. Co. v. Wynant*, 114 Ind. 525, 17 N. E. 118, 5 Am. St. Rep. 644.

[f] (Sup. 1890)

In an action against a railroad company for injury caused by alleged negligence in the construction of its road at a crossing, evidence that after the accident the company changed and repaired its road is inadmissible to show negligence.—*Terre Haute & I. R. Co. v. Clem*, 123 Ind. 15, 23 N. E. 965, 18 Am. St. Rep. 303, 7 L. R. A. 588.

[g] (Sup. 1890)

It is proper to show that no whistle was sounded when the train passed a crossing a mile distant from the one on which the accident occurred; that the person driving plaintiff's buggy was "a safe hand;" and that they were on their way to church when the accident occurred.—*Cincinnati, I., St. L. & C. Ry. Co. v. Howard*, 124 Ind. 280, 24 N. E. 892, 19 Am. St. Rep. 96, 8 L. R. A. 593.

[h] (Sup. 1891)

In an action against a railroad company for negligently blowing the whistle and allow-

ing steam to escape from its engine, whereby plaintiff's horse was frightened, it is proper to show the amount of travel across the railroad at the place of the accident, as bearing on defendant's negligence.—*Indianapolis Union Ry. Co. v. Boettcher*, 131 Ind. 82, 28 N. E. 551.

[i] (Sup. 1893)

In an action against a railroad company for injuries received at a crossing, alleged to be the result of excessive speed in running a train, it is proper to show that during the two or three weeks before the collision the usual speed of the train, while passing the crossing, had been from 40 to 60 miles an hour, that the jury may have some guide in finding the speed of the train when the collision occurred.—*Chicago, St. L. & P. R. Co. v. Spilker*, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218.

[j] (App. 1897)

In an action based on *Horner's Rev. St.* 1897, § 3903 (*Rev. St.* 1894, § 5153), requiring a railroad company constructing its road across a highway to restore it to its former state, or leave it in a safe and secure condition, to recover for personal injuries alleged to have been caused by the defective condition of the highway, evidence of proceedings of the county commissioners relative to the construction of a retaining wall near the highway, which were taken at plaintiff's instance, was admissible to show his knowledge of the condition of the highway.—*Seybold v. Terre Haute & I. R. Co.*, 18 Ind. App. 367, 46 N. E. 1054.

[k] (App. 1902)

In an action for injuries sustained by being struck by an engine, the record of a yard clerk, who claimed that it was a full and complete record of the number of cars on the switch track, was properly excluded.—*Cleveland, C. & St. L. Ry. Co. v. Coffman*, 64 N. E. 233, 66 N. E. 179, 30 Ind. App. 462.

In an action for injuries sustained by being struck by an engine backing, evidence that the defendant had maintained a gong at the crossing to give warning, and that it had allowed the same to be out of repair, was admissible to show negligence, although the defendant was not required by law to maintain such gong.—*Id.*

[l] (App. 1906)

Where decedent was killed at a highway crossing by an interurban electric car, and there was no claim that decedent did not know the signal for highway crossings of either interurban or steam railroads when he heard them, a question whether there was a customary signal in use by steam railroads on trains approaching public highway crossings was irrelevant.—*Indianapolis & Northern Traction Co. v. Newby*, 90 N. E. 29.

[m] (App. 1910)

While ordinarily a railroad company's negligent acts or omissions cannot determine whether a traveler was negligent in crossing the track

at a crossing, the showing of negligent omission by the company of any precautions upon which the traveler was entitled to rely may aid in determining whether the latter exercised due care; and, where it appeared that, though the country around the crossing was open, the night was dark and stormy, and the wind blew in a direction to carry the sound away from the traveler, the failure to give the statutory signals and to carry a headlight could be considered by the jury in determining whether the traveler acted with ordinary prudence in approaching and crossing the track.—*Chicago & E. R. Co. v. Ginther*, 90 N. E. 911.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1124-1137.

See, also, 33 Cyc. pp. 1074-1087.

§ 348. — Sufficiency of evidence.

[a] (Sup. 1832)

In an action against a railroad company for injuries to plaintiff's son caused by a collision at a highway crossing, the evidence considered, and *held* insufficient to show that such son was not guilty of contributory negligence.—*Indianapolis & V. R. Co. v. McLin*, 82 Ind. 435.

[b] (Sup. 1832)

A railroad was on a grade above the highway. On either side of the crossing there was a drop of 15 to 18 inches from the track to the grade of the street. Plaintiff, a girl of 12 years, was driving a docile team of two horses, which she was accustomed to drive. The horses had been startled by a passing train, and were crossing the track quite rapidly. Plaintiff testified that, as she went up the grade to the railroad, she placed her foot on the brake, and would have controlled them had it been level, but as the front wheels of the wagon dropped from the track it threw her out. *Held*, that the evidence sustained a verdict for plaintiff.—*Louisville, E. & St. L. R. Co. v. Pritchard*, 131 Ind. 564, 31 N. E. 358.

[c] (Sup. 1893)

In an action against a railroad company for personal injuries caused by horses taking fright at a box car standing on the highway at a crossing, the complaint alleged that defendant's negligence consisted in leaving its car on the crossing. Plaintiff testified that the horses got scared at the car, and that she had no recollection of hearing any noise about the car, or testifying on a former trial that the horses got scared at a noise in or about the car. Her husband testified that the horses got scared both at the car and the noise, and admitted that on the former trial he testified that they were scared at the noise in or about the car. *Held*, that a verdict for plaintiff was supported by the evidence.—*Cleveland, C., C. & I. Ry. Co. v. Wynant*, 134 Ind. 681, 34 N. E. 569.

[d] (App. 1893)

In an action for damages at a railway crossing it appeared that plaintiff, when ap-

proaching the crossing, waited for a freight train to pass, and, after looking, and neither seeing nor hearing any train, he started up the grade to the crossing, and when on top of the grade saw a passenger train approaching at the rate of 40 miles an hour; that no signals were given; that plaintiff's horse was entering on the track, but, on account of the roughness of the crossing, plaintiff thought he could more safely go forward than attempt to back out, and so whipped up his horse, and the rear of the wagon was struck by a car. Defendant's civil engineer and others testified that from the slope of the grade a train was visible 1,405 feet, but plaintiff testified to the presence of trees, which obstructed the view of a train until it came around a bend 700 feet distant. *Held*, that a finding of the jury that plaintiff was not guilty of contributory negligence would not be disturbed.—*Louisville, E. & St. L. Consolidated R. Co. v. Kelly*, 6 Ind. App. 545, 33 N. E. 1103.

[e] (Sup. 1896)

In an action for injuries at a crossing it appeared that plaintiff was familiar with the locality, and that he had good sight and hearing. Plaintiff testified that before going on the track he stopped, looked, and listened; that he did not see any train, or hear any signals; that his view was unobstructed for 200 feet. His own witnesses testified that the engine was moving at the rate of from 25 to 35 miles per hour, and that they heard it as it passed. Many witnesses testified for defendant that the speed was about 15 miles per hour, and that the signals were given. *Held*, that plaintiff had failed to establish his freedom from contributory negligence.—*Lake Erie & W. R. Co. v. Stick*, 143 Ind. 449, 41 N. E. 365.

[f] (Sup. 1896)

A judgment against a railway company for death of plaintiff's decedent, in a collision at a crossing, will be reversed where the only evidence of the care exercised by decedent was the testimony of a witness that he saw decedent when 27 feet from the track, driving in a slow walk; that, at the time, he was looking in the opposite direction from which the train was approaching; that he continued to so look up to the time he was struck by the train, unless for a short time when his view of decedent was obstructed by a building.—*Cincinnati, H. & I. R. Co. v. Duncan*, 143 Ind. 524, 42 N. E. 37.

[g] (App. 1898)

When the hand car first approached the crossing, a horse being driven on the highway was in a badly frightened condition. One of the operators of the car testified that he did not know, and another that he did not think, that the horse was scared at the car, while the others gave no testimony on that point. *Held*, there was nothing to support a finding that the operators knew that the car caused the fright.—*Lake Erie & W. R. Co. v. Juday*, 49 N. E. 843, 19 Ind. App. 486.

[h] (Sup. 1899)

In an action against a railroad company to recover damages for injuries received at a crossing, the complaint alleged that the crossing was on a 10-foot embankment, and that the highway, near the intersection, was so fenced and located that it was impossible to turn a wagon drawn by a team; that the view was obstructed, and a traveler, coming from the direction in which plaintiff was, could not see a train moving westward until within 200 feet of the crossing; that plaintiff looked and listened from advantageous places, and stopped his team, stood up in his wagon, and looked up and down the track, when within 35 feet of it, and neither saw nor heard anything; that a train could not be seen east of the crossing further than 400 feet; that plaintiff started across the track, and at that moment a wild passenger train coming from the east appeared in sight, not more than 200 feet away, running down a steep grade at the rate of 80 miles an hour, and then for the first time the locomotive whistle was sounded and the bell rung, but plaintiff could not stop his team and turn around for want of time and room, and could not back it, and his only chance of escape was by crossing, which he attempted to do, whereupon he was struck before he could get out of the way; and that plaintiff was without fault. It was also alleged that plaintiff's team, when on the crossing, was discovered by the fireman on the locomotive, and that he called the attention of the engineer to it, but that the engineer failed to stop or check the speed of the train, though he could have done so, and thereby averted the collision. *Held*, that it is sufficiently shown that the failure to give the statutory signals was the proximate cause of the accident.—*Baltimore & O. S. W. Ry. Co. v. Young*, 54 N. E. 791, 153 Ind. 163.

[i] (App. 1900)

In an action to recover for the alleged willful and wanton killing of plaintiff's son at a crossing, the jury returned a general verdict for plaintiff, and specially found that the train was running 15 miles an hour in the evening, in violation of a city ordinance, without headlight or lookout; that the bell was not rung nor the whistle sounded before reaching the crossing, and, though the engineer did not see deceased before the engine struck him, he might have seen him when within 30 feet of the cab, and could not then have avoided the injury; and that the engineer did not know that deceased was on the track or in dangerous proximity thereto before he was killed. *Held*, that such acts did not show a willful and wanton killing of deceased, and the court properly rendered judgment for defendant, notwithstanding the general verdict for plaintiff.—*Ilf v. Chicago, I. & L. R. Co.*, 56 N. E. 932, 24 Ind. App. 492, 79 Am. St. Rep. 274.

[j] (App. 1902)

Plaintiff testified that he was struck by an engine backing at 15 miles an hour; that before crossing the track he stopped twice, and

listened for the approach of a train. The evidence showed that the view of the track was unobstructed for some distance. *Held*, that plaintiff's testimony was not sufficient to prove that he was free from contributory negligence, as, if he stopped and listened, he must have heard the engine.—*Cleveland, C., C. & St. L. Ry. Co. v. Coffman*, 64 N. E. 233, 68 N. E. 179, 30 Ind. App. 462.

[k] (Sup. 1903)

Evidence examined in an action against a railway company for injuries received by being struck by a train while crossing the track, and *held* to support a judgment for plaintiff.—*Cleveland, C., C. & St. L. Ry. Co. v. Stewart*, 68 N. E. 170, 161 Ind. 242.

[l] (App. 1904)

In an action against a railroad company for injuries caused by a collision of defendant's cars with plaintiff's team and wagon at a crossing, the evidence considered, and *held* not to show that the railroad company was guilty of willfulness or wantonness.—*Baltimore & O. S. W. R. Co. v. Reynolds*, 71 N. E. 250, 33 Ind. App. 219.

[m] (App. 1904)

That a collision occurred at a railway crossing between a train and a traveler on the highway does not conclusively show that he did not take sufficient precaution.—*Chicago, I. & L. Ry. Co. v. Turner*, 69 N. E. 484, 33 Ind. App. 264.

[n] (App. 1905)

Evidence in an action for injuries at a railroad crossing *held* to show plaintiff guilty of contributory negligence.—*Southern Ry. Co. v. Davis*, 72 N. E. 1053, 34 Ind. App. 377.

[o] (App. 1905)

In an action against a railroad for negligently causing the death of plaintiff's decedent while attempting to drive over a crossing, the fact that from certain points in the highway defendant's road could be seen for certain distances did not sufficiently show that the approaching train could have been seen by decedent had she looked for it, so as to warrant the disturbing of a verdict in plaintiff's favor on the question of contributory negligence.—*New York, C. & St. L. R. Co. v. Robbins*, 76 N. E. 804, 38 Ind. App. 172.

[p] (Sup. 1906)

That the statutory signals were given at a railroad crossing is not conclusive that the company is not guilty of negligence toward a person injured there.—*Lake Shore & M. S. Ry. Co. v. Barnes*, 166 Ind. 7, 76 N. E. 629, 3 L. R. A. (N. S.) 778.

[q] (App. 1907)

In an action for injuries at a crossing, evidence examined, and *held* sufficient to sustain the finding that plaintiff was not guilty of contributory negligence.—*Baltimore & O. S. W. R. Co. v. Rosborough*, 40 Ind. App. 14, 80 N. E. 869.

[r] (App. 1907)

Proof that a child 10 years old, killed by a train at a crossing, failed to stop and look when between two tracks, is not sufficient to overthrow a general verdict for plaintiff suing for his death.—*Baltimore & O. S. W. R. Co. v. Hickman*, 40 Ind. App. 315, 81 N. E. 1086.

[s] (App. 1908)

Evidence that defendant operated its train 40 to 50 miles per hour over a city street crossing at which intestate was killed, in violation of a four-mile speed ordinance, *held* to warrant a finding that such negligence was the proximate cause of intestate's death.—*Wamsley v. Cleveland, C. & St. L. Ry. Co.*, 41 Ind. App. 147, 82 N. E. 490, 83 N. E. 640.

Proof of the surroundings of a railroad track at the time of the trial is not conclusive of its surroundings at the time the injuries were received.—*Id.*

[t] (App. 1908)

In an action for personal injuries at a railroad crossing, it is not error to refuse to instruct that, the credibility and veracity of the witnesses on either hand being equal, positive evidence that certain signals were given, and that certain signals were heard, is of greater weight than the mere negative testimony that said signals were not heard.—*Cleveland, C. & St. L. Ry. Co. v. Wuest*, 41 Ind. App. 210, 83 N. E. 620; *Id.*, 41 Ind. App. 711, 84 N. E. 1123.

[u] (App. 1908)

In an action against a railroad company for injuries caused by the fright of plaintiff's horse at a crossing, the evidence *held* sufficient to warrant an inference of negligence by the company.—*Vandalia R. Co. v. McMains*, 42 Ind. App. 532, 85 N. E. 1038.

In an action against a railroad company for frightening a horse at a crossing by blowing off steam, negligence may be imputed to the company, in the absence of express testimony that the steam was unnecessarily emitted; the place, the length and character of the train, its distance from the team and the crossing, the purpose and use of steam cocks, and all other circumstances, may be considered by the jury, in the light of experience, in determining whether the company was negligent.—*Id.*

[v] (Sup. 1909)

The burden of proving contributory negligence being upon the railroad company, in an action against it for injuries claimed to have been caused at a street crossing by its violation of an ordinance requiring the gates to be closed when trains were passing, where there was no testimony upon the question of negligence, plaintiff was entitled to recover upon his *prima facie* showing of negligence in violating the ordinance.—*Evansville & T. H. R. Co. v. Berndt*, 172 Ind. 697, 88 N. E. 612.

In an action against a railroad company for personal injuries at a grade crossing be-

cause of its failure to close the crossing gates when a train was approaching, evidence *held* sufficient to sustain a verdict for plaintiff.—*Id.*

[w] (App. 1909)

In an action for intestate's death by being struck by a train at a highway crossing, evidence *held* to sustain a finding that the statutory crossing signals were not given.—*Grand Trunk Western Ry. Co. v. Reynolds*, 90 N. E. 94.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1138-1150.

See, also, 33 Cyc. pp. 1087-1095.

§ 350. — Questions for jury.

Instructions invading province of jury, see TRIAL, § 194.

[a] (Sup. 1873)

Whether in a given case ordinary care requires the blowing of the whistle or the ringing of the bell of a locomotive on approaching a highway crossing is a question for the jury.—*Indianapolis, C. & L. R. Co. v. Hamilton*, 44 Ind. 76.

[b] (Sup. 1881)

Whether it is the duty of the driver of a team, approaching a railroad crossing, to leave his team and go upon the track to see that there is no danger, before crossing, is a question to be determined by the jury in the light of all the attendant circumstances.—*Pittsburgh, C. & St. L. Ry. Co. v. Wright*, 80 Ind. 236.

[c] (Sup. 1886)

It is proper to submit to the jury the question whether one who failed to look and listen before crossing a railroad track was, under all the circumstances, guilty of contributory negligence in failing to take such precaution, where it appeared that he was struck by a train gravitating down a grade without any engine attached; that no signal was given of its approach; that the view was obstructed; and that his attention may have been diverted by an engine which preceded the cars a short distance, whose bell was rung and the whistle sounded as it passed.—*Chicago & E. I. R. Co. v. Hodges*, 105 Ind. 398, 7 N. E. 801.

[d] (Sup. 1891)

Plaintiff's intestate was killed by a train while driving across defendant's track at a public crossing. There were six tracks, and the intestate drove his team, which was gentle, and under his control, at a walk upon the crossing without perceiving any approaching train, though he looked and listened, the view being obscured by cars and buildings. While he was crossing, some men signaled him to stop, but he, misunderstanding the signal, started his team at a trot. They became unmanageable, on seeing the approaching train, and he was run over and killed. *Held*, that the question of contributory negligence was for the jury.—*Baltimore & O. & C. R. Co. v. Walborn*, 127 Ind. 142, 26 N. E. 207.

[e] (Sup. 1891)

In an action by the father against a railroad company for the negligent killing of his seven-year old daughter it appeared that deceased, with other little children, was returning from school along the usual street, which was crossed by defendant's tracks; that they waited for a freight train on the north track to pass, after which deceased started to cross, and was run over by a train backing up at the rate of seven miles an hour on the south track. The latter train had been hidden by the first train, and there was no signal given, except by the engine, which was at the other end, a distance of 300 feet. *Held*, that the court properly refused to direct a verdict for defendant.—*Louisville, N. A. & C. Ry. Co. v. Rush*, 127 Ind. 545, 26 N. E. 1010.

[f] (Sup. 1892)

Defendant's railroad, running northeast, crossed a street, running east, at acute angles. Plaintiff, a woman 40 years old, with sight and hearing unimpaired, approached the crossing, of four tracks, from the east. When 80 feet from the "down main" track, where she could see 800 feet up the tracks she looked and saw no train. At 37 feet from the "down main" track, where she could see 400 feet up the tracks, she looked again, and saw no train. She then looked to the southwest, and in crossing the "down main" track was struck by a passenger engine and cars from the northeast, moving at the rate of 20 miles an hour, in violation of a 4-mile ordinance, and ringing no bell. A freight train, with bell ringing, and steam escaping, had just passed. *Held*, plaintiff having a right to rely on defendant's compliance with the ordinance, and the accident having been probably caused by its violation, that the court would not say she was guilty of contributory negligence.—*Cleveland, C., C. & I. Ry. Co. v. Harrington*, 131 Ind. 426, 30 N. E. 37.

[g] (App. 1892)

Whether it is negligence to detach cars from a train, and send them along the track, and over a highway crossing, without an engine attached, is generally a question for the jury.—*Ohio & M. Ry. Co. v. McDaniel*, 5 Ind. App. 108, 31 N. E. 836.

[h] (App. 1892)

In an action for injuries received at a railroad crossing, it appeared that plaintiff's horse became frightened, and backed on defendant's track at a crossing at the same time that an engine of defendant, about 150 feet away, began approaching, backing towards the crossing, and that plaintiff, by his voice and violent gestures, tried to attract the attention of the engineer, but was unable to do so. *Held*, that the question of defendant's negligence should have been submitted to the jury.—*Leavitt v. Terre Haute & I. R. Co.*, 5 Ind. App. 513, 31 N. E. 860, 32 N. E. 866.

[i] (Sup. 1893)

In an action against a railroad company for injuries received at a crossing, it appeared that there were a number of tracks crossing the street, and that as plaintiff was crossing after the passing of a train on one track he was struck by a car on another track, which was backing up from the opposite direction. Plaintiff testified that it was very dark at the time of the accident, and that before the passing of the train for which he waited he looked for the approach of other trains, but saw none; that as the train passed he saw the gate on the opposite side of the crossing open, and undertook to cross; that as the train passed he looked for other trains, but saw none until he was struck by the car; that the car was running "pretty fast." *Held*, that it was error to direct a verdict for defendant on the theory that plaintiff was guilty of gross carelessness contributing to the injury, as that question was for the jury.—*Neubacher v. Indianapolis Union Ry. Co.*, 134 Ind. 25, 33 N. E. 798.

[j] (Sup. 1893)

The view of defendant's tracks in a town being obstructed until within 12 feet of the crossing, and further obstructed by a box car standing on a side track partly on the crossing, the question of plaintiff's negligence in not stopping within the 12 feet, where he testified that he stopped and listened when 60 feet from the crossing, and continued to look and listen until he was struck, is for the jury.—*Cincinnati, I., St. L. & C. Ry. Co. v. Grames*, 136 Ind. 39, 34 N. E. 714.

[k] (App. 1893)

In an action against a railroad company and a city for injuries through falling down an embankment at the intersection of a railroad track with a city street, where plaintiff testifies that as she walked along the crossing she did not look where she was putting her feet, the question of her negligence was for the jury.—*Cincinnati, H. & I. R. Co. v. Claire*, 6 Ind. App. 390, 33 N. E. 918.

In an action against a railroad company and a city for injuries through falling down an embankment at the intersection of a railroad track with a city street, the complaint alleged that the railroad company, under an ordinance, raised its track, which had for years been on a level with the street, three feet above the sidewalk; that defendants placed wooden steps from the track to the sidewalk, unprotected, and without any light to reveal their location in the nighttime, and left the sidewalk for a year, when plaintiff, in the nighttime, not knowing of the change of grade, fell down the embankment at the steps, and was seriously injured. *Held*, that the court properly instructed the jury that they must determine whether it was negligence to raise the grade, put in the steps at that particular place, and leave them unprotected by rails.—*Id.*

[l] (App. 1893)

Plaintiff, approaching a railroad crossing, listened for a train which he expected, and after it had passed, while he was 100 feet from the track, he drove forward, without looking in the direction from which the train had come until he was within 10 feet of the track, though he could have seen along the track when 35 feet from it. *Held*, in an action for injury from a train running 12 seconds behind the first, at 15 to 20 miles an hour, without any signal, that plaintiff's failure to look was not negligence per se.—*Grand Rapids & I. R. Co. v. Cox*, 8 Ind. App. 29, 35 N. E. 183.

[m] (App. 1896)

While one about to pass over several parallel railroad tracks must look in both directions, and listen for the approach of trains from either side, whether, if delayed by the approach of a train which, while passing, and afterwards, shut out the view of a train approaching from the opposite direction on another track, a failure to wait till that obstacle to vision was entirely removed was negligence, is for the jury.—*Indianapolis Union Ry. Co. v. Neubucher*, 16 Ind. App. 21, 43 N. E. 576, 44 N. E. 669.

[n] (App. 1898)

In an action against a railroad company for personal injuries received at a crossing, there was evidence that the train was running 35 miles an hour, and gave no warning; that plaintiff stopped and listened 300 and 150 feet from the crossing, and heard nothing; that when within 50 feet, and as soon as she could look both ways, she did so, looking in the wrong direction first, and, when she looked in the right direction, the train was on her; that the view was obstructed by a cut up to the right of way in the direction from which the train was coming; that the wind was blowing so as to carry the noise of the train away from plaintiff; that, if plaintiff had stopped at any point between the beginning of the cut and the crossing, she could not have heard the train. After plaintiff stopped the last time, she started her horse on a trot. *Held*, that it could not be said, as a matter of law, that plaintiff was guilty of contributory negligence.—*Louisville & N. R. Co. v. Williams*, 51 N. E. 128, 20 Ind. App. 576.

[o] (Sup. 1900)

In an action against a railroad company for injuries to a child nine years of age at a crossing, it could not be said, as a matter of law, that his age established that he was capable or incapable of negligence; the question being one of fact for the jury.—*Cleveland, C., C. & St. L. R. Co. v. Klee*, 56 N. E. 234, 154 Ind. 430.

[p] (App. 1900)

Plaintiff's team was struck and killed by defendant's train while he was attempting to drive over a crossing. Along on the track, and about 15 to 20 feet from it, were several buildings which obstructed the view for some dis-

tance in the direction from which the train was coming, running at a high rate of speed. Plaintiff stopped about 15 steps from the track to allow the parties riding with him to fix their seats, and he looked and listened, but could not hear the train. The view was obstructed at this point. He drove on a walk till his horses reached the track, at the time looking in the opposite direction from the way the train was coming; and his fellow passengers, looking the other way, saw the train just about the time it struck them. Plaintiff attempted to start his team, but was prevented by the party riding with him. There were no signals of the train's approach until almost simultaneous with the accident. *Held*, that it could not be determined, as a matter of law, that the evidence was not sufficient to sustain a finding that plaintiff was exercising due care.—*Peirce v. Ray*, 56 N. E. 776, 24 Ind. App. 302.

[q] Whether a traveler was guilty of contributory negligence at a railroad crossing *held* a question for the jury.—(App. 1900) *Pittsburgh, C., C. & St. L. Ry. Co. v. Carlson*, 56 N. E. 251, 24 Ind. App. 559; (Sup. 1905) *Greenwaldt v. Lake Shore & M. S. Ry. Co.*, 74 N. E. 1081, 165 Ind. 219; (App. 1905) *Pennsylvania Co. v. Fertig*, 34 Ind. App. 459, 70 N. E. 834; (1905) *New York, C. & St. L. R. Co. v. Robbins*, 76 N. E. 804, 38 Ind. App. 172; (1907) *Cleveland, C., C. & St. L. Ry. Co. v. Schneider*, 80 N. E. 985, 40 Ind. App. 38; (1908) *Lowden v. Pennsylvania Co.*, 41 Ind. App. 614, 82 N. E. 941; (1900) *Pittsburgh, C., C. & St. L. Ry. Co. v. Lynch*, 43 Ind. App. 177, 87 N. E. 40; (1909) *Grand Trunk Western Ry. Co. v. Reynolds*, 90 N. E. 94.

[r] (App. 1901)

While plaintiff was driving on a highway across defendant's tracks, his wagon was struck by a train running at the rate of 40 or 50 miles an hour. The crossing was in a cut. The wagon was covered, so that plaintiff could see in the direction of the approaching train only by rising to his feet and protruding his head beyond the cover. He stopped 60 feet from the track, and when 25 feet from the track he checked his team, each time carefully looking and listening for the train, but did not see or hear it. Without further looking he then drove on the track, and before the hind wheels of the wagon left the track it was struck by the train. No signals of the train's approach were given. *Held*, that the question of plaintiff's contributory negligence was for the jury, since the neglect of the defendant to give the proper signals of the approach of the train might have the effect of throwing an ordinarily prudent person off his guard.—*Wabash R. Co. v. Bidle*, 59 N. E. 284, 60 N. E. 12, 27 Ind. App. 161.

[rr] (Sup. 1902)

The evidence in an action for death at a crossing, considered in connection with *Burns' Rev. St. 1901*, § 359a (*Horner's Rev. St. 1901*).

§ 284a), fixing on the defendant the burden of proving contributory negligence, *held* not to show, as a matter of law, that decedent was guilty of contributory negligence.—*Malott v. Hawkins*, 63 N. E. 308, 159 Ind. 127.

[s] (App. 1904)

In an action against a railroad company for injuries caused by a collision at a crossing, where there was no conflict in the evidence relative to the question of willfulness, its decision was for the court.—*Baltimore & O. S. W. R. Co. v. Reynolds*, 71 N. E. 250, 33 Ind. App. 219.

[ss] (App. 1904)

Where a mule team which deceased was driving became frightened and unmanageable as they approached a railway crossing, whether the engineer was justified in sounding an alarm signal, tending to increase the fright of the team, after the engineer had discovered them, was for the jury.—*Nichols v. Baltimore & O. S. W. R. Co.*, 33 Ind. App. 229, 70 N. E. 183, 71 N. E. 170.

[t] (App. 1904)

An instruction, in an action for death in a railway crossing collision, that, if the fog was so dense as to prevent the decedent from seeing or hearing the train from his place on the wagon in time to avoid injury, it was his duty to get off, and go in advance of his team, and if he failed to do so there could be no recovery, was properly refused.—*Chicago, I. & L. Ry. Co. v. Turner*, 69 N. E. 484, 33 Ind. App. 264.

The precise number of feet from a railway crossing a traveler on the highway should stop in the exercise of reasonable care cannot be stated as a matter of law, but is for the jury to determine.—*Id.*

[tt] (App. 1904)

In an action against a railroad for injuries caused to a boy about seven years old by backing a train of cars on him as he was crossing a street, the question whether he was guilty of contributory negligence in walking too close to the train is for the jury.—*Pittsburgh, C. & St. L. Ry. Co. v. McNeil*, 69 N. E. 471, 34 Ind. App. 310.

[u] (Sup. 1905)

Where, on an issue as to the contributory negligence of one injured in a railroad crossing accident, the facts are of a character to be reasonably subject to more than one inference or conclusion, the question is one for the jury.—*Greenawaldt v. Lake Shore & M. S. Ry. Co.*, 74 N. E. 1081, 165 Ind. 219.

[uu] (App. 1905)

That a railroad track was straight and the injury occurred in the daytime is not conclusive as to plaintiff's contributory negligence in attempting to cross, since the passage of two passenger trains at the crossing where the injury occurred might have been unusual, or plaintiff might have been acquainted with the train schedule and the west-bound train was

not on time.—*Smith v. Michigan Cent. R. Co.*, 35 Ind. App. 188, 73 N. E. 928.

The ringing of a signal bell at a railroad street crossing is not conclusive as to contributory negligence of a pedestrian killed thereat, where two trains were running in opposite directions, and where, in passing to the rear of one, she was struck by the other.—*Id.*

[v] (Sup. 1906)

To run a train over an ordinary country highway crossing at the rate of 50 miles an hour is not negligence per se.—*Lake Shore & M. S. Ry. Co. v. Barnes*, 166 Ind. 7, 76 N. E. 629, 3 L. R. A. (N. S.) 778.

[vv] (App. 1906)

Where, in an action for death in a crossing accident, it appeared that there was an automatic alarm bell at the crossing and that it did not ring, such fact did not, as a matter of law, give intestate the right to presume that the way was clear; but it was a circumstance to be considered by the jury in determining the question of due care.—*Southern Indiana Ry. Co. v. Corps*, 76 N. E. 902, 37 Ind. App. 586.

[w] (App. 1906)

Whether a wife riding in a wagon with her husband, who was driving, was guilty of contributory negligence in crossing a railroad after dark, when she could have seen an approaching train only a portion of the time, and might, or might not, have heard it by stopping and listening, is a question for the jury.—*New York, C. & St. L. R. Co. v. Robbins*, 38 Ind. App. 172, 76 N. E. 804.

[ww] (App. 1907)

In an action for injuries to a traveler on a highway by a defect in defendant's highway railroad crossing, of which defect he had no knowledge, evidence *held* to require submission of the question of plaintiff's negligence to the jury.—*Chicago & E. I. R. Co. v. Gallion*, 39 Ind. App. 604, 80 N. E. 547.

[x] (App. 1907)

Whether a child 10 years old, killed by a train at a crossing, was guilty of contributory negligence, *held* for the jury.—*Baltimore & O. S. W. R. Co. v. Hickman*, 40 Ind. App. 315, 81 N. E. 1086.

[xx] (App. 1908)

In an action for death of plaintiff's intestate at a city railroad crossing, defendant proved that at the time of the trial a person walking along the street from the direction intestate approached could have seen the train 56 feet from the track, but the evidence did not disclose the condition of the view at the time of the accident, nor show what, if any, obstructions to such view existed at that time, and there was no evidence that, if intestate heard the train whistle, she would have known that it was an approaching train on defendant's road. *Held*, that she was not shown to have been negligent as a matter of law.—*Wamsley v.*

Cleveland, C., C. & St. L. Ry. Co., 41 Ind. App. 147, 82 N. E. 490, 83 N. E. 640.

[y] (App. 1908)

The failure of a boy driving a wagon over an elevated railroad crossing to see a train running at the rate of 75 miles an hour, where he had an unobstructed view of the track, after he came within 25 feet thereof, does not render him negligent as a matter of law, especially where he stopped, looked, and listened 50 feet from the crossing.—Wendel v. Cleveland, C., C. & St. L. Ry. Co., 41 Ind. App. 460, 82 N. E. 460.

[yy] (Sup. 1909)

While a traveler on an unknown highway on a dark, rainy night in an inclosed vehicle is required to use more diligence than he would be required to use in an open vehicle in broad daylight, in approaching a railroad crossing, yet whether plaintiff was negligent in approaching a crossing under such circumstances at the time she was struck and injured by a train, due to the railroad company's negligence in driving the train over the crossing without signal, and with the steam cut off, was for the jury.—Chicago & E. R. Co. v. Fretz, 90 N. E. 70.

[z] (App. 1909)

The maintenance by a railroad of a shed and pile of ties on its right of way near a crossing, thereby obstructing the view of approaching trains, was not in itself negligence as a matter of law.—Chicago, I. & L. Ry. Co. v. Stepp, 88 N. E. 343.

[zz] (App. 1909)

In an action for death of a traveler at an interurban railroad crossing, whether defendant was negligent, and whether decedent was guilty of contributory negligence, *held* for the jury.—Indianapolis & Northern Traction Co. v. Newby, 90 N. E. 29.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1152-1192.

See, also, 33 Cyc. pp. 1097-1129.

§ 351. — Instructions.

Construction and effect of charge as a whole, see TRIAL, § 295.

Error in instructions cured by withdrawal or giving other instructions, see TRIAL, § 296.

Form, requisites, and sufficiency of instructions in general, see TRIAL, § 233.

Inconsistent or contradictory instructions, see TRIAL, § 243.

Instructions as to credibility of witnesses, see TRIAL, § 236.

Instructions invading province of jury, see TRIAL, § 194.

Requests for instructions, see TRIAL, § 260.

[a] (Sup. 1870)

In an action against a railway company for the death of plaintiff's intestate at a highway crossing, alleged to have been due to the negligence of the defendant, where it appeared

that at the time the accident occurred the train was running at about 50 miles an hour, an instruction that it was the duty of the railway company to exercise care in running the train at a reasonable rate of speed, such a rate of speed as would enable a prudent man exercising ordinary care to avoid collision, was erroneous.—Bellefontaine Ry. Co. v. Hunter, 33 Ind. 335, 5 Am. Rep. 201.

[b] (Sup. 1882)

Where, in an action against a railroad for personal injuries received by plaintiff, while attempting to cross a bridge over defendant's track through striking a hand car alleged to have been negligently left by defendant on the bridge, the court charged that the burden of proving by a preponderance of evidence that defendant put the car on the bridge was on plaintiff, it was not error to refuse an instruction that, if the proof was equally balanced on that question, the finding should be for defendant.—Pittsburgh, C. & St. L. Ry. Co. v. Sponier, 85 Ind. 163.

[c] (Sup. 1889)

In an action against a railroad company for personal injuries received at a crossing, though an instruction follows the language of Rev. St. § 4020, requiring railroad companies to have upon their locomotives such whistles and bells as "are now in use or may hereafter be used by well-managed railroads," the jury can only understand that defendant was bound to furnish such whistles and bells as were in use at that time; and the words relating to the future are not prejudicial.—Cleveland, C., C. & I. Ry. Co. v. Ashbury, 120 Ind. 289, 22 N. E. 140.

[d] (Sup. 1890)

In an action against a railroad for injuries received in a crossing accident, a charge that, if the whistle was not sounded nor the bell rung, it was a circumstance tending to show want of contributory negligence, and that the jury might find therefrom that it was sufficient to establish want of contributory negligence, as it was for them to determine as to the weight of the evidence, was erroneous.—Cincinnati, I. St. L. & C. Ry. Co. v. Howard, 24 N. E. 892, 124 Ind. 280, 8 L. R. A. 593, 19 Am. St. Rep. 96.

[e] (Sup. 1892)

In an action against a railroad company to recover damages for personal injuries at defendant's crossing, the court instructed the jury that it was defendant's duty to exercise "a high degree of care" in approaching the crossing. *Held*, the court having explained to the jury what amount of care was required, that they could not be misled by the instruction.—Ohio & M. Ry. Co. v. Buck, 130 Ind. 300, 30 N. E. 19.

[f] (Sup. 1892)

In an action against a railroad for injury in a crossing accident while plaintiff was driving his horse and wagon along a street where

the approaches to the defendant's track were steep and narrow, and where passengers on the street could with difficulty see the approaching trains until they reached the top of an embankment at the crossing, a charge that if the jury should find that at the time of or just preceding the injury plaintiff approached the crossing and could by looking in the proper direction have seen the train coming toward him in time to have avoided the injury, even though the engineer gave no warning of his approach by ringing the engine bell or otherwise, and though the train was running 15 or 20 miles an hour, still the verdict must be for the defendant, "for, if you find under such circumstances that plaintiff omitted to look for the train, he was guilty of such negligence as deprives him of the right to recover," was pertinent to the theory of the defense that plaintiff might by looking have seen the approaching train and was not objectionable because of the omission of the elements of listening which were fully treated in other instructions.—*Pennsylvania Co. v. Horton*, 31 N. E. 45, 132 Ind. 189.

[g] (Sup. 1893)

In an action against a railroad company for injuries received at a crossing, a request to charge that plaintiff, to avoid danger, should "exercise her senses as fully as possible," was properly changed by the court to "exercise her senses as an ordinarily prudent and careful person.—*Chicago, St. L. & P. R. Co. v. Spilker*, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218.

A charge that if plaintiff had any notice of the approach of the train, and heedlessly drove on the track, without seeing if she could cross in safety, then she could not recover, unless the injuries were purposely inflicted, sufficiently informs the jury of the rights of the parties as to priority in going on the crossing.—*Id.*

In an action for injuries sustained by a collision at a street crossing, it was proper to instruct that, to entitle the plaintiff to recover, it must appear from a fair preponderance of the evidence not only that the injuries complained of were caused by the negligent acts or some of the negligent acts of the employees of the railway company as charged, but that plaintiff herself was free from all negligence contributing directly to the injuries.—*Id.*

[h] (Sup. 1893)

In an action for personal injuries caused by horses taking fright at a box car standing on the highway at a crossing, the court refused to charge that "defendant had the right to leave its car standing upon the track * * * at any point or place," and if the car in question was placed by defendant at a point where it did not obstruct the highway, and it was afterwards, by persons not in its employ, moved on or partly on the highway, defendant would not be liable unless it negligently permitted it to

so remain for an unreasonable length of time, "and after notice or knowledge to defendant or her employes that said car was upon said highway." The court instructed that defendant had the right to have its cars standing on the track at any place, "except in or upon the right of way of the highway;" and if the car in question was placed by defendant at a point where it did not obstruct the highway, and it was afterwards, by persons not in its employ, moved on or partly on the highway, defendant would not be liable unless it negligently permitted it to so remain for an unreasonable length of time. *Held*, that the substance of so much of the refused instruction as was correct was given to the jury. *McCabe, J.*, dissenting.—*Cleveland, C., C. & I. Ry. Co. v. Wynant*, 134 Ind. 681, 34 N. E. 569.

[i] (App. 1893)

In an action against a railroad company for injuries sustained at a crossing, an instruction declaring that it was the duty of plaintiff's intestate on approaching the railroad crossing for the purpose of going on it to look and listen was not erroneous because it did not state that it was his duty to stop at the proper time and place where there was no necessity to stop.—*Ohio & M. Ry. Co. v. Hill*, 34 N. E. 646, 7 Ind. App. 255.

[j] (Sup. 1895)

Where the court, at defendant's request, charged that "if the obstructions at the crossing were not in the traveled part of the highway, and if the collision was the proximate cause of the injury, then there could be no recovery," it was proper to add, "unless said obstructions were negligently maintained by the defendant, and were one of the causes which contributed to the collision resulting in the death of [decedent], without fault on her part."—*Lake Shore & M. S. Ry. Co. v. McIntosh*, 140 Ind. 261, 38 N. E. 476.

[k] (Sup. 1895)

Where plaintiff, an active man, was struck by an engine while attempting to cross the tracks, it was error to charge that a railroad company must stop the engine, in order to avoid injury to one on the crossing, if by the exercise of reasonable care such person might have been seen in time to have stopped the engine, as such instruction, not being applicable to the facts in the case, was misleading.—*Lake Erie & W. R. Co. v. Stick*, 143 Ind. 449, 41 N. E. 365.

[l] (App. 1895)

Where the horse driven by the plaintiff was quiet, and plaintiff, after seeing the approaching engine, attempted to turn the horse to one side of the road, but was prevented by obstructions placed there by defendant, whereupon the horse became frightened and sprang across the track, it was proper to refuse to charge on the theory of inevitable accident.—

Lake Shore & M. S. Ry. Co. v. Anthony, 12 Ind. App. 126, 38 N. E. 831.

It was proper to refuse to charge that "if plaintiff, by stopping at a point 40 or 50 feet distant from the crossing, and looking and listening, could have discovered the train he collided with, and did not do so," to find for defendant, such instruction taking from the jury the question of contributory negligence.—Id.

[m] (Sup. 1897)

In an action based solely on a railroad company's failure to give the statutory signals of a train approaching a crossing, if, at defendant's request, an irrelevant instruction is given relative to the company's right to presume that a person approaching the crossing will stop to permit the train to pass, defendant cannot object to an amendment as to the company's duty to stop the train if it appears that the person is about to cross.—Baltimore & O. S. W. Ry. Co. v. Conoyer, 48 N. E. 352, 49 N. E. 452, 149 Ind. 524.

[n] (App. 1898)

An instruction warned the jury that the negligence of defendant railroad company in failing to give the statutory signals at a crossing where plaintiff was injured did not excuse want of due care on the part of plaintiff. *Held*, that it was proper to further instruct that, in determining plaintiff's conduct, the jury might consider the evidence as to locality and obstructions, if there were such, and also "the failure of defendant, if that be true, to sound the whistle and ring the bell as required by statute," where there was evidence that, in approaching the crossing, the view was entirely obstructed in the direction from which the train was coming.—Louisville & N. R. Co. v. Williams, 51 N. E. 128, 20 Ind. App. 576.

[o] (Sup. 1899)

An instruction, in an railroad accident case, that the failure of those in charge of the locomotive to give the statutory signals on approaching a crossing constitutes negligence, and if, on account thereof, injury comes to a highway traveler at such crossing, who is free from negligence, it is sufficient to charge such company with negligence, is proper, and is not equivalent to stating that such proof is conclusive on the question of negligence.—Baltimore & O. S. W. Ry. Co. v. Young, 54 N. E. 791, 153 Ind. 163.

In a railroad crossing case, an instruction that no failure on the part of defendant to do its duty would excuse plaintiff from using his senses of sight and hearing was sufficient without using the words, "make complete use of his senses of sight and hearing.—Id.

In a railroad crossing case, an instruction that plaintiff cannot recover unless it is shown that the injury occurred without negligence on his part is equivalent to, and warrants the refusal of, an instruction that when a person crossing a railroad track is injured by collision

with a train the fault is prima facie his own, and he must show affirmatively that his fault or negligence did not contribute to the injury before he is entitled to recover.—Id.

[p] (App. 1901)

Plaintiff approached a railroad crossing on the east side of the street, into which side a car projected, and attempted to cross in close proximity to such car, when she was struck by the car, by reason of its being "kicked" by another car set in motion a block away, the view of the approach of which was obstructed by cars on another track. The west side of the street was unobstructed. *Held*, that an instruction that the jury might take into consideration all the facts enumerated, in determining whether plaintiff was guilty of contributory negligence, was proper.—Cleveland, C., C. & St. L. Ry. Co. v. Penketh, 60 N. E. 1095, 27 Ind. App. 210.

In an action for injuries at a railroad crossing, the court instructed that it was defendant's duty to give a warning of the approach of its cars, and if no warning was given, and plaintiff, before entering on the track, exercised ordinary and reasonable care, by looking and listening, at a point where she could have seen or heard the car's approach, to ascertain if any were approaching, and could neither hear nor see an approaching train or cars, she was justified in presuming that she could pass over in safety. In a number of other instructions the jury was fully instructed as to plaintiff's duty as she approached the crossing. *Held*, that, taken in connection with the other instructions, such instruction was not objectionable, as meaning that if she could hear and see an approaching car at any point before she reached the crossing, and used ordinary care in looking and listening at that particular point, and from such point could neither hear nor see an approaching car or train, she had a right to presume she could pass over in safety.—Id.

The jury having been instructed that plaintiff could not recover if her own negligence contributed to her injury, the court instructed as to reasonable and ordinary care, and added that "this is the degree of care the plaintiff must have exercised before she can recover, and that defendant and its employees must have exercised to avoid liability." *Held*, that such instruction was not objectionable as misleading the jury into believing that if the company was negligent it was liable, regardless of the plaintiff's contributory negligence.—Id.

[q] (Sup. 1902)

The court, in a railroad crossing accident case, in which contributory negligence of deceased is in issue, should instruct specifically as to the duties of a person about to cross a railroad track.—Malott v. Hawkins, 63 N. E. 308, 159 Ind. 127.

[r] (App. 1904)

In an action against a railroad for crossing injuries, a charge that it was defendant's duty

to give the statutory signals on approaching a crossing, and if it failed to do so, and injury resulted therefrom, the defendant would be guilty of negligence, and if the engineer failed to sound the whistle and ring the bell, and by reason of such failure the accident occurred, and plaintiff was injured without negligence on his part, the verdict should be for him, was not open to the objection of relieving plaintiff from the exercise of ordinary care.—*Evansville & T. H. R. Co. v. Clements*, 70 N. E. 554, 32 Ind. App. 659.

[s] (App. 1904)

In a railway crossing accident case the railway company is entitled to have the jury instructed specifically as to the decedent's duty to exercise reasonable care when approaching the track.—*Chicago, I. & L. Ry. Co. v. Turner*, 69 N. E. 484, 33 Ind. App. 264.

[t] (Sup. 1905)

In an action against a railroad company for injuries to plaintiff resulting from his horse taking fright at a hand car left in the highway, an instruction which informed the jury "that the road was a public highway, if used by the public continuously 20 years," was not erroneous.—*Southern Ind. Ry. Co. v. Norman*, 165 Ind. 126, 74 N. E. 896.

[u] (App. 1907)

Where plaintiff, while driving a wagon loaded with sewer pipe was injured by being thrown from the wagon as it passed over a defect in a railroad highway crossing, an instruction that if the sewer pipe was so loaded that it was liable to fall at places where the highway was rough or uneven, and plaintiff knew of such danger, and the accident was caused by one of the front wheels of plaintiff's wagon dropping into a rut or depression in the highway when the accident occurred, causing the pipe on which plaintiff was sitting to fall from the wagon and injure him, he was negligent, was properly refused, as eliminating what a reasonably prudent man would have done under like circumstances.—*Chicago & E. I. R. Co. v. Gallion*, 39 Ind. App. 604, 80 N. E. 547.

In an action against railroad company for injuries to plaintiff by a defect in a railroad highway crossing, an instruction that if the injuries were caused by the sewer pipe with which the plaintiff's wagon was loaded falling from plaintiff's wagon on him and injuring him while he was in the act of crossing defendant's track at the crossing, and that the sewer pipe was placed on the wagon in an unsafe or insecure position, where it would be likely to fall in passing over uneven or sloping places on such highway, then plaintiff could not recover, was properly denied, as declaring as a matter of law, that the acts hypothesized constituted contributory negligence.—*Id.*

[v] (App. 1907)

An instruction that, where one is injured on a railroad crossing of a public highway, the presumption is that plaintiff used the required

care, but that such presumption might be removed by the evidence, the burden being on defendant to remove it, was not erroneous on the theory that it conveyed the impression that evidence of contributory negligence could come only from defendant's witnesses.—*Cleveland, C., C. & St. L. Ry. Co. v. Schneider*, 40 Ind. App. 38, 80 N. E. 985.

[w] (App. 1908)

In an action for personal injuries at a railroad crossing, it appeared that plaintiff was a boy 16 years of age, of good eyesight and hearing, employed as a farm hand, intrusted with and doing the work of a man, familiar with the team he was driving, which was gentle, and with the crossing and the dangers incident thereto. An instruction stated that the law required him to use that degree of care and caution that a person similar to him of ordinary prudence would be presumed to use under similar circumstances. *Held*, that the instruction might be fairly construed to mean a person similarly situated, and was not misleading.—*Cleveland, C., C. & St. L. Ry. Co. v. Wuest*, 41 Ind. App. 210, 83 N. E. 620; *Id.*, 41 Ind. App. 711, 84 N. E. 1123.

[x] (Sup. 1908)

Where, in an action against a railroad company for injuries to a pedestrian at a crossing, the evidence showed that there was no pressing haste, that a watchhouse about 9 feet from the track obstructed the view, but that plaintiff could have looked from a point nearer the track, an instruction that plaintiff was not bound to take the highest possible degree of care, and that the jury might, in determining whether he exercised a reasonable degree of care, consider whether the house prevented him from seeing until he was close to the track, was erroneous, as involving the idea that the watchhouse might be regarded as an excuse for failure to see the approaching train. Judgment (App. 1908) 83 N. E. 1135, reversed.—(Sup. 1908) *Cleveland, C., C. & St. L. Ry. Co. v. Lynn*, 171 Ind. 539, 85 N. E. 999, 86 N. E. 1017.

[y] (Sup. 1910)

In an action for death of one struck at a railway crossing by a train, an instruction that, to constitute willful injury or death, the act producing it must have been intentional or have been done under circumstances evincing a reckless disregard and a willingness to inflict injury or death, was misleading, in that it established willfulness if the act producing decedent's death—i. e., the running of the train over the crossing—was intentional.—*Cleveland, C., C. & St. L. Ry. Co. v. Starks*, 92 N. E. 54.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1193-1215.

See, also, 33 Cyc. pp. 1129-1142.

§ 352. — Verdict and findings.

Construction and operation of special inter-rogatories, see TRIAL, § 365.

Contrary to evidence as ground for new trial, see *NEW TRIAL*, § 70.

Failure to answer interrogatories or make findings, see *TRIAL*, § 356.

Questions proper to be submitted by special interrogatories, see *TRIAL*, § 350.

Sufficiency of special findings in general, see *TRIAL*, § 355.

[a] (*Sup.* 1889)

As defendant's train was approaching the town of C., the engine was detached, and run on ahead of the cars, leaving them to follow of their own momentum to the depot. The cars passed over a highway crossing, near the depot, and, as deceased attempted to cross, he was killed. The jury returned a general verdict for plaintiff, but found specially that decedent had been familiar with the crossing for 10 years; that he was on foot, and on his way to the depot, when struck; that had he looked he could have seen about 200 feet along the main track before reaching it; that it had been the habit of those in charge of the train some months before the injury to detach the engine, and run it to the water tank; that the train conductor stood on the depot platform, and shouted a warning to deceased, as did also a brakeman on the train; that the brakes were set from the time the engine was detached until deceased was struck; that the train was approaching at the rate of four miles an hour; and that there was nothing to prevent deceased from seeing it. *Held*, that the court erred in overruling defendant's motion for judgment on the special findings, notwithstanding the general verdict.—*Chicago & E. I. Ry. Co. v. Hedges*, 118 Ind. 5, 20 N. E. 530.

[b] (*App.* 1891)

A complaint against a railroad company alleged, in general terms, that defendant so carelessly and negligently managed a certain freight train that the same ran over plaintiff's threshing-machine while it was fast in a broken crossing. The jury rendered a special verdict, finding, among other things, that the accident happened at night, that the headlight of the locomotive "was dirty to an extent that interfered with its use," "that there were two brakemen on the train, composing a part of the crew," that they could have stopped after seeing the threshing, but made no effort to do so, and that the engineer and the conductor were the only ones who applied any brakes for that purpose. *Held*, that the findings quoted, when taken in connection with the other findings, were pertinent under the general allegation of negligence in the complaint, and need not be disregarded in considering the question of the sufficiency of the verdict to sustain a judgment.—*Evansville & T. H. R. Co. v. Taft*, 2 Ind. App. 234, 28 N. E. 443.

[c] (*Sup.* 1892)

In an action against a railway company for injuries received in crossing defendant's track, the jury returned a general verdict for

plaintiff. In answers to special interrogatories it was found that plaintiff was familiar with the crossing; that he passed over it on the morning of the day on which he was injured; that the train was behind time, and running fast; and that no signals were given. In other answers it was found that it was too dark for plaintiff to have seen the train; that he could have seen it when within a distance of 18 feet; and that there were obstacles which would have prevented him from seeing the train had he been looking in the direction from which it was approaching. *Held*, that there was no such irreconcilable conflict between the general verdict and the special interrogatories as called for the reversal of the verdict.—*Toledo, St. L. & K. C. R. Co. v. Adams*, 131 Ind. 38, 30 N. E. 794.

[d] (*Sup.* 1892)

An answer to an interrogatory to the effect that a person saw a locomotive approaching 40 or 50 feet from him before he attempted to cross the track is the statement of a fact, as is also the statement that he made the attempt to cross and was struck.—*Korraday v. Lake Shore & M. S. Ry. Co.*, 29 N. E. 1069, 131 Ind. 261.

[e] (*Sup.* 1893)

In an action for personal injuries sustained by being thrown from a wagon while driving over a railroad crossing, owing to the fact that plaintiff's horse was frightened by the sudden escape of steam from the automatic safety valve of a locomotive standing near the track, a general verdict in plaintiff's favor is not in conflict with special findings that the engineer caused the steam to escape, and that he could have controlled the safety valve by regulating his fires, and injecting cold water into the boiler.—*Louisville, N. A. & C. Ry. Co. v. Schmidt*, 134 Ind. 16, 33 N. E. 774.

[f] (*Sup.* 1893)

Where it appears that plaintiff had to look both east and west in the short space of 27½ feet from the track, that it was raining, that there was the noise of escaping steam from an engine on a side track, and that the train was coming at 35 or 40 miles an hour, a finding that plaintiff did not and could not see or hear the train in time to avoid the collision overcomes a finding that a person at certain points on the street, and looking in a certain direction, could see the train.—*Chicago, St. L. & P. R. Co. v. Spilker*, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218.

[g] (*Sup.* 1893)

A special verdict in an action for injuries sustained by a traveler in a collision with a train at a railway crossing which fails to find the fact that plaintiff exercised ordinary care under the circumstances is not sufficient to warrant a judgment in his favor.—*Cincinnati, I., St. L. & C. Ry. Co. v. Grames*, 34 N. E. 714, 136 Ind. 39.

[h] (App. 1893)

The jury found that plaintiff's horse became frightened at the approach of the train, and that the escaping steam and noise made it unmanageable; that if defendant's servants on the locomotive had rung the bell while approaching the crossing, had not run the train at an unlawful speed, and had not allowed the steam to escape, plaintiff's horse and buggy would not have been damaged, but did not find whether it was necessary or not to blow off steam. *Held* that, as the negligent acts found constituted two of the three concurring proximate causes of the injury, defendant was liable.—*Louisville, N. A. & C. R. Co. v. Davis*, 7 Ind. App. 222, 33 N. E. 451.

[i] (App. 1898)

A special verdict, in an action for injury caused by the frightening of plaintiff's horse, when close to a railroad crossing, by a passing train, shows contributory negligence, notwithstanding finding that in approaching the crossing plaintiff exercised all the care ordinarily exercised by prudent persons under similar circumstances, and that the flagman was not in his usual and proper place, the other findings showing that, while view of the approaching train was prevented by obstructions, plaintiff could, if she had stopped and listened attentively, instead of talking and laughing with others in the vehicle, have heard the train while she was at a safe distance from the track, and if she had looked attentively could have seen the flagman giving warning signals when she was more than 100 feet from the track.—*Hancock v. Lake Erie & W. R. Co.*, 51 N. E. 369, 21 Ind. App. 10.

[j] (App. 1900)

Where, in an action for injuries received at a railroad crossing, the jury specially found that defendant's failure to sound its locomotive whistle not less than 100 rods from a crossing, and to ring its bell continuously from that point to the crossing, might have been the approximate cause of the injury, and also found that the whistle was sounded, such findings were not in irreconcilable conflict with its verdict in plaintiff's favor, since they did not establish that defendant's failure to ring the bell was not the proximate cause of the injury.—*Lake Erie & W. R. Co. v. Graver*, 55 N. E. 968, 23 Ind. App. 678.

Since the jury's special finding that a locomotive bell was not rung continuously from a point not less than 80 nor more than 100 rods from a crossing at which plaintiff was injured, and until such crossing had been fully passed, as required by *Burns' Rev. St. 1894*, § 5307, shows negligence per se by the railroad, such finding was in harmony with the general verdict in plaintiff's favor in an action for his injuries.—*Id.*

Where a jury specially found that plaintiff, in full possession of all his faculties, was struck by defendant's train at a railroad cross-

ing which he knew to be extraordinarily dangerous, and that the train by which he was struck was about due; that he was driving a gentle team at a slow walk, and that from a point 500 feet from the crossing he did not slacken his speed, nor stop to look and listen; that at several points from about 300 feet from the crossing he could have seen the approaching train through rows of trees between the highway and the track; that at a point 35 feet from the crossing he had an unobstructed view of the track in the direction from which the train was approaching for a distance of 300 feet, and, had he stopped to look and listen, could have seen and heard the train,—such findings were in irreconcilable conflict with a verdict in plaintiff's favor, since it was his duty to look and listen, and hence defendant's motion for judgment on such findings was improperly denied.—*Id.*

[k] (App. 1900)

In an action for personal injuries sustained by plaintiff through being struck by a train while crossing the track of defendant railroad company at a highway, the jury found, in response to special interrogatories, that if the plaintiff had diligently and cautiously used his sense of sight and hearing from a point 500 feet from the crossing until the crossing was reached he could have prevented the accident; that if he had stopped and listened he could have heard the whistle sounded by defendant's engine 100 yards from the crossing; that at the time the whistle was sounded plaintiff could have heard it at the point in the highway where he then was, if he had put his ears out of the buggy in direction of the train, and attentively listened therefor. *Held*, that a general verdict in favor of plaintiff could not be sustained, since from the special findings plaintiff could have avoided the injury by the exercise of such care as he was bound to employ.—*Cleveland, C., C. & St. L. Ry. Co. v. Griffin*, 58 N. E. 503, 26 Ind. App. 368.

[l] (Sup. 1902)

Under *Burns' Rev. St. 1901*, § 556 (*Horne's Rev. St. 1901*, § 547), providing that, when special findings of fact are inconsistent with the general verdict, the former shall control, and the court shall give judgment accordingly, where, in an action to recover for death by collision, the findings in answer to interrogatories show that deceased could have seen the headlight in time to have avoided the collision, if he had looked, and that he heard the noise of the train about 10 minutes before the collision, and could have heard the train at any time thereafter until the collision, if he had listened, it is proper to render judgment on such findings for defendant, notwithstanding a general verdict for plaintiff, since they show contributory negligence precluding recovery.—*Morford v. Chicago, I. & L. Ry. Co.*, 63 N. E. 857, 158 Ind. 494.

[m] (App. 1902)

A finding in a general verdict that decedent looked and listened for approaching trains before passing on the track will be deemed unsupported by the evidence, where the special verdict contained a finding that there was no evidence that decedent looked and listened after passing the obstructions on the first track.—*Cleveland, C., C. & St. L. Ry. Co. v. Heine*, 62 N. E. 455, 28 Ind. App. 163.

[n] (Sup. 1903)

In an action for the death of plaintiff's intestate, killed at railway crossing, special findings showed that the decedent first discovered the train when at a distance of 18 feet from the crossing; that he was then traveling at a rate of 3 or 4 miles an hour, while the train was approaching at a rate of about 30 miles an hour; and that when he was 25 feet from the crossing the train was 250 feet distant therefrom. *Held*, that a finding of the jury that decedent exercised ordinary care in endeavoring to cross in front of the train after discovering it was the statement of a conclusion, and, in view of the other facts shown, must be disregarded.—*Wabash R. Co. v. Keister*, 67 N. E. 521, 163 Ind. 609.

[o] (App. 1904)

Where, in a railroad crossing accident case, it is impossible to determine with accuracy from the special findings whether, when plaintiff was at any certain point in his approach to the crossing after having stopped, looked, and listened, he could have seen or heard the train, a general verdict for plaintiff will not be set aside.—*Pennsylvania Co. v. Fertig*, 70 N. E. 834, 34 Ind. App. 459.

[p] (App. 1905)

Where the facts specially found show that decedent, killed at a crossing, did not use ordinary care, and that a failure to do so was the proximate cause of the accident, such findings are in irreconcilable conflict with a general verdict for plaintiff, and such verdict must yield to the facts specially found.—*Southern Ry. Co. v. Davis*, 72 N. E. 1063, 34 Ind. App. 377.

[q] (App. 1905)

In an action against a railroad company for injuries caused by the fall of plaintiff's horse upon a narrow road and his precipitation over an unguarded embankment at a highway crossing, where answers to interrogatories showed that neither the want of a proper guard rail nor the narrowness of the road caused the horse to "choke, stumble, or reel," the answers were not in irreconcilable conflict with a general verdict for plaintiff.—*Evansville & I. R. Co. v. Allen*, 34 Ind. App. 636, 73 N. E. 630.

[r] (App. 1905)

Plaintiff's intestate approached a city railroad crossing provided with gates, as required by ordinance. The gates were closed for a train on the track nearest to intestate, but were raised

before that train had passed the crossing. She thereupon walked toward the train, and after it had passed was killed by a train on the next track not more than 20 feet from the place where she stopped to allow the first train to pass, and running at an unlawful rate of speed. The jury especially found that she did not look or listen for the second train after she left the spot where she waited for the first train; that she could not have seen the second train at any time while she was within 10 feet from the nearest rail of the track on which it ran, had she looked, because the view was obstructed by the first train; but that she could have seen the train after she left the place where she stopped. It was also found that crossing bells were ringing continuously, but not that such bells were caused to ring alone by the second train. *Held*, that such special findings were not inconsistent with a general verdict in favor of plaintiff.—*Smith v. Michigan Cent. R. Co.*, 73 N. E. 928, 35 Ind. App. 188.

[s] (Sup. 1907)

In an action for wrongful death, the complaint alleged that while one of defendant railroad company's locomotives, on which decedent, an employé, was riding westerly, was approaching a street crossing, defendant street railway company whose tracks crossed the railroad tracks negligently ran its car upon the crossing without sending its conductor ahead, as required by a city ordinance, to see whether locomotives or cars were approaching; that a collision ensued between the locomotive and the car, and that, to escape injury, decedent jumped to the ground; that at the same time another of defendant railroad company's locomotives, which was running easterly on a parallel track at a speed, in violation of a city ordinance limiting the speed to four miles an hour, struck the street car, and decedent was killed. It was also alleged that the brake on the street car was defective. The answers of the jury to interrogatories stated, in substance, that the first collision was a slight one; that the east-bound locomotive was running at the rate of 12 miles per hour at the time of the first collision; that it was then 250 feet away, and could not have been stopped in time to avoid the collision, though it could have been stopped if running at the rate of four miles per hour; that the brake on the street car did not fail to work; and that the failure of the engineer of the east-bound locomotive to begin to stop his train promptly when he saw the first collision was not the sole and proximate cause of the second collision. In answer to the question: "What, if any, careless or negligent act of any person engaged in running said street car caused, or helped to cause, said first collision?" the jury answered: "The act of the conductor in beckoning the motorman to come on." *Held*, that there was nothing in the answers to show that the negligence of each defendant in approaching the crossing was not a proximate cause of the injury.—*Indianapolis Union Ry. Co. v. Waddington*, 169 Ind. 448, 82 N. E. 1030.

[t] (App. 1907)

In an action for injuries received at a railway crossing, the general verdict finding that plaintiff exercised due care was not overcome by answers to interrogatories showing that he could have discovered the danger in time to avoid it had he looked in a certain direction at a certain time, since the facts specially returned do not exclude the existence of circumstances warranting the conclusion that he exercised due care.—*Baltimore & O. S. W. R. Co. v. Rosborough*, 40 Ind. App. 14, 80 N. E. 869.

[u] (App. 1908)

In an action for the death of plaintiff's son, who was killed at a railway crossing, the finding in the general verdict that the son was not guilty of contributory negligence was not overcome by the answers to special interrogatories showing that he could, had he looked, have seen the approaching train when he was 25 feet from the track, and the train 500 feet away, it appearing that he stopped, looked, and listened when 50 feet from the track and saw and heard no train; that he was driving a team attached to a wagon with a hayrack on, so that his horses' heads were several feet in front of him; that only three or four seconds elapsed from his first opportunity to see the train until he was struck, and that the approach to the track was very narrow and steep on both sides.—*Wendel v. Cleveland, C., C. & St. L. Ry. Co.*, 41 Ind. App. 460, 82 N. E. 469.

[v] (App. 1908)

A general verdict in favor of a pedestrian, suing a railroad company for injuries in a collision with a train at a street crossing, is a finding that she exercised ordinary care.—*Lowden v. Pennsylvania Co.*, 41 Ind. App. 614, 82 N. E. 941.

The complaint in an action against a railroad for injuries to a pedestrian in a collision with a train at a street crossing alleged that as the pedestrian proceeded over the crossing she continued to look and listen. Special findings showed a straight track from the place of the accident of 600 feet, and also placed the pedestrian in the center of the track 30 feet from the approaching train. The train was operated at such speed that the entire distance of 600 feet could be run in less than half a minute. A street car had passed, and other cars were on the track, and the pedestrian could not hear the approaching train because of noise. *Held*, that the special findings were not inconsistent with a general verdict in favor of the pedestrian.—*Id.*

[w] (Sup. 1909)

Where, in an action for injuries to a pedestrian at a crossing, the complaint alleged that the train approached the crossing at a speed of 30 miles per hour, and the answer in the special verdict did not show the rate of speed, and the warning given might not have been in time to have given plaintiff opportunity to escape, the general verdict was not overcome by the special verdict, for, as against the general verdict, it

could not be assumed that conditions at the crossing were such that plaintiff could have heard the signals.—*Cleveland, C., C. & St. L. Ry. Co. v. Lynn*, 171 Ind. 589, 85 N. E. 999, 86 N. E. 1017.

[x] (Sup. 1909)

Where, in an action for injuries to a traveler at a railroad crossing in the night, the complaint, general verdict, and answers to the interrogatories showed that the railroad company's failure to give statutory signals of the train's approach was the proximate cause of the injury, and that the accident was the natural result of such breach of duty, and that neither plaintiff nor her companion were aware of the presence of the railroad track, nor of the train until the horse was frightened at the close approach thereof, a general verdict for plaintiff was not in conflict with the answers to the special interrogatories.—*Chicago & E. R. Co. v. Fretz*, 90 N. E. 76.

[y] (App. 1909)

In an action against a railroad company for a death at a highway crossing, where the jury specially found that defendant failed to give the statutory crossing signals, and in which negligence in not doing so and contributory negligence were in issue, the jury, by their general verdict, found that intestate's death was caused by such negligence, and that decedent was not himself negligent.—*Grand Trunk Western Ry. Co. v. Reynolds*, 90 N. E. 94.

In an action for intestate's death by being struck by defendant's train at a highway crossing at night, the special findings did not show that intestate was familiar with the crossing, or with a cut about 165 feet east thereof, through which the train ran in approaching the crossing, or that he knew that he was approaching it, or knew the location of the crossing signpost, and did not show that he saw the engine headlight, or saw or heard, or could have seen or heard, the train, but that he could have seen the headlight at some distance from the crossing had he looked; but such findings did not show where he was when he could have known of the train's approach. *Held*, that the special findings did not require a holding as a matter of law that intestate was negligent.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 1216.

See, also, 33 Cyc. p. 1142.

(G) INJURIES TO PERSONS ON OR NEAR TRACKS.

Accidents at crossings, see ante, §§ 298-352.

Companies and persons liable, see ante, §§ 256-273.

Injuries to persons at stations, see ante, § 274.

Injuries to persons on freight trains, see ante, § 276.

Injuries to persons on or near street railroad tracks, see STREET RAILROADS, §§ 67-119.

Injuries to persons working on or about cars, see ante, § 275.

§ 354. **Right to go on or near track.**
Pleading, see post, § 394.

FOR CASES FROM OTHER STATES,
SEE 41 CENT. DIG. R. R. §§ 1220-1234.
See, also, 33 Cyc. p. 1145.

§ 355. — **In general.**

[a] (Sup. 1887)

While passing along defendant's track, which was laid in a public street, plaintiff's foot was caught between a rail and a plank inside the track, and while thus fastened he was run over by one of defendant's trains. The evidence showed that both in the construction of the track where the injury occurred, and in running the train which injured plaintiff, the defendant was negligent, and that plaintiff was free from negligence. *Held*, that plaintiff was not a trespasser in walking upon defendant's track, and that defendant was liable for the injuries sustained.—*Louisville, N. A. & C. Ry. Co. v. Phillips*, 112 Ind. 59, 13 N. E. 132, 2 Am. St. Rep. 155.

[b] (App. 1893)

Where a city grants to a railroad company the right to construct its tracks along a public, unimproved street, and the company erects an embankment in the street, and lays its tracks thereon, a person walking along the track is neither a trespasser nor a licensee, so as to be there at his own peril, since the grant to the company does not oust the rights of the public in the street.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Bennett*, 9 Ind. App. 92, 35 N. E. 1033.

[c] (Sup. 1894)

Though a policeman is authorized by a railroad company to patrol its tracks, he is a trespasser in walking thereon for his own convenience on his way to enter on the discharge of his duties on his beat. *Howard, C. J.*, dissenting.—*Pennsylvania Co. v. Myers*, 136 Ind. 242, 36 N. E. 32.

[d] (Sup. 1898)

A child, playing on the right of way of a railroad, where it is crossed by a public highway, is not a trespasser.—*Krenzer v. Pittsburgh, C., C. & St. L. Ry. Co.*, 151 Ind. 587, 43 N. E. 640, 52 N. E. 220, 68 Am. St. Rep. 252.

[e] (Sup. 1900)

In an action for personal injuries, it appeared that defendant railroad permitted the public to use a path crossing its premises. Plaintiff, while walking on the path at night, became confused by a car standing on the track across the path, and, on attempting to go around the car, fell into a pit maintained by defendant under its tracks, which was not concealed, except by the darkness. *Held*, that plaintiff was not entitled to recover, since he was a mere licensee, and defendant owed him no duty except not to

injure him willfully.—*Lingenfelter v. Baltimore & O. S. W. Ry. Co.*, 55 N. E. 1021, 154 Ind. 49.

[f] (Sup. 1902)

A complaint alleged that plaintiff, a passenger, told the conductor where he desired to go, and that, relying on the statement of the conductor, he left the train at the wrong point, and did not aver wrong or negligence in such act, or dereliction of duty to a passenger, but alleged that, not knowing any other way to reach his destination, he started along defendant's road, and, while proceeding "with all due care and prudence, he struck his foot against a stake that defendant's agents or employes had carelessly and negligently left sticking above the ground," and was injured, and that his injury was "wholly from the aforesaid carelessness." *Held*, that the complaint was for an injury, in tort, and not on the contract of carriage, and, as it did not contend that plaintiff was wrongfully put off at such point, he was a trespasser in going on the road, and the complaint did not state a cause of action.—*Indiana Ry. Co. v. Felrick*, 64 N. E. 221, 158 Ind. 621.

[g] (Sup. 1904)

A boy eight years of age, who climbed on a box car to look at a sale of stock in an adjacent stockyard, was a trespasser.—*Jordan v. Grand Rapids & I. Ry. Co.*, 70 N. E. 524, 162 Ind. 464, 102 Am. St. Rep. 217.

[h] (Sup. 1907)

Where decedent was assisting in loading a railway car for shipment by his employer, when some one nearby shouted an alarm to stop an approaching train, and decedent left his place and went around the car to a point where he could see the train, to render any assistance emergency might require, he was not a trespasser at that point.—*Chicago, I. & L. Ry. Co. v. Pritchard*, 168 Ind. 398, 79 N. E. 508, 81 N. E. 78, 9 L. R. A. (N. S.) 857, transferred from appellate court, 39 Ind. App. 701, 78 N. E. 1044.

[i] (App. 1907)

One walking upon a street of a city, although it was used by a railroad company, was not a trespasser as between him and the company.—*Manion v. Lake Erie & W. Ry. Co.*, 40 Ind. App. 569, 80 N. E. 166.

[j] (App. 1907)

In the use of public streets by railroads and street cars, trains and cars have the right of way over travelers on the highway, but in all other respects their rights to the use of the highway are only equal.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Warrum*, 42 Ind. App. 179, 82 N. E. 934, 84 N. E. 356.

A railroad is bound to exercise reasonable care in the conduct of its business to avoid injury to a person rightfully on a public highway.—*Id.*

The act of a railroad in maintaining a platform in a public street, with the consent of the municipal authorities, does not exclude the pub-

lic from passing over it; the rights of the railroad and the public being reciprocal.—Id.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1220-1227, 1235.

See, also, 33 Cyc. p. 1145.

§ 356. — Customary use of track.

[a] (Sup. 1859)

Where a plaintiff, without having procured a ticket, was crossing a side track of a railroad in the night to get on a passenger train at its usual place of stopping on the main track, he had the same right to cross the side track as persons have to cross a railroad on a public street or highway.—Indiana Cent. Ry. Co. v. Hudelson, 13 Ind. 325, 74 Am. Dec. 254.

[b] (Sup. 1886)

A person crossing a part of a railway track habitually used by the public in approaching the depot, with the knowledge and consent of the railway company, is not a trespasser.—Chicago & E. I. R. Co. v. Hedges, 105 Ind. 398, 7 N. E. 801.

[c] (Sup. 1895)

Between stations and public crossings the track of a railroad company belongs exclusively to it and all persons who use the same are trespassers, and, even if they do so with the permission of the company or by its sufferance, they subject themselves to all the risks incident to the hazardous undertaking.—Lamport v. Lake Shore & M. S. R. Co., 41 N. E. 586, 142 Ind. 269.

[d] (App. 1895)

The use of a railroad track by pedestrians without the consent of the railroad company, unless it is founded on some claim of right, is not sufficient to authorize the public to regard that part of the track as a public street, so as to change the nature of the liability of the railroad company for injuries to a person while walking on the track.—Louisville, N. A. & C. Ry. Co. v. Miller, 40 N. E. 539, 12 Ind. App. 414.

The evidence in an action for injuries showed that decedent was struck by a train while he was walking along defendant's railroad track; that the railroad had been located at such place 24 years, and that the public had for a long time used the right of way as a public highway, but it was not shown that such use was with the consent of the defendant or under any claim of right, or that the part of the street covered by the right of way was used by the public as a street prior to the building of the railroad. *Held*, that a charge to the effect that, if the jury should find that such right of way had been used as a street for 20 years, the decedent had a right to regard it as a public highway, was erroneous.—Id.

[e] (App. 1895)

In determining whether the acquiescence of a railroad company in the use of its tracks as a footpath is to be construed as an invitation to

the public to so use the tracks, the continuous use of the tracks by the railroad company must be considered.—Cleveland, C., C. & St. L. Ry. Co. v. Adair, 39 N. E. 672, 40 N. E. 822, 12 Ind. App. 569.

Mere sufferance or permissive acquiescence in the use of the tracks and right of way of a railroad company at a place where it runs through private property is not sufficient to constitute an invitation to the public to use the track as a way for foot passengers, so as to impose a greater duty on the railroad company to avoid injury to persons so using the track.—Id.

One traveling on foot along the track on the right of way of a railroad company, which for several years has permitted such travel, is not a trespasser, but a licensee.—Id.

[f] (App. 1897)

In an action for injuries caused by the derailment of a car loaded with railroad ties, one of which struck plaintiff when about 40 feet from the track, the jury found specially that the railroad at the place of the accident was constructed on a public highway, whose use by vehicles was thereby rendered impossible; that the public did not cease to use it for travel on foot; that on both sides of the track a space of 3 feet was kept smooth by defendant, and was used by the public as a footway for over 35 years; that defendant, 30 years after its road was constructed, inclosed with fences ground on which plaintiff was injured, and over which an elevated board walk was constructed by a private citizen, connecting his grounds and the railroad, and crossing over the fence built by defendant, for the use of the public, with defendant's knowledge; that until 2 years before the accident defendant kept, for the use of the public, for such foot travel, plank walks along the side of its railroad bridge on such highway, which were used by the public; that 2 years before the accident defendant took up such planks, and put up warning boards, forbidding all persons to use the track for foot passage; and that plaintiff had read the notice on such boards. The jury did not find the existence of a right of way of defendant. *Held*, that the facts showed that plaintiff was rightfully on a public highway.—Louisville, N. A. & C. Ry. Co. v. Downey, 18 Ind. App. 140, 47 N. E. 494.

[g] (Sup. 1901)

A person injured while using a footway on a railroad track for her own convenience, which had been used by the public for six months without any dedication by the company, is not entitled to maintain an action against the company therefor for a failure to maintain watchmen, or operate gates, or give warning of the approach of trains, since the company owed plaintiff no duty except to refrain from willful or wanton negligence.—Cannon v. Cleveland, C., C. & St. L. Ry. Co., 62 N. E. 8, 157 Ind. 682.

[h] (App. 1907)

The user of a part of a railroad right of way by the public as a highway for foot pas-

sengers does not prove either an implied dedication or a prescriptive right.—*Manion v. Lake Erie & W. Ry. Co.*, 40 Ind. App. 569, 80 N. E. 166.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1228-1234.

§ 357. Care required in general.

Right of trespassers to benefit of signals and lookouts, see post, § 369.

[a] (App. 1898)

To constitute negligence on the part of a railway company in the operation of its road, facts must be stated which affirmatively show that the accident resulted from want of some precaution which the railway company ought to have taken.—*Lake Erie & W. Ry. Co. v. Juday*, 49 N. E. 843, 19 Ind. App. 436.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 1235.

See, also, 33 Cyc. pp. 1145, 1146.

§ 358. Care required as to licensees.

Questions for jury, see post, § 400.

[a] (Sup. 1887)

The duty imposed on a railway company does not require the use of every possible protection to avoid injury to individuals, nor that the company should have employed any particular means which it may appear after the accident would have avoided it, as it was only required to use reasonable precautions to prevent accidents as would have been adopted by prudent persons prior to the accident.—*Wabash, St. L. & P. R. Co. v. Locke*, 14 N. E. 391, 112 Ind. 404, 2 Am. St. Rep. 193.

Where plaintiff's intestate was at the place where he sustained a fatal injury on lawful business with defendant company, the company owed him the duty to have its premises in a reasonably safe condition, and to prevent damage to him and all others having lawful occasion to transact business with it from any unseen or unusual danger of which it had, or of which by the exercise of reasonable diligence it should have had, knowledge.—*Id.*

[b] (App. 1895)

In an action against a railroad company for the killing of the minor son of plaintiff, where it appears that the child was a mere licensee on defendant's track, without invitation, the fact that the negligence of defendant was the proximate cause of death is not ground for a recovery, unless the injury was willful.—*Cleveland, C. & St. L. Ry. Co. v. Adair*, 12 Ind. App. 569, 39 N. E. 672, 40 N. E. 822.

[c] (App. 1896)

A railroad company owes to a licensee no duty of protection against negligence.—*Hall v. Cleveland, C. & St. L. Ry. Co.*, 44 N. E. 489, 15 Ind. App. 496.

[d] (App. 1905)

Where a night watchman, after signaling a train to stop, goes across the track and notifies hotel guests of the train's approach, and then returns and stands six feet from the track, on a pavement in use by the public for several years, he is not a licensee, but is there by lawful right.—*Chicago & L. Ry. Co. v. Thrasher*, 35 Ind. App. 58, 73 N. E. 829.

[e] (App. 1905)

A consideration is not essential to the creation of a valid license to use a railroad track.—*Wabash R. Co. v. Erb*, 36 Ind. App. 650, 73 N. E. 939, 114 Am. St. Rep. 392.

[f] (App. 1907)

Those in charge of a railroad train running along a street or way are bound to anticipate the presence of persons on the track and to exercise reasonable care to avoid injuring persons placed in peril.—*Manion v. Lake Erie & W. Ry. Co.*, 40 Ind. App. 569, 80 N. E. 166.

[g] (App. 1909)

A railroad company owes a licensee on its right of way no duty, except upon discovering his peril to use reasonable care to avoid injuring him.—*Ziehm v. Pittsburgh, C. & St. L. Ry. Co.*, 88 N. E. 707.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1236, 1237.

§ 359. Care required as to trespassers.

[a] (Sup. 1886)

An instruction to the jury that a railroad company will be responsible for injury to a person unlawfully upon the railroad track if its employes were guilty of negligence, is erroneous under any issue. A person unlawfully upon the railway track can recover from the company only for willful injury.—*Chicago & E. I. R. Co. v. Hedges*, 105 Ind. 398, 7 N. E. 801.

[b] (Sup. 1887)

No cause will lie against a railroad company for causing the death of a trespasser, unless the act of its employes is willful.—*Palmer v. Chicago, St. L. & P. R. Co.*, 14 N. E. 70, 112 Ind. 250.

[c] (App. 1898)

Although a child two years old is non sui juris, its age will not prevent it from becoming a trespasser on a railroad.—*Baltimore & O. S. W. Ry. Co. v. Bradford*, 49 N. E. 388, 20 Ind. App. 348, 67 Am. St. Rep. 252.

[d] A railroad company is not liable for injuries to a trespasser unless the injuries are purposely or recklessly inflicted, or it has knowledge of the injured person's danger in time to have prevented the injury.—(App. 1899) *Dull v. Cleveland, C. & St. L. Ry. Co.*, 52 N. E. 1013, 21 Ind. App. 571; (Sup. 1904) *Jordan v. Grand Rapids, & I. Ry. Co.*, 70 N. E. 524, 162 Ind. 464, 102 Am. St. Rep. 217.

[e] (App. 1896)

One who has wandered on a railroad track, not at a public crossing, though but seven years old, is a trespasser, for injuries to whom the railroad company is not liable when caused merely by its negligence.—*Dull v. Cleveland, C. & St. L. Ry. Co.*, 52 N. E. 1013, 21 Ind. App. 571.

[f] (Sup. 1904)

A railroad company is not required, before moving cars standing on a side track, to examine them, to prevent injury to possible trespassers thereon.—*Jordan v. Grand Rapids & I. Ry. Co.*, 70 N. E. 524, 162 Ind. 464, 102 Am. St. Rep. 217.

[g] (Sup. 1907)

Though one standing near a railway track may have been a trespasser, the company was liable for injuries occasioned by the failure of an engineer to stop a train in obedience to signals, though the engineer did not know why he was signaled to stop.—*Chicago, I. & L. Ry. Co. v. Pritchard*, 168 Ind. 398, 79 N. E. 508, 81 N. E. 78, 9 L. R. A. (N. S.) 857, transferred from appellate court, 39 Ind. App. 701, 78 N. E. 1044.

Where the circumstances were sufficient to apprise a locomotive engineer of a peril ahead which might involve life or limb, and he did not stop his engine, the mere fact that the person injured was a technical trespasser would not bar a recovery.—*Id.*

[h] (App. 1907)

An employé of an independent contractor, repairing a depot, left the place of his work and went to the depot platform to procure a lifting jack. There was no agreement between the railroad and the independent contractor or the employé who should furnish the necessary appliances. The employé could have, by going across the street, obtained a jack from a private individual; but he undertook to use the jack belonging to the railroad. *Held*, that the employé was not a trespasser on the railroad property while procuring the jack, and the railroad could not defeat an action for injuries occasioned by its employés moving a car and injuring him, on the theory that it owed him no duty.—*Pittsburgh, C. & St. L. Ry. Co. v. Cozatt*, 39 Ind. App. 682, 79 N. E. 534.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1233, 1239.

See, also, note, 97 C. C. A. 566.

§ 360. Frightening animals near railroad.

Admissibility of evidence, see post, § 397.

Contributory negligence, see post, § 381.

Contributory negligence of driver of team, see post, § 381.

Pleading, see post, § 394.

[a] (Sup. 1891)

The ordinary use of a locomotive and the ordinary sounding of the whistle and escape of

steam is not negligence.—*Indianapolis Union Ry. Co. v. Boettcher*, 28 N. E. 551, 131 Ind. 82.

In an action for injuries to plaintiff, who was thrown by his horse, which became frightened at the sounding of a whistle, and blowing off of steam by defendant's locomotive, the court instructed that if an injury came to the plaintiff by his horse merely becoming frightened at the locomotive while standing on the track, however close to the highway, that had become stationary a few minutes before and making no loud and unusual noises, there could be no recovery for such injuries, as under such circumstances the locomotive could not be considered an object likely to frighten horses, and that, in order under such circumstances to make it such an object of danger, it must have been shown that in its use some act was done to cause its machinery to make a noise, or smoke or steam in a way that would amount to negligence. *Held*, that the instruction was proper.—*Id.*

[b] (App. 1892)

A railroad company is not liable for damages caused by a horse taking fright at smoke from a locomotive in the streets of a city, where the discharge of smoke was the natural result of coaling the locomotive, and was not caused by the negligence of those in charge of it.—*Leavitt v. Terre Haute & I. R. Co.*, 5 Ind. App. 513, 31 N. E. 860, 32 N. E. 866.

[c] (App. 1892)

Where an engineer, in approaching a point where it is his duty to sound his whistle under the statute, observes near by a man struggling with a team of horses hitched to a vehicle, and can see from the surroundings that sounding his whistle will render the team unmanageable, and greatly endanger life, it is his duty to desist until the danger point is past, or stop his train.—*Louisville, N. A. & C. Ry. Co. v. Stanger*, 7 Ind. App. 179, 32 N. E. 209, 34 N. E. 688.

[d] (Sup. 1893)

Permitting steam to escape from an automatic safety valve attached to a locomotive, frightening a horse, is not negligence rendering the company liable for injuries received by one thrown from the vehicle, where it appears that the use of the safety valve is necessary to the safety of the locomotive, and that there is no practicable method of reducing the pressure on the valve.—*Louisville, N. A. & C. Ry. Co. v. Schmidt*, 134 Ind. 16, 33 N. E. 774.

[e] (Sup. 1896)

A railroad company is liable for frightening horses by unnecessarily blowing its whistle in the populous parts of a city.—*Rogers v. Baltimore & O. S. W. Ry. Co.*, 49 N. E. 453, 150 Ind. 307.

[f] (App. 1896)

A railroad company operating in the usual and ordinary manner a hand car on which were bright, glistening tools used by the employés in performing their duties, is not liable for injuries resulting from a horse driven on a public highway becoming frightened thereat.—*Lake*

Erie & W. R. Co. v. Juday, 49 N. E. 843, 19 Ind. App. 436.

Where the operators of a hand car, knowing that its operation is the cause of the frightened condition of a horse driven on a public highway, make no attempt to stop or retard the speed of the car, the railroad company is liable for the damages resulting therefrom.—Id.

[g] (App. 1899)

A complaint alleging that death was caused by the negligent and unnecessary sounding of a locomotive's whistle, which frightened deceased's horses, is good on demurrer.—*Chicago & E. Ry. Co. v. Cummings*, 53 N. E. 1026, 24 Ind. App. 192.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1241-1244.

See, also, 33 Cyc. pp. 1147-1153.

§ 361. Failure to fence railroad.

[a] (Sup. 1864)

Under 1 Gav. & H. St. p. 342, railroad companies are liable for animals, but not persons, injured upon their roads, where they might be, but are not, fenced, irrespective of the question of negligence.—*Thayer v. St. Louis, A. & T. H. R. Co.*, 22 Ind. 28, 85 Am. Dec. 409; *McKinney v. Ohio & M. R. Co.*, 22 Ind. 99.

[b] (App. 1898)

The liability of a railroad company, under Burns' Rev. St. 1894, § 5323 (Horner's Rev. St. 1897, § 4098a), requiring railroad companies to maintain fences along their railroad tracks, and providing that companies failing to comply therewith shall be liable for all damages done to stock, does not extend to the killing of a child, caused by its wandering on the track by reason of the fence being torn down.—*Baltimore & O. S. W. Ry. Co. v. Bradford*, 49 N. E. 388, 20 Ind. App. 348, 67 Am. St. Rep. 252.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 1246.

§ 362. Defects in roadbed, tracks, or equipment.

Contributory negligence, see post, § 381.

Pleading, see post, § 394.

Questions for jury, see post, § 400.

[a] (Sup. 1887)

Where telegraph wires were extended over the tracks of a railroad company, under which trains continuously passed, the company was only bound to anticipate such combinations of circumstances and accidents and injuries therefrom, as, taking into account its own past experience and the experience and practices of others in similar situations, together with what was inherently probable in the condition of its wires as they related to the conduct of its business, might reasonably forecast as likely to happen.—*Wabash, St. L. & P. R. Co. v. Locke*, 14 N. E. 391, 112 Ind. 404, 2 Am. St. Rep. 193.

Where a person on the grounds of a railroad company was injured by coming in contact

with a wire which was disconnected from the pole by a brakeman standing on the top of a car, the proper inquiry is not whether the accident might have been avoided if the company had anticipated its occurrence, but whether, taking the circumstances as they then existed, the company was negligent in failing to anticipate and provide against the occurrence.—Id.

[b] (App. 1892)

Where a railroad renders the use of a highway unsafe in violation of Rev. St. 1881, § 3903, it is bound in operating its road to exercise proper care to prevent injury to a person placed in danger by its wrong in his lawful use of the highway.—*Hoggatt v. Evansville & T. H. R. Co.*, 29 N. E. 941, 3 Ind. App. 437.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1240, 1245, 1247.

§ 364. Articles projecting, falling, or thrown from trains.

Contributory negligence, see post, § 381.

Evidence admissible under pleadings, see post, § 395.

Persons working about cars, see ante, § 275.

Pleading, see post, § 394.

[a] (Sup. 1899)

An iron pin, thrown from a train running 42 miles an hour, on a 2° curve, on a smooth track, was carried 8 feet laterally while falling 8 feet vertically. *Held*, that the lateral movement could not have been caused by the velocity of the train.—*Cleveland, C., C. & St. L. Ry. Co. v. Berry*, 53 N. E. 415, 152 Ind. 607, 46 L. R. A. 33.

[b] (App. 1907)

A railroad company is not primarily liable for the negligence of railway mail clerks, and the only ground on which it is liable for their acts is that the clerks travel on its cars and have it in their power by dangerous practices to injure those who may lawfully be in close proximity to the track, and to whom it owes the duty of exercising reasonable care to protect from injury by reason of the passage of its trains, and that it has without objection suffered mail clerks to indulge in such dangerous practice.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Warrum*, 42 Ind. App. 179, 82 N. E. 934, 84 N. E. 356.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1252, 1253.

See, also, 33 Cyc. p. 1146.

§ 365. Mode of running trains or cars.

[a] (Sup. 1859)

The company having the legal right to run their train upon a side track, it is immaterial whether it was run upon that track by accident or design, if run with due care. No greater care would be required in case of such accident than if the train were thrown upon the track by design.—*Indiana Cent. Ry. Co. v. Hudelson*, 13 Ind. 325, 74 Am. Dec. 254.

[b] (Sup. 1904)

Municipal ordinances regulating the movements of locomotives and cars create duties, and their violation, in case of a person injured as a result of such violation, is negligence per se.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Lightheiser*, 163 Ind. 247, 71 N. E. 218, 660.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1254-1256.

§ 366. Signals and lookouts.

Frightening animals by signals, see ante, § 360. Pleading, see post, § 394.

Willful or wanton acts, see post, § 391.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1257-1266.

§ 367. — In general.

[a] (Sup. 1887)

A child seven years of age, without the fault of its parents, wandered to the station of the railroad company, and there entered a passenger train. The child was carried to the next station, where it was put off by the conductor. It wandered along the track for a mile, and, at a point where it could be seen three-fourths of a mile distant, it was run over and killed by a freight train, which was moving slowly up an ascending grade, and which could have been easily stopped before running upon the child. *Held*, that the railroad company was liable.—*Indianapolis, P. & C. R. Co. v. Pitzer*, 109 Ind. 179, 6 N. E. 310, 10 N. E. 70, 58 Am. Rep. 387.

[b] (App. 1904)

Where a city ordinance makes it unlawful for persons managing a train of cars to cause it to be run backwards in or through the city without providing a watchman on the rear end thereof in order to avoid accidents, neither the speed nor distance can be regarded as the essence of the act.—*Pittsburgh, C., C. & St. L. Ry. Co. v. McNeil*, 69 N. E. 471, 34 Ind. App. 810.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1257, 1258.

§ 368. — Violations of statutes or ordinances.

Admissibility of evidence, see post, § 397.

Assumption of risk by employes, see MASTER AND SERVANT, § 204.

Reliance by person injured on compliance with regulation, see post, § 385.

[a] (Super. 1873)

Where a locomotive is running at a rate of speed declared to be unlawful by the ordinances of the city, or is run backwards without a watchman on the rear, contrary to such ordinances, the act is not, merely because of the violation of the ordinances, indicative of an intent to commit an injury, nor is it conclusive evidence of negligence.—*Scudder v. Indianapolis, P. & C. Ry. Co.*, Wils. 481.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 1266.

§ 369. — Persons entitled to benefit of signals and lookouts.

Reliance on signals, see post, § 385.

[a] (Sup. 1887)

Deceased, an experienced switchman and brakeman, attending a transfer engine, had occasion to switch the train with which he was connected, and while so occupied the appellant's train, at a speed less than four miles per hour, and with the bell continuously ringing, came backing on a parallel track in his direction. At the time of the accident he was at or near a switch standard between the tracks, where the approaching train could have been seen for a distance of 142 feet. The uncontradicted testimony of the watchman stationed on the rear car of the backing train was that deceased, when the train was within ten feet, looked directly at it, and believing that he saw it, he gave him no special warning. *Held*, that an ordinance of the city requiring a watchman to be stationed on the rear end of backing trains was not violated because the watchman did not give special warning to deceased, who was apparently cognizant of the approach of the train; and the facts showing no negligence on the part of the appellant, and contributory negligence on the part of the deceased, there could be no recovery.—*Cincinnati, I., St. L. & C. Ry. Co. v. Long*, 112 Ind. 166, 13 N. E. 659.

[b] (Sup. 1894)

The fact that the train hands could have seen a trespasser on the track in time to have stopped the train, and thus avoided injuring him, is not such negligence as will render the company liable, since ordinary care would not require them to anticipate that he would not step off.—*Pennsylvania Co. v. Myers*, 136 Ind. 242, 36 N. E. 32.

[c] (Sup. 1902)

Decedent, a passenger, alighted from his train in its yards, and proceeded to a street along a route which was reasonably safe. Before reaching the street he turned suddenly from his route, crossing defendant's track, which was parallel to those of the carrier from which he alighted, and just as he reached the street was struck by an engine. The men on the engine had not perceived the decedent's peril, and he was proceeding without looking for approaching trains. There was light about the place, and a headlight on the engine which struck deceased, though the engine approached without giving signals. *Held* that, as decedent was a trespasser on defendant's track, it did not owe him the duty to use ordinary care for his protection, and was not liable as for negligently causing his death.—*Brooks v. Pittsburgh, C., C. & St. L. Ry. Co.*, 62 N. E. 694, 158 Ind. 62.

[d] (App. 1904)

Under Burns' Rev. St. 1901, § 5307, requiring railway trains to give signals on approach

ing a crossing, and section 5308, declaring that the company "shall be liable in damages to any person, or his representatives, who may be injured in property or person * * * by the neglect or failure" to do so, a person who was approaching a railroad crossing without intending to cross, and who was just turning on a side road running parallel with the railroad track when his horse was frightened by the approach of a train without giving the signal, could not recover for injuries sustained.—*New York, C. & St. L. R. Co. v. Martin*, 72 N. E. 654, 35 Ind. App. 669.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1259-1262.

§ 371. Rate of speed.

As willful act, see post, § 391.

Opinion evidence as to rate of speed, see EVIDENCE, § 492.

Pleading, see post, § 394.

Proximate cause of injury, see post, § 389.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1267-1274.

§ 372. — In general.

[a] (Sup. 1855)

The law requires that a train of cars in passing through a town shall be run with a greater degree of care, and hence at a less rate of speed, than is generally observed in the movement of the train.—*Lafayette & I. R. Co. v. Shriner*, 6 Ind. 141, followed in *Smith v. Terre-Haute & R. R. Co.* (1856) 7 Ind. 553.

[b] (Sup. 1884)

A passenger on a passenger train was ejected by the conductor, and placed far enough to one side of the track so as to be out of danger from passing trains. The passenger was intoxicated, and subsequently got on the track. Held, that the employes in charge of a subsequent train were not chargeable with notice that the passenger had gone on the track before they saw him there or had information of his being there that required them to run slow enough to stop before they reached him.—*McClelland v. Louisville, N. A. & C. Ry. Co.*, 94 Ind. 276.

[c] (App. 1898)

Burns' Rev. St. 1894, § 5307 (Rev. St. 1881, § 4020), which requires railroad engineers to sound the whistle and bell when approaching a crossing, was intended solely for the protection of persons and animals approaching the crossing, and has no application where a child trespassed on the track a considerable distance from the crossing, though, had the whistle been sounded therefor, the child's parents might have been enabled to save the child's life.—*Baltimore & O. S. W. Ry. Co. v. Bradford*, 49 N. E. 388, 20 Ind. App. 348, 67 Am. St. Rep. 252.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1267-1269, 1271-1274.

§ 373. — Violations of statutes or ordinances.

Admissibility of evidence, see post, § 397.

As willful act, see post, § 391.

Effect of contributory negligence, see post, § 387.

Injuries to servants, see MASTER AND SERVANT, § 137.

Reliance by person injured on compliance with regulation, see post, § 385.

[a] (Super. 1873)

Where a locomotive is running at a rate of speed declared to be unlawful by the ordinances of the city, or is run backwards without a watchman on the rear contrary to such ordinances, the act is not, merely because of the violation of the ordinance, indicative of an intent to commit an injury, nor is it conclusive evidence of negligence.—*Scudder v. Indianapolis, P. & C. Ry. Co.*, Wils. 481.

[b] (Sup. 1892)

The violation of an ordinance regulating the speed of trains within the city limits is negligence per se.—*Pennsylvania Co. v. Horton*, 132 Ind. 189, 31 N. E. 45.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 1270.

See, also, note, 59 C. C. A. 5.

§ 375. Precautions as to persons seen on or near track.

Failure to take as willful act, see post, § 391.

Proximate cause of injury, see post, § 389.

Right to rely on precautions, see post, § 385.

Sufficiency of evidence, see post, § 398.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1275-1284.

§ 377. — Right to presume that person will leave track or avoid danger.

[a] The law presumes that a person walking on a railroad track will leave the same in time to prevent injury from an approaching train, of which he has knowledge, or should have, by the ordinary use of his senses; and the managers of the train may act on this presumption.—(Super. 1873) *Scudder v. Indianapolis, P. & C. Ry. Co.*, Wils. 481; (1895) *Louisville, & N. R. Co. v. Cronbach*, 12 Ind. App. 606, 41 N. E. 15.

[b] (Super. 1873)

If an engineer in charge of a locomotive or train of cars looks ahead and sees a man walking at the side of the track, it is not his duty to infer that the man will walk into danger in front of his engine when it is approaching near, and giving the usual signal of approach.—*Scudder v. Indianapolis, P. & C. Ry. Co.*, Wils. 481.

[c] (Sup. 1874)

It cannot be required of persons managing a locomotive and train of cars that they

shall stop the train whenever any one is seen upon the track, especially at points where many persons are passing and crossing the track. They have a right to presume that persons walking along or across the track will not remain until an approaching train is upon them.—*Terre Haute & I. R. Co. v. Graham*, 46 Ind. 239.

[d] (Sup. 1878)

Where a middle-aged man, in possession of the senses of sight and hearing, entered on a railroad track, walked thereon 30 yards, was overtaken by a train moving at no part of the time faster than 3 miles an hour, the bell constantly ringing and the track clear, and was struck by the pilot and killed, the engineer had a right to presume that he would leave the track at the last moment, and to act on such presumption, and if the killing was not willful on the engineer's part, the company is not liable therefor.—*Indianapolis & V. R. Co. v. McClaren*, 62 Ind. 566.

[e] (Sup. 1887)

Where defendant's railroad track and the tracks of other railways connected with union tracks, which were used under certain regulations by the several companies for switching cars and other local purposes, the defendant's employes had the right to assume that the servants of the other companies who were in the discharge of duties on the tracks of the union company would observe a degree of care commensurate with the known perils of the situation and the duties required of them.—*Cincinnati, I., St. L. & C. R. Co. v. Long*, 13 N. E. 659, 112 Ind. 166.

Persons in control of railroad trains have a right to presume that men of experience will act reasonably in all given contingencies, and they are not bound to anticipate and provide against extraordinary and improbable conditions, which involve inattention on the part of others, and their duty to persons thus situated only begins when they have good reason to suppose that such persons are unconsciously in peril or disabled from avoiding it.—Id.

[f] (Sup. 1887)

An engineer of a moving train may presume until the last moment that a person walking on the track will leave it in time to avoid danger.—*Palmer v. Chicago, St. L. & P. R. Co.*, 14 N. E. 70, 112 Ind. 250.

[g] (Sup. 1888)

Where an engineer sees a person on the track ahead of him, apparently of adult age, in the possession of his ordinary faculties, and at liberty to leave the track at pleasure, he may rightfully presume that such person will leave the track in time to avoid danger.—*Ohio & M. Ry. Co. v. Walker*, 113 Ind. 196, 15 N. E. 234, 3 Am. St. Rep. 638.

[h] (App. 1894)

The engineer of a moving train may presume, till the contrary appears, that a person

on the track will leave it in time.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Judd*, 10 Ind. App. 213, 36 N. E. 775.

[i] (App. 1896)

An engineer has the right, up to the last moment, to presume that an adult walking upon the track apparently in possession of his faculties will give way to the train and leave the track, and that the engineer may act upon that presumption, and need not slacken his speed. Before he can justify his conduct in continuing his speed unchecked by any such presumption he should himself be guilty of no wrong. He should have given proper and reasonable signals, and should himself be proceeding with due care.—*Lake Erie & Western R. Co. v. Brafford*, 43 N. E. 882, 44 N. E. 551, 15 Ind. App. 655.

FOR CASES FROM OTHER STATES.

SEE 41 CENT. DIG. R. R. § 1280.

§ 378. — Children.

Sufficiency of evidence, see post, § 398.

[a] (Sup. 1867)

Where the question is one of simple negligence, there is no distinction between the case of a child unnecessarily exposed to danger and that of a person of mature years, but, here the question becomes one of gross negligence or willful misconduct on the part of defendant, the rule is not the same, and, if an engineer discovers a young child on the railroad track, he is required to use greater effort to stop the train than if he had discovered a grown person in the same situation.—*Lafayette & I. R. Co. v. Huffman*, 28 Ind. 287, 92 Am. Dec. 318.

[b] (Sup. 1887)

A railroad company is held to the exercise of a higher degree of care when a young child is seen on the track than in the case of an adult; and where the child is of tender years the employes of the company have no right to act upon the presumption that it will leave the track, but must use ordinary care to prevent running upon it.—*Indianapolis, P. & C. R. Co. v. Pitzer*, 109 Ind. 179, 6 N. E. 310, 10 N. E. 70, 58 Am. Rep. 387.

[c] (App. 1893)

The rule that a railway company owes no duty to trespassers except to avoid willful or reckless injury does not apply where children of tender years are seen on the track, as there is then an affirmative duty owing to the child.—*Louisville, E. & St. L. Consol. R. Co. v. Lohges*, 6 Ind. App. 288, 33 N. E. 449.

Though a child killed by defendant railroad company's train was a trespasser on defendant's track, it was actionable negligence for the employes in charge of the train to make no attempt to stop the train when they saw, after ringing the bell and sounding the whistle,

that decedent did not understand the signals, and made no attempt to leave the track.—Id.

FOR CASES FROM OTHER STATES.

SEE 41 CENT. DIG. R. R. §§ 1281, 1282.
See, also, note, 25 L. R. A. 784.

§ 379. — Infirm or helpless persons.

[a] (Sup. 1893)

A railroad company owes to a trespasser no protection against negligence, but it does owe him the duty of all reasonable effort to avoid injuring him when his presence and his inability to avoid injury are known to it.—Parker v. Pennsylvania Co., 34 N. E. 504, 134 Ind. 673, 23 L. R. A. 552.

FOR CASES FROM OTHER STATES.

SEE 41 CENT. DIG. R. R. §§ 1283, 1284.

§ 380. Contributory negligence of person injured.

Admissibility of evidence, see post, § 397.

Contributory negligence of owner or driver of vehicle imputable to occupant, see NEGLIGENCE, § 98.

Contributory negligence of parent or custodian imputable to child, see NEGLIGENCE, §§ 94–96.

Injury avoidable notwithstanding contributory negligence, see post, § 390.

Instructions, see post, § 401.

Negating in pleading, see post, § 394.

Presumptions and burden of proof, see post, § 396.

Questions for jury, see post, § 400.

Sufficiency of evidence, see post, § 398.

FOR CASES FROM OTHER STATES.

SEE 41 CENT. DIG. R. R. §§ 1285–1318.

See, also, 33 Cyc. p. 1154.

§ 381. — Care required of persons on or near tracks in general.

[a] (Super. 1873)

A mere habit of using the tracks of a railroad with the knowledge of the railroad company, but without invitation from the company, will not lessen the degree of care required of those so using the track.—Scudder v. Indianapolis, P. & C. Ry. Co., Wils. 481.

Where a person walking by the side of a railroad track heedlessly or negligently steps upon the track in front of the approaching locomotive, he cannot recover, unless those in charge of the locomotive saw his peril, or could, by use of ordinary diligence, have seen it in time to prevent the injury, after it became apparent that he was in danger.—Id.

[b] (Sup. 1874)

Persons who walk, ride, or drive on a railroad track between stations and public crossings, although with the permission of the company, assume all risks incident to the act, and cannot recover from the company for injuries received while so doing, unless the injury was

wantonly or intentionally inflicted.—Jeffersonville, M. & I. R. Co. v. Goldsmith, 47 Ind. 43.

[c] (Sup. 1889)

Where a railroad has constructed its track along a highway constituting the only means of ingress and egress from the home of an adjacent landowner, leaving excavations and embankments in the highway in violation of its duty to restore it to its former condition, use of the highway under such circumstances by members of the adjacent landowner's family does not of itself constitute such contributory negligence as will defeat a recovery against the railroad for personal injuries suffered.—Evansville & T. H. R. Co. v. Crist, 19 N. E. 310, 116 Ind. 446, 2 L. R. A. 450, 9 Am. Rep. 865.

[d] (Sup. 1889)

Where one with full knowledge of the custom of a railway company in the use of its switch engines in the removal of cars thrown in upon a "Y" track steps upon the track, and attempts to cross in full view of a moving engine, and is struck and injured, he is guilty of contributory negligence, which is not excused by the fact that on a parallel track near the scene of the accident, but further from him, stood a passenger train awaiting the clearing of the main track.—Ohio & M. Ry. Co. v. Hill, 117 Ind. 56, 18 N. E. 461.

[e] (Sup. 1893)

Railroad companies in the operation of their trains have necessarily the right to make all reasonable and usual noise incident thereto, and persons whose duties call them near a railway must be presumed to know of such right and to act for their own safety with reference thereto.—Louisville, N. A. & C. Ry. Co. v. Schmidt, 33 N. E. 774, 134 Ind. 16.

[f] (Sup. 1893)

Where a person who is unacquainted with the locality, and without license, walks into an archway under a mill, which is merely large enough to admit an ordinary box car, and through which runs a railroad switch so curved as to prevent a view of an approaching car, he is a trespasser, and guilty of such contributory negligence as precludes a recovery for his death caused by the negligence of the railroad company in running a car into the archway at an unlawful rate of speed.—Parker v. Pennsylvania Co., 134 Ind. 673, 34 N. E. 504.

[g] (App. 1893)

A pedestrian who undertakes to cross a railroad running along a city street, when he sees a train approaching at a distance of 930 feet, is negligent. Lotz, J., dissenting.—Pittsburgh, C., C. & St. L. Ry. Co. v. Bennett, 9 Ind. App. 92, 35 N. E. 1033.

[h] (Sup. 1894)

The fact that a policeman is authorized by a railroad company to patrol and keep tramps off its tracks does not absolve him from the duty of exercising due care for his own

safety.—*Pennsylvania Co. v. Myers*, 136 Ind. 242, 36 N. E. 32.

[i] (App. 1898)

Where one employed by a street contractor was shoveling gravel near a railroad track, he had the right to assume that the track was in a fit condition for the passage of trains, and that he might pursue his work without danger from injury by the derailment of an engine from the accumulation of gravel on the track.—*St. Louis, I. & E. R. Co. v. Ridge*, 49 N. E. 828, 20 Ind. App. 547.

[j] (Sup. 1899)

In an action by one injured by an iron pin thrown from a passing train, the jury answered specially that plaintiff knew the character of the train, when it was due, its usual rate of speed in passing that point, and before it came along he stepped aside at least 10 feet from the track, and that the place to which he withdrew was safe from risks that might reasonably be apprehended. *Held*, that the answers did not show contributory negligence.—*Cleveland, C., C. & St. L. Ry. Co. v. Berry*, 53 N. E. 415, 152 Ind. 607, 46 L. R. A. 33.

[k] (Sup. 1903)

An employé in a quarry was killed by defendant's cars while attempting to cross the latter's side tracks, which ran through the quarry yard. Defendant's tracks were laid on the quarry premises under a contract with the quarry company. *Held*, that defendant and decedent were both on the premises by its express invitation, and decedent, in passing over the tracks, was at least bound to the exercise of ordinary care.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Seivers*, 67 N. E. 680, 70 N. E. 133, 162 Ind. 234.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1285-1293.

See, also, 33 Cyc. p. 1154.

§ 382. — Care required of children and others under disability.

[a] (App. 1895)

The fact that the minor plaintiff in a personal damage suit was playing, at the time of the accident, in the public street, through which the defendant's train regularly ran, does not show negligence per se.—*Louisville, N. A. & C. Ry. Co. v. Sears*, 11 Ind. App. 654, 38 N. E. 837.

[b] (App. 1895)

The evidence in an action for the death of a boy seven years old showed that he went on defendant's track by crossing over a cattle guard at a place where the right of way was fenced on both sides, where the track was on an embankment two or three feet high, and where a great number of trains were continually passing, and was struck by an engine at a point on the track over 900 feet from a crossing. There was no evidence of any allurement or invitation to the boy to go on the track at that

point, or that he had previously walked thereon with defendant's consent, or knew that others did, and no evidence that defendant could, by the use of reasonable diligence, have seen the boy and avoided the accident. *Held*, that defendant was not liable.—*Cleveland, C., C. & St. L. Ry. Co. v. Adair*, 12 Ind. App. 569, 39 N. E. 672.

[c] (Sup. 1898)

A bright, intelligent child, 7½ years old, who, though he knows that trains are liable to pass, and that if, when they pass, he is on the track, he will be run over, sits down on a railroad track to play, falls asleep, and is run over, is guilty of contributory negligence.—*Krenzer v. Pittsburgh, C., C. & St. L. Ry. Co.*, 151 Ind. 587, 43 N. E. 649, 68 Am. St. Rep. 252, 52 N. E. 220.

Where plaintiff was injured by a train while asleep on the track, and the persons in charge of the train, though negligent in proceeding at excessive speed, and in failing to ring the bell, did not know of his presence in time to have avoided the injury, the company is not liable.—*Id.*

[d] (App. 1899)

A child over seven years old, and of sufficient intelligence to know the difference between danger and safety, is a person sui juris so as to be chargeable with contributory negligence resulting in her being struck by a train.—*Dull v. Cleveland, C., C. & St. L. Ry. Co.*, 52 N. E. 1013, 21 Ind. App. 571.

[e] (Sup. 1907)

In an action for injuries to plaintiff, a child eight years old, caused by one of defendant's trains being backed down upon him while on its tracks by defendant's invitation, defendant could not relieve itself of liability on the theory that plaintiff, with full knowledge and appreciation of the danger, voluntarily encountered it and thereby took upon himself the risk incident thereto in the absence of anything to show that he knew or appreciated the danger, since the appreciation of such danger by a child of plaintiff's age would not be presumed.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Simons*, 168 Ind. 333, 79 N. E. 911.

[f] (Sup. 1908)

In an action against a railroad for injuries received on defendant's track, evidence of plaintiff's intoxication at the time of the injury was admissible on the question of contributory negligence.—*Pittsburgh, C., C. & St. L. Ry. Co. v. O'Conner*, 171 Ind. 686, 85 N. E. 969.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1297-1304.

§ 383. — Failure to look or listen for approaching train.

Injury to employes, see MASTER AND SERVANT, § 236.

Questions for jury, see post, § 400.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

8 IND. DIG.—42

[a] (Super. 1873)

A person who is walking upon the track of a railroad, or about to step upon such track, must exercise care in looking to see if trains or locomotives are approaching; and a failure to look under such circumstances is negligence.—*Scudder v. Indianapolis, P. & C. Ry. Co.*, Wils. 481.

A person walking on a track of a railroad is bound to use more care and diligence, and to keep a better lookout for approaching danger, than when walking on an ordinary road.—Id.

[b] (Sup. 1874)

Where a person walked upon the track of a railroad, knowing that it was time for a train going in the same direction, and looked back several times, but did not see the train or hear any signal, though he thought he heard it come to the point from which he started, and he could have seen the train for nearly $\frac{1}{4}$ of a mile, but did not observe it until it struck him, and he was injured thereby, and those in charge of the train, on observing that said person was heedless of the approaching danger, made the usual efforts to stop the train and avoid running upon him, *held*, that he could not recover for the injury.—*Terre Haute & I. R. Co. v. Graham*, 46 Ind. 239.

[c] (Sup. 1894)

A pedestrian rightfully on a railroad track, who meets an approaching train, is guilty of contributory negligence in stepping on an adjoining track without looking or listening for a train approaching him from behind, which he knows is due, and which was in plain sight, where there was ample space between the tracks to have permitted the passage of the trains in safety, and there were good walks on both sides of the track, over which deceased could have reached his destination in safety.—*Pennsylvania Co. v. Myers*, 136 Ind. 242, 36 N. E. 32.

[d] (App. 1895)

A person reasonably active, and not defective in sight or hearing, who steps on a railroad track immediately in front of an engine headed in the direction he is going, and under steam, and walks along the track in front of it for about 300 feet without looking back or listening to ascertain whether the engine is moving, there being nothing to prevent his hearing or to obstruct his view, is negligent.—*Louisville & N. R. Co. v. Cromback*, 12 Ind. App. 666, 41 N. E. 15.

[e] (App. 1899)

One who stands on a railroad track for two or three minutes in front of an approaching train which can be seen for three-quarters of a mile, without taking any precautions, and is struck by it, is guilty of contributory negligence as a matter of law.—*Dull v. Cleveland, C. & St. L. Ry. Co.*, 52 N. E. 1013, 21 Ind. App. 571.

[f] (Sup. 1903)

While the rule requiring persons to look and listen at the crossing of a railroad over a public highway does not apply in all its strictness to those whose employment requires them to be on, about, and across the tracks, it is their duty, when not engaged in work demanding their attention, to look and listen for approaching trains.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Seivers*, 67 N. E. 680, 70 N. E. 133, 162 Ind. 234.

Where, in an action for death of an intestate while crossing certain switch tracks of a railroad company, the undisputed facts disclosed that had deceased exercised any degree of care or vigilance he could have avoided the collision which resulted in his death and that but a mere glance toward the east would have disclosed the moving cars in time so that he could have escaped the impending danger, he was guilty of contributory negligence precluding recovery.—Id.

Plaintiff's decedent, an employé in a quarry, was killed by defendant's cars while attempting to cross the latter's side tracks, which ran through the quarry yards. It appeared that decedent had a clear view up and down the track from a point $3\frac{1}{2}$ feet therefrom; that he failed to look, but stepped on the track, stopped, and looked westward, and while so doing was struck by a train from the east; that, if he had looked eastwardly, he could have seen the train in time, or, if he had not stopped, would have crossed in safety. *Held* contributory negligence precluding recovery.—Id.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1305-1310.

See, also, 33 Cyc. p. 1154.

§ 384. — Knowledge of danger.

[a] (Super. 1873)

A railroad track is of itself notice of danger to any foot passenger crossing or walking thereon.—*Scudder v. Indianapolis, P. & C. Ry. Co.*, Wils. 481.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 1294.

§ 385. — Reliance on precautions on part of railroad company.

[a] (Sup. 1885)

A trespasser walking on a railroad track was negligent in relying on the railroad company to give the statutory signals to warn him of the approach of a train.—*Ivens v. Cincinnati, W. & M. Ry. Co.*, 2 N. E. 134, 103 Ind. 27.

[b] (App. 1893)

Where a pedestrian, either while crossing a railroad track at a crossing, or while lawfully walking along a track laid in a public street, can, if he looks, see an approaching train in time to avoid it, the fact that the company fails to give the statutory signals, and runs the train at an unlawful rate of speed, does not

excuse the pedestrian from exercising proper care to avoid danger, and no inference of due care on the part of the pedestrian can be drawn from such negligence of the company.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Bennett*, 9 Ind. App. 92, 35 N. E. 1033.

A person walking along a railroad track laid in a public street, though not a trespasser or licensee, must use his senses of sight and hearing; and if, when he sees an approaching train at a distance of 1,384 feet, he remains on the track, or dangerously near it, relying on the assumption that it is not running above the ordinance rate of four miles per hour, he is negligent.—*Id.*

[c] (App. 1896)

A person walking on a railroad track located on a street has a right to assume, in the absence of any indication to the contrary, that the railroad company will obey an ordinance limiting the speed of trains in the city.—*Lake Erie & W. R. Co. v. Brafford*, 15 Ind. App. 655, 43 N. E. 882, 44 N. E. 551.

[d] (Sup. 1907)

A railroad track is notice of danger, and a traveler may not enter thereon relying on the assumption that the railway company will obey a municipal ordinance.—*Indianapolis Union R. Co. v. Waddington*, 169 Ind. 448, 82 N. E. 1030.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1311-1313.

See, also, 33 Cyc. p. 1155.

§ 386. — Acts in emergencies.

[a] (Sup. 1861)

The plaintiff was walking with his father up a railroad track down which a train was moving at the rate of about four miles an hour, in full sight. They crossed an unplanked bridge, but the train came upon them before the father had cleared the bridge, and the son stepped back to help him off the bridge, and succeeded, but lost his own leg in the act. The engineer reversed his engine and took all means to avoid an injury. *Held*, that no case for a recovery of damages from the company was shown.—*Evansville & C. R. Co. v. Hiatt*, 17 Ind. 102.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 1205.

See, also, 33 Cyc. p. 1154.

§ 387. — Effect in general.

[a] (Sup. 1884)

Where plaintiff trespassing on the track of a railroad company saw people at the depot waiting for the train and heard the whistle at the depot and continued on the track, taking no precautions for his safety, while others near him both saw and heard it, his negligence would defeat his action for injuries in being struck by the train, though defendant was guilty of gross

negligence.—*Terre Haute & I. R. Co. v. Graham*, 95 Ind. 286, 48 Am. Rep. 719.

[b] (Sup. 1894)

The fact that a railroad company runs its trains at a prohibited rate of speed through the city limits does not absolve a person on the track from the duty of exercising ordinary care for his safety, unless he is willfully injured.—*Pennsylvania Co. v. Myers*, 136 Ind. 242, 36 N. E. 32.

[c] (App. 1899)

Even though the railroad company be culpably negligent in running its train at an unlawful rate of speed, contributory negligence in standing on the track for two or three minutes in front of an approaching train, which can be seen for three-quarters of a mile, bars a recovery.—*Dull v. Cleveland, C., C. & St. L. Ry. Co.*, 52 N. E. 1013, 21 Ind. App. 571.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1296, 1314-1316.

§ 389. Proximate cause of injury.

Contributory negligence as proximate cause, see ante, § 387.

[a] (App. 1892)

In an action against a railroad company for personal injuries it appeared that plaintiff was driving his team on a highway running parallel with, and 50 yards from, defendant's track, and near a station; that along the highway on the side opposite the track there were a plank fence and a creek; that he was within a few rods of a point where the track crossed the highway and creek, when an "irregular" train approached; that there was a crossing a short distance on the opposite side of the station; that the whistle was not sounded for such crossing nor for the station; that when the train came within about 100 yards of plaintiff his team, usually gentle, became frightened, and started in a trot; that by the use of the brake he slackened the team, when the engineer blew the whistle and let off steam, causing the team to run away; that the train was on the crossing when the team reached it, and the horses broke through the fence, and dashed down the banks of the creek, severely injuring plaintiff; that the accident was without fault on plaintiff's part; that he was in plain view of the engineer from the time the team first became frightened until after the accident; that the engineer, instead of making an effort to stop or check the speed of the train, which was running 20 miles an hour, increased the speed, and did not stop when he saw the accident had occurred. *Held*, that the proximate cause of plaintiff's injuries was the negligent conduct of defendant's servants.—*Louisville, N. A. & C. Ry. Co. v. Stanger*, 7 Ind. App. 179, 32 N. E. 209, 34 N. E. 688.

[b] (App. 1899)

The failure of the engineer to attempt to stop the train after discovering a person on the track, even if negligence, was not the proximate cause of the injury, where it was impossible to stop the train in time to avert the accident, and he gave danger signals.—*Dull v. Cleveland, C. C. & St. L. Ry. Co.*, 52 N. E. 1013, 21 Ind. App. 571.

[c] (App. 1907)

An employé of an independent contractor, repairing a depot, was injured by being caught between a car moved by the employés of the railroad and a bumping post. At the instant the car was moved the employé's knee gave way, in consequence of his attempting to pitch an appliance across the track. *Held*, that the proximate cause of the injury, was the moving of the car, and not the giving way of the employé's knee.—*Pittsburgh, C. C. & St. L. Ry. Co. v. Cozatt*, 39 Ind. App. 682, 79 N. E. 534.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1319-1323.

See, also, 33 Cyc. p. 1155.

§ 390. Injury avoidable notwithstanding contributory negligence.

Instructions, see post, § 401.

Pleading, see post, § 394.

[a] (Sup. 1878)

Contributory negligence is a complete defense to an action against a railroad company for running over and killing plaintiff's intestate, unless the killing was willful, even though the company, after discovering his danger, could have prevented the accident by the exercise of ordinary care and diligence.—*Pennsylvania Co. v. Sinclair*, 62 Ind. 301, 30 Am. Rep. 185.

[b] (Sup. 1903)

Even though defendant was negligent in running cars at a greater speed than usual, and in failing to have a brakeman on the front car to give warning to persons on the tracks, such negligence was not sufficient to render it liable notwithstanding decedent's negligence, which was the proximate cause of the accident.—*Pittsburgh, C. C. & St. L. Ry. Co. v. Seivers*, 67 N. E. 680, 70 N. E. 133, 162 Ind. 234.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1324, 1325.

§ 391. Willful or wanton acts and gross negligence.

Admissibility of evidence, see post, § 397.

Pleading, see post, § 394.

Questions for jury, see post, § 400.

[a] (Sup. 1874)

The agents and servants of a railroad company while engaged in running a train of cars are in the line of their duty, and for their acts willfully done while so engaged, resulting in injury to a person walking on the track, the company is liable.—*Terre Haute & I. R. Co. v. Graham*, 46 Ind. 230.

[b] (Sup. 1883)

A trespasser on a railway track, injured by the negligence of the railway company, may not recover unless such negligence was willful; mere gross negligence is not sufficient.—*Terre Haute & I. R. Co. v. Graham*, 95 Ind. 296, 43 Am. Rep. 719.

[c] (Sup. 1887)

Where a man is walking on the track of a railroad, and another is a short distance behind him running and making signals of warning, and endeavoring to induce the foremost man to leave the track, it is willfulness, and not mere negligence, for an engineer who sees such signals to push on, regardless of them, without using ordinary care to stop the train, and the contributory negligence of the deceased in going upon the track will not bar a recovery.—*Palmer v. Chicago, St. L. & P. R. Co.*, 112 Ind. 250, 14 N. E. 70.

[d] (Sup. 1893)

Though there are usually large numbers of people in the immediate vicinity of a switch and archway, and a four-foot walk along one side of the latter which is used by persons passing through it, the running of a car through such archway at a high rate of speed is nothing more than negligence, in the absence of actual knowledge by the company's operatives of the presence of deceased in such archway, and is not such willfulness as renders the company liable notwithstanding deceased's contributory negligence in the use of it.—*Parker v. Pennsylvania Co.*, 134 Ind. 673, 34 N. E. 504.

[e] (App. 1894)

Decedent was walking on defendant's main track, towards the depot. An engine near by was blowing off steam so noisily that the coming train could not be heard. The view of the track was clear for half a mile. Decedent's strength and senses were sound. The station whistle was blown several hundred yards away, the bell rung continuously, and the danger signals given. The engineer testified that he saw decedent on the track, and when he saw that decedent did not leave it he gave the alarm signals, and used every means to stop his train, and tried to avoid injuring him. *Held*, that no willful injury had been shown.—*Pittsburgh, C. C. & St. L. Ry. Co. v. Judd*, 10 Ind. App. 213, 36 N. E. 775.

[f] (Sup. 1896)

In an action for the death of a deaf adult, run over by defendant's train while walking on its track, located on a street, the evidence showed that the train was running at an unlawful speed; that the engineer saw deceased on the track, with his back to the train, and kept his eyes constantly on him, while going over 2,700 feet, and saw that, although the bell was rung and the whistle sounded, deceased gave no heed; that two men, within the plain range of the engineer's vision, were making signals to attract deceased's attention; and that

the engineer made no effort to check the speed of the train until he was within 40 feet of deceased. *Held*, that the facts authorized the jury to find that the killing was willful, though the engineer denied that he intended to kill the man or run over him.—*Lake Erie & W. R. Co. v. Brafford*, 15 Ind. App. 635, 43 N. E. 882, 44 N. E. 551.

[g] (Sup. 1898)

The reliance of an engineer of a train on the presumption that a man on the track could and would get to a point of safety is not willfulness.—*Ullrich v. Cleveland, C., C. & St. L. Ry. Co.*, 51 N. E. 95, 151 Ind. 358.

[h] (App. 1900)

Before willfulness can be attributed to servants or employés in the operation of a train of cars, facts should be averred and shown that would charge them with knowledge, actual or imputed, of impending danger, before any duty of the company arises to require of it affirmative acts or effort to avoid resulting injury.—*Huff v. Chicago, I. & L. Ry. Co.*, 56 N. E. 932, 24 Ind. App. 492, 79 Am. St. Rep. 274.

[i] (Sup. 1902)

The running of an engine over a street at a speed in excess of that permitted by ordinance, without signals of warning, and without knowledge that any person was near the crossing, is not sufficient to charge the company for the willful killing of a decedent who placed himself in the place of danger immediately before he was struck.—*Brooks v. Pittsburgh, C., C. & St. L. Ry. Co.*, 62 N. E. 694, 158 Ind. 62.

[j] (App. 1902)

Plaintiff's intestate, while walking on the track of defendant railroad company, with its implied license, while it was raining, with an umbrella in front of her, at a time when persons were likely to be on the track, was struck by a train, one of the windows on the engine of which was obstructed. No warning signal was given near the place, and none was ordinarily required. The speed was not shown to be greater than usual, and it did not appear that deceased was seen, or where she came on the track. *Held*, that it did not appear that the death was caused by a wrongful omission of the company, so it could not be held liable on the ground of conduct showing a reckless disregard for the safety of others, and a willingness to inflict the injury.—*Manlove v. Cleveland, C., C. & St. L. Ry. Co.*, 65 N. E. 212, 29 Ind. App. 694.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1317, 1326-1330.

See, also, 33 Cyc. p. 1154.

§ 392. Acts or omissions of employés or others.

[a] (App. 1901)

In an action against a railroad company for injury to a horse, the complaint alleged

that, while the horse was on the railroad track, defendant's servants, riding on a hand car, willfully and intentionally frightened the horse by making loud noises, and willfully and intentionally drove him along the track, between the rails, at great speed, by shouting and rapidly following him with the car, to a culvert crossing the track, into which he fell, and was injured. *Held*, that the complaint did not state a cause of action against the railroad company, since the willful acts of its servants complained of were not shown to have been instigated by or committed for the defendant, or in the line of the servants' duty.—*Wabash R. Co. v. Linton*, 60 N. E. 313, 26 Ind. App. 596.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 902-909.

§ 393. Actions for injuries.

Waiver of privilege of excluding testimony as to communications to physicians, see WITNESSES, § 219.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1331-1392.

See, also, 33 Cyc. pp. 1156-1160.

§ 394. — Pleading

Pleading ownership and operation of road, see ante, § 268.

[a] (Sup. 1864)

A complaint in an action against a railroad company for negligently running over a person on its track which alleges that decedent "was at the time lawfully on said railroad," etc., does not sufficiently show that his negligence did not contribute to his injury.—*Indianapolis, P. & C. R. Co. v. Keely's Adm'r*, 23 Ind. 133.

[b] (Sup. 1867)

The complaint, in an action against a railroad company to recover damages for injuries sustained by a child of tender years from a passing locomotive, charged that the defendant in a "careless and wanton" manner ran the locomotive over, etc. *Held*, that the word "wanton" did not mean "willful," and added no force to the charge that the act was done in a "careless" manner.—*Lafayette & I. R. Co. v. Huffman*, 28 Ind. 287, 92 Am. Dec. 318.

[c] (Sup. 1874)

A complaint against a railroad company, alleging that the plaintiff was on the track of the defendant's road, and, without any warning to him, and without any fault on his part, the locomotive was negligently run against him, etc., is substantially good. Such complaint is also good if it is alleged that the defendant willfully and purposely and with great force ran the locomotive against the plaintiff.—*Terre Haute & I. R. Co. v. Graham*, 46 Ind. 239.

[d] (Sup. 1874)

Where the facts alleged in a complaint against a railroad company for personal injuries

show that the plaintiff was guilty of contributory negligence, the complaint is bad, although it may allege that plaintiff was free from fault.—*Jeffersonville, M. & I. R. Co. v. Goldsmith*, 47 Ind. 43.

[e] (Sup. 1875)

A complaint against a railroad company to recover damages for an injury to the person of plaintiff, a child of seven years, caused by the negligence of the defendant's employes in the course of their employment, which fails to show, either by direct averment or by the allegation of facts, that there was no contributory negligence, is bad on demurrer.—*Higgins v. Jeffersonville, M. & I. R. Co.*, 52 Ind. 110.

[f] (Sup. 1878)

An allegation that defendant railroad company ran its train "at a recklessly and grossly negligent and dangerous rate of speed to wit, at the rate of 40 miles an hour," in violation of an ordinance limiting the rate to 6 miles an hour, does not sufficiently charge willful injury.—*Pennsylvania Co. v. Sinclair*, 62 Ind. 301, 30 Am. Rep. 185.

[g] (Sup. 1885)

A complaint alleging that by reason of a box car being in the highway and "in its then condition" plaintiff's horse became frightened was not bad on demurrer as failing to allege that plaintiff's horses took fright at the car.—*Cleveland, C., C. & I. Ry. Co. v. Wynant*, 100 Ind. 100.

[h] (Sup. 1886)

Where plaintiff's complaint, in an action against a railroad company, avers generally that the injury on which the action is based was inflicted willfully, and without fault or negligence on plaintiff's part, and then proceeds to state specific facts from which it is apparent that he was a trespasser and was negligent, and that the act of the company's servants was not willful, a demurrer to the complaint is properly sustained.—*Ivens v. Cincinnati, W. & M. Ry. Co.*, 103 Ind. 27, 2 N. E. 134.

[i] (Sup. 1886)

In actions against a railroad company, to recover damages for killing a person, when the pleading, notwithstanding the frequent use of the words "purposely" and "willfully," does not charge that the defendant purposely or willfully killed the intestate, or purposely or willfully ran the train upon him, or caused it so to be run upon him, the allegations amount to no more than a charge of killing through negligence.—*Chicago & E. I. R. Co. v. Hedges*, 105 Ind. 398, 7 N. E. 801.

[j] (Sup. 1887)

A complaint for damages for personal injury received through being run over on a railroad track, which does not allege that the plaintiff was free from negligence, must show that the injurious acts were purposely and intentionally committed with design to injure, or that

they were committed under such circumstances as that the natural and probable consequences thereof would be to produce injury; and the mere recital that the acts were done "carelessly negligently, wantonly, and willfully" is insufficient.—*Louisville, N. A. & C. Ry. Co. v. Ader*, 110 Ind. 376, 11 N. E. 437.

[k] (Sup. 1889)

A complaint alleging that defendant had constructed its railroad upon a highway, and had dug an excavation therein, and piled the dirt along the sides thereof, making embankments 9 feet high for the distance of 150 yards, leaving no way for persons to pass, except upon the embankments, with the track between; and that plaintiff was, while lawfully riding along the highway, thrown from her horse and injured, on account of defendant's neglect to restore the highway to its former state, and on account of the neglect of defendant's servants, after seeing her situation, to stop their hand car to prevent her horse from becoming frightened—is sufficient on demurrer to show negligence on the part of defendant.—*Evansville & T. H. R. Co. v. Crist*, 116 Ind. 446, 19 N. E. 310, 9 Am. St. Rep. 865, 2 L. R. A. 450.

[l] (Sup. 1889)

In an action against a railroad company for personal injuries, where the complaint charges defendant with negligence, but uses the qualifications "wanton," "willful," and "with the intention to injure plaintiff," the gravamen of the action is simple negligence, and the complaint states a good cause of action.—*Cleveland, C., C. & I. Ry. Co. v. Asbury*, 120 Ind. 289, 22 N. E. 140.

[m] (Sup. 1890)

A willful killing is not charged by a complaint alleging that, while decedent was walking along the street, defendant unlawfully, carelessly, and willfully ran one of its locomotives and trains over him and killed him, and that said willful, careless, negligent, and unlawful act of defendant consisted in its running the train along the street at a high rate of speed, and without ringing the bell, in violation of an ordinance; as no facts or circumstances are averred from which it can be said that defendant's servants knew that decedent was on the track, or that the use of the street was such that the act of running the train in that manner showed a reckless disregard of life.—*Sherfey v. Evansville & T. H. R. Co.*, 121 Ind. 427, 23 N. E. 273.

[n] (Sup. 1891)

The complaint in an action against a railroad company for negligently blowing the whistle and allowing steam to escape from its engine, whereby plaintiff's horse was frightened, alleged that plaintiff was riding along a street which was parallel to defendant's track, near its intersection with another street; that the horse was gentle, and plaintiff was not guilty of any negligence, but was using all diligence

to manage his horse well and to avoid any accident; that defendant's servants, who were in charge of a locomotive engine on such track, well knowing that plaintiff was on the highway, "so carelessly ran and managed the said locomotive engine as to cause and suffer it, by the blowing of its whistle, the blowing off of its steam, and suffering its steam to escape from it, to make loud and unusual noises, and thus frighten the horse which the plaintiff was riding, and causing him to become unmanageable, and to thus throw this plaintiff," etc. *Held*, that the complaint stated facts sufficient to constitute a cause of action.—*Indianapolis Union Ry. Co. v. Boettcher*, 131 Ind. 82, 28 N. E. 551.

A complaint alleging "that the said defendant, by its agents and servants, well knowing that the plaintiff was passing along said street and highway, and not regarding its duty in that respect, but intending to injure the plaintiff, and do that which would result in his injury, so purposely, willfully, and recklessly ran and managed its locomotive engine, which was upon said switch and side track, as to cause it, by the blowing of its whistle and the blowing off of its steam, to make loud and unusual noises, and thus to frighten the horse," sufficiently charged a willful injury.—*Id.*

[o] (Sup. 1892)

In an action against a railroad company for personal injury, it must affirmatively appear from the complaint that the injured party was free from contributory negligence, and the best formula for the expression of that fact is the general averment that the injured party was himself without fault.—*Ft. Wayne, C. & L. Ry. Co. v. Gruff*, 132 Ind. 13, 31 N. E. 460; *Pennsylvania Co. v. Horton*, 132 Ind. 189, 31 N. E. 45.

[p] (Sup. 1893)

In an action against a railroad company for personal injuries caused by falling into an unguarded excavation adjoining defendant's track in a city, it is not necessary to state in the complaint that plaintiff was ignorant of the existence of the ditch, where it is alleged that defendant was negligent and plaintiff was without fault.—*Ohio & M. Ry. Co. v. Levy*, 134 Ind. 343, 32 N. E. 815, 34 N. E. 20.

[q] (App. 1893)

A complaint by a widow, as executrix of her deceased husband, alleged that defendant railroad company negligently ran its train at the rate of 40 miles an hour, contrary to a city ordinance; that deceased, while walking on defendant's track, which ran along a street, and looking and listening, was so suddenly confronted by the approaching train that he lost his presence of mind and was unable to escape. *Held*, that the complaint did not affirmatively show that deceased was negligent.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Bennett*, 9 Ind. App. 92, 35 N. E. 1033.

Nor was a further paragraph, alleging that the train was run at an unusual rate of speed; that defendant failed either to have a watchman at the crossing, or to give any signal; and that deceased looked and listened in time to have escaped from a train moving in the usual way, and at the customary rate of speed,—subject to demurrer.—*Id.*

[r] (App. 1894)

A complaint alleging that the engineer, recklessly and willfully, with knowledge of decedent's unconsciousness of the danger, and without regard for consequences, ran his engine over decedent, states a cause of action, whether decedent was a trespasser or not.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Judd* 10 Ind. App. 213, 36 N. E. 775.

[s] (Sup. 1895)

Where one placed in peril of a moving train by his own negligence is injured, a complaint to recover for such injury, as for wanton recklessness, in that the engineer, knowing of plaintiff's peril, failed to stop the train, must allege that the train could have been stopped in time to avoid the injury.—*Evans v. Pittsburgh, C., C. & St. L. Ry. Co.*, 142 Ind. 204, 41 N. E. 537.

An averment in a complaint for injuries from a railroad train, that a brakeman saw plaintiff's peril, and "immediately signaled the engineer to stop the train," is not a sufficient allegation that the engineer knew of plaintiff's peril to render the railroad company liable on the ground of wanton negligence in failing to stop its train.—*Id.*

[t] (App. 1895)

In an action against a railroad company for the death of plaintiff's minor son, a complaint alleging that he was walking on defendant's track at a place where, for 20 years, defendant had permitted persons to travel on foot, but which was a considerable distance from any highway, street, or alley, and was killed by the tender of an engine which was backing at an unlawful rate of speed, without ringing the bell and without a watchman, as required by law, but failing to allege that the boy went on the track by defendant's invitation, or that defendant could, by the use of reasonable diligence, have discovered him and avoided the accident, or that children were in the habit of walking on or along the track, with defendant's knowledge, or that defendant knew that children were likely to expose themselves to danger by going on the right of way at that place, is demurrable.—*Cleveland, C., C. & St. L. Ry. Co. v. Adair*, 12 Ind. App. 569, 39 N. E. 672, 40 N. E. 822.

[u] (App. 1896)

The complaint alleged that deceased, a child 14 years old, of ordinary intelligence, was accustomed, with the public, to cross defendant's tracks, between certain street crossings, with the knowledge, permission, and license of defendant; that desiring to cross the tracks

when a long train of cars had been standing thereon, extending across the street crossing for an unreasonable length of time, he undertook to pass under and between two cars; that suddenly, without warning, the train was violently started, by which the boy was killed. *Held*, that the facts alleged were insufficient to charge the railway company with negligence.—*Hall v. Cleveland, C., C. & St. L. Ry. Co.*, 15 Ind. App. 496, 44 N. E. 489.

[v] (App. 1897)

In an action for injuries caused by the derailment of a car loaded with railroad ties, one of which struck plaintiff, the complainant showed that he was injured while more than 15 feet from the track, and while trying to run further from it, and alleged that the inhabitants of the town were accustomed to walk in the vicinity of the tracks, all of which defendant and its servants well knew, and that he was without fault. It did not aver that he was on defendant's track or right of way. *Held*, that there was nothing inconsistent in the averment of particular facts and the general averment of freedom of fault on plaintiff's part.—*Louisville, N. A. & C. Ry. Co. v. Downey*, 18 Ind. App. 140, 47 N. E. 494.

[vv] (Sup. 1898)

A complaint, in an action against a railway company, which alleges that it "carelessly, negligently, recklessly, and without any necessity whatever" caused the whistle of a locomotive to be blown, thereby frightening plaintiff's team, causing it to run away, and injuring plaintiff sufficiently states the negligence complained of as against a demurrer.—*Rogers v. Baltimore & O. S. W. Ry. Co.*, 49 N. E. 453, 150 Ind. 397.

[w] (Sup. 1898)

A complaint charging a willful killing by a railway company's servants of one walking across a high trestle does not sufficiently set forth a cause of action which states that the engineer saw deceased when 2,000 feet away, and he was trying to get off the trestle, and had about 100 feet to go, the train running 1,000 feet of that distance, at 25 miles an hour, but not stating how fast it ran the last part of the distance of about 40 rods, and how fast it ran when the engine struck him, or at what point the peril of deceased became reasonably manifest, or at what point the engineer failed to make every possible effort to stop the engine, he having the right to continue the presumption that deceased would get off the trestle until the point making it perilous to continue was reached.—*Ullrich v. Cleveland, C., C. & St. L. Ry. Co.*, 51 N. E. 95, 151 Ind. 358.

[ww] (Sup. 1899)

An allegation that defendant, a railroad, negligently and carelessly permitted a heavy iron pin to be placed and to remain on the tender of its engine, so that it was thrown off against plaintiff by the speed of the train, is not demurrable as not setting forth the specific

acts of negligence.—*Cleveland, C., C. & St. L. Ry. Co. v. Berry*, 53 N. E. 415, 152 Ind. 607, 46 L. R. A. 33.

[x] (App. 1899)

A complaint for the death of a child, alleging that defendant's engineer could have seen the child on the track if he had looked, but that he negligently failed to see her; that he was carelessly and recklessly running the engine at an unlawful rate of speed, and by reason thereof was unable to control the train, and stop it, on seeing the child; and that she was willfully, recklessly, and negligently killed,—is based on the theory of negligence, and not of willfulness.—*Dull v. Cleveland, C., C. & St. L. Ry. Co.*, 52 N. E. 1013, 21 Ind. App. 571.

[xx] (App. 1906)

Allegations showing that defendant's train ran through a town, at a high rate of speed, without any headlight, and giving no signals, but shows that plaintiff's injuries were not inflicted by reason of such negligence, add nothing to the complaint.—*Chicago I. & L. Ry. Co. v. Thrasher*, 35 Ind. App. 58, 73 N. E. 829.

[y] (App. 1906)

A complaint *held* to sufficiently show that plaintiff was on the track, not through bare tolerance of the defendant, but under circumstances which placed on defendant the duty not to injure plaintiff through negligence on the part of the operatives of trains.—*Wabash R. Co. v. Erb*, 73 N. E. 939, 36 Ind. App. 650, 114 Am. St. Rep. 392.

[yy] (Sup. 1907)

A complaint in an action for injuries caused by the operation of a railroad alleged that defendant knowingly and negligently maintained and operated, at the place of accident, a switching device that was extremely dangerous, particularly to children passing along or across the railroad track at that point, in this: that the space between the throw rail of the switch and the west rail of the main track was not blocked, but left open in such a manner that persons crossing the track at that point were liable to get their feet fastened therein, and further alleged that the engine and cars could have been stopped at any time within a space of 30 feet, but defendant's employees, knowing the dangerous condition of the place and the custom of children to pass over the same, negligently failed to keep watch of the track ahead of the backward moving train and so ran the cars toward and over plaintiff. *Held*, that the complaint was sufficiently specific.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Simons*, 168 Ind. 333, 79 N. E. 911.

[z] (App. 1908)

In an action against a railroad for the death of an employé of a manufacturing company, struck by a train on a spur track leading into a building of the company while at work on the track, the complaint charged that defendant negligently backed its locomotive over

the spur track and into the building and failed to give any warning before entering it, and that defendant's brakeman when at a distance of 100 feet from decedent, knowing his ignorance of the approach of the cars which were moving slowly, failed to signal or otherwise notify the engineer to stop in time to avoid injury, but did not allege that the brakeman by signals could have stopped the train. The complaint also alleged that from the noise of the machinery in the building decedent could not hear the approach of the incoming cars in time to avoid the collision, but did not allege that defendant knew that the machinery in the building was making a noise likely to prevent decedent from hearing the train. It did not allege that defendant was not rightfully upon the track, or that it was using it for any other purpose than that for which it was constructed or in any other than the ordinary way; nor did it allege any facts from which it could be said as a matter of law that the handling of the locomotive and cars as stated would likely be attended with a danger which should have been foreseen by a reasonably prudent person, and guarded against by stopping the cars or ringing the bell or blowing the whistle. *Held*, that the complaint did not state a cause of action against defendant.—*Lake Erie & W. Ry. Co. v. Bray*, 42 Ind. App. 48, 84 N. E. 1004.

In an action against a railroad for death by being struck by a train, the complaint showed that decedent saw the train before it reached him and undertook to climb upon a platform adjacent to the track on which the train passed, and, failing in his attempt, took a position between the platform and track and was injured by coming in contact with the third car of the train, which was wider than the first two cars which had passed him in safety, but the complaint did not show that defendant was aware of decedent's danger in time to have stopped the cars so as to avoid the injury. *Held*, that the facts alleged were not sufficient to bring the case within the doctrine of the last clear chance.—*Id.*

[zz] (App. 1809)

A complaint alleged that a switch ran past the office of the factory in which plaintiff worked, and that he and other employes had to pass through the office every morning, and were compelled to pass over it, that his employer did not allow the railroad to move cars thereon during working hours, but, knowing that the employes were passing over the switch at the usual time, it ran its engine into the factory yard and negligently failed to notify him and other employes that it intended to move cars thereon before they crossed the track, and negligently ran its engine at high speed and with unnecessary force against cars between which plaintiff was passing and injured him. *Held*, that the company's demurrer to the complaint was properly overruled, and its motion in arrest, based on insufficiency of the complaint, was also properly de-

nied.—*Chicago & E. I. Ry. Co. v. Hendrix*, 43 Ind. App. 411, 87 N. E. 663.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1331-1338.

See, also, 33 Cyc. p. 1156.

§ 395. — Issues, proof, and variance.

[a] (Sup. 1887)

A complaint alleging that the deceased was killed while walking on the track belonging exclusively to the railroad company by the willful wrong of the servants of the company, will not admit evidence that the place where the accident occurred was one which the company had licensed the public to use.—*Palmer v. Chicago, St. L. & P. R. Co.*, 112 Ind. 250, 14 N. E. 70.

[b] (App. 1891)

In an action against a railroad company for the death of a child run over on its tracks, and which the engineer testifies he first saw when 200 yards off, and when it was in the weeds along the track, evidence that the engineer's sight was defective, and that it was negligence to permit weeds to grow so near the track, cannot be considered, in the absence of any allegations in regard thereto in the complaint.—*Pennsylvania Co. v. Davis*, 4 Ind. App. 51, 29 N. E. 425.

[c] (App. 1907)

Where, in an action against a railroad for injuries to a person in a public street struck by a mail pouch thrown from a rapidly moving train, the complaint alleged that for more than two years it had been the custom of the railroad to permit bags of mail to be thrown from trains while in motion, and thereby subject persons on a street to great hazard of life, proof of the throwing off of mail sacks by postal clerks at other points than the particular spot where plaintiff was struck was admissible.—*Pittsburgh, C. & St. L. Ry. Co. v. Warrum*, 42 Ind. App. 179, 82 N. E. 934, 84 N. E. 356.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1339, 1340.

See, also, 33 Cyc. p. 1157.

§ 396. — Presumptions and burden of proof.

As to ownership and operation of road, see ante, § 270.

[a] (Sup. 1896)

Where the evidence shows that one killed by a train could have seen it in time to avoid the accident, if he had looked, the law will assume that he did actually so see it.—*Lamport v. Lake Shore & M. S. R. Co.*, 142 Ind. 269, 41 N. E. 586.

In an action for wrongful death of a person while walking on a railroad track, the burden is on his administrator to show that he was in the exercise of due care at the time, though he had a right to use the track for the purpose in question.—*Id.*

[b] (Sup. 1903)

Where a person, in crossing a railroad track, is injured by a collision with a train, the fault is *prima facie* his own.—Pittsburgh, C., C. & St. L. Ry. Co. v. Salvors, 67 N. E. 680, 70 N. E. 133, 162 Ind. 234.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1341-1343, 1357.

See, also, 33 Cyc. p. 1157.

§ 397. — Admissibility of evidence.

Admissions as evidence, see EVIDENCE, §§ 208, 246.

Scope of evidence in rebuttal, see TRIAL, § 62.

[a] (Sup. 1875)

In an action against a railroad for injury caused by negligence in running a train in a city, an ordinance regulating the running of trains in the city, their speed, the ringing of the bell, etc., may be shown in evidence, together with the violation, as a matter to be considered in deciding the question of negligence.—St. Louis & S. E. Ry. Co. v. Mathias, 50 Ind. 65.

[b] (Sup. 1878)

Since a railroad company may be liable for the willful acts of its employes in killing a person walking upon its track, their conduct in the management of the train may be given in evidence as tending to show that the injury was willful, and purposely inflicted.—Indianapolis & V. R. Co. v. McClaren, 62 Ind. 566.

[c] (Sup. 1891)

In an action against a railroad company for negligently blowing the whistle and allowing steam to escape from its engine, whereby plaintiff's horse was frightened, thereby injuring plaintiff, plaintiff was properly allowed to show that the horse had been used since the accident, and had acted all right; the purpose of such testimony being to prove the gentleness of the horse.—Indianapolis Union Ry. Co. v. Boettcher, 131 Ind. 82, 28 N. E. 551.

[d] (Sup. 1904)

In an action against a railroad company, plaintiff alleged that defendant negligently moved certain cars which had been standing on a side track, and on which plaintiff's decedent and other persons were sitting and standing, watching a sale of horses in an adjoining stockyard. *Held*, that evidence that a sale of horses at the same place on a former occasion attracted boys and men to that vicinity was not admissible to show that the railway company had notice that any one was on the cars.—Jordan v. Grand Rapids & I. Ry. Co., 70 N. E. 524, 162 Ind. 464, 102 Am. St. Rep. 217.

[e] (Sup. 1907)

In an action for injuries to plaintiff caused by being run over by one of defendant's trains while his foot was caught in a switch in which it became fastened while he was attempting to

cross its tracks at a place where he had a right to cross, the action of the trial court in permitting a question to be asked plaintiff as to whether he could have got across the track when he started across before the train got there, if his foot had not caught, to which he answered in the affirmative, was not reversible error in the absence of any evidence tending to show that plaintiff was guilty of contributory negligence, since it was not a crossing case and plaintiff was not attempting to cross the track in front of an approaching train, taking a chance of crossing before the train came.—Pittsburgh, C., C. & St. L. Ry. Co. v. Simons, 168 Ind. 333, 79 N. E. 911.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1344-1355.

See, also, 33 Cyc. p. 1157.

§ 398. — Sufficiency of evidence.

[a] (Sup. 1871)

In an action against a railroad company for negligently causing the death of A., it appeared from the evidence that A. and others in the employment of a union railway company were at work at a certain point on the railroad track of said union company over which trains could pass at that point; that a train of cars owned and run by defendant was backing at the time; that the bell of the locomotive was ringing; that there were four or five cars in the train and no method of communicating with the engineer from the rear of the train, nor was there any brake in working order on the car farthest from the locomotive, although a brakeman was on the rear end of the car, the locomotive being at the other end of the train, nor was any person in advance of the train to warn others of its approach. The locomotive was in charge of the fireman; the engineer being absent to procure a drink. The other persons employed with B. at work on the track stepped off, and some one called to him "Look out," when B., instead of stepping back, stepped forward, and was struck and killed. *Held*, that such evidence was sufficient to sustain a finding against the railroad company.—Indianapolis, B. & W. Ry. Co. v. Carr, 35 Ind. 510.

[b] (App. 1891)

A child 20 months old escaped from its home, went upon a railroad track, and was killed by a train. The engineer testified that when about 200 yards distant he saw the child in the weeds bordering the track, and immediately shut off steam, reversed the engine, and sanded the track, but that the child crawled on the rail before he reached it. The train was running about 40 miles an hour, and could not have been stopped in less than 400 yards. The direct distance from the weeds to the track was seven feet, but there was an intervening ditch two feet deep. Further back was a bridge across the ditch, but the evidence failed to show which route the child took. The child could walk, but was slow in its movements, and habitually crawled over obstacles. Two witnesses familiar

with its movements testified that it would have required between two and three minutes to crawl from the weeds to the track. There was evidence that while so doing it might have been seen at a distance of 700 yards. *Held*, that there was not sufficient evidence of negligence to support a verdict against the railroad company.—*Pennsylvania Co. v. Davis*, 4 Ind. App. 51, 29 N. E. 425.

[c] (App. 1896)

In an action for the death of a deaf adult run over by defendant's train while walking on its track located on a street, the evidence showed that the train was running at an unlawful speed; that the engineer saw deceased on the track, with his back to the train, and kept his eyes constantly on him, while going over 2,700 feet, and saw that, although the bell was rung and the whistle sounded, deceased gave no heed; that two men within the plain range of the engineer's vision were making signals to attract deceased's attention; and that the engineer made no effort to check the speed of the train until he was within 40 feet of deceased. *Held*, that the facts authorized the jury to find that the killing was willful, though the engineer denied that he intended to kill the man or run over him.—*Lake Erie & W. R. Co. v. Brafford*, 15 Ind. App. 655, 43 N. E. 882, 44 N. E. 551.

[d] (Sup. 1899)

In an action for injury caused by an iron pin being thrown from the tender of a passing train by its speed, a verdict for plaintiff is not sustained where the evidence does not show that the pin was on the tender in a position from which a reasonably prudent person would anticipate that it might be thrown out by the speed of the train, or that, if it were in a dangerous place, defendant knew, or might by the exercise of reasonable diligence have known, of it in time to obviate the risk.—*Cleveland, C., C. & St. L. Ry. Co. v. Berry*, 53 N. E. 415, 152 Ind. 607, 46 L. R. A. 33.

[e] (Sup. 1907)

Where decedent was assisting in loading a flat car with poles for shipment by his employer, and some one nearby shouted an alarm to stop an approaching train, and decedent left his place, and went around the car to a point where he could see the train, and while there was killed, the jury could presume, in the absence of evidence as to why he went around the car, that he did so through a sense of duty to assist in any emergency that might arise.—*Chicago, I. & L. Ry. Co. v. Pritchard*, 168 Ind. 398, 79 N. E. 508, 81 N. E. 78, 9 L. R. A. (N. S.) 857, transferred from appellate court, 39 Ind. App. 701, 78 N. E. 1044.

[f] (App. 1907)

Where, in an action against a railroad company for injuries to a person in a public street struck by a mail pouch thrown from a rapidly moving train, the complaint alleged that for more than two years it had been the custom of

the company to knowingly permit large bags of mail to be thrown from the trains by mail clerks while the trains were in rapid motion, it was essential to a recovery to show that it was the custom to throw the mail where it was liable to do injury to some person, but it was not essential that the evidence show that it was thrown off customarily at the exact spot where plaintiff was struck; the negligence of the company being in permitting the dangerous practice.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Warrum*, 42 Ind. App. 179, 82 N. E. 934, 84 N. E. 356.

In an action against a railroad for injuries to a pedestrian on a public street struck by a mail pouch thrown from a rapidly moving train, evidence *held* insufficient to show contributory negligence precluding a recovery.—*Id.*

[g] (App. 1909)

In an action for injuries caused by striking cars on a switch in a factory yard while plaintiff was passing between them on his way from work, evidence *held* to sustain findings of negligence and innocence of contributory negligence.—*Chicago & E. I. Ry. Co. v. Hendrix*, 43 Ind. App. 411, 87 N. E. 663.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1356, 1358-1363.

See, also, 33 Cyc. p. 1157.

§ 400. — Questions for jury.

Instructions invading province of jury, see TRIAL, § 191.

[a] (Sup. 1877)

What does or does not "necessarily involve or evince a willingness to inflict injury" cannot be stated as a proposition of law, and is wholly a question for the jury. So *held* in an action against a railroad company for running a locomotive over a child two years old.—*Evansville & C. R. Co. v. Wolf*, 59 Ind. 89.

[b] (Sup. 1882)

Where there is uncontradicted evidence of contributory negligence of a person killed on a railroad track and no willfulness of defendant is shown, it is the duty of the court, in an action for the death, to direct a verdict for the defendant.—*McClaren v. Indianapolis & V. R. Co.*, 83 Ind. 319.

Upon the trial of an action to recover for injuries sustained upon a railroad track, where the evidence is not conflicting, and shows that plaintiff was without right on the track when struck by a train, and that no negligence is imputable to defendant, a verdict for defendant is properly ordered by the court.—*Id.*

[c] (Sup. 1887)

There were no allegations in the complaint that decedent was willfully or purposely run upon and killed by defendant or its servants. The evidence showed decedent was a trespasser on the track of the railroad when killed. *Held*,

that where it did not appear, either by the issues presented or the proof, that the injury was willfully inflicted, a direction by the court that there should be a finding for defendant was proper.—*Gregory v. Cleveland, C., C. & I. R. Co.*, 112 Ind. 385, 14 N. E. 228.

[d] (Sup. 1896)

Where, in an action against a railroad company for the death of a person on its track, there is evidence that the deceased could have seen the train in time to have avoided the accident, which is not overcome, it is proper to direct a verdict for defendant.—*Lamport v. Lake Shore & M. S. R. Co.*, 142 Ind. 209, 41 N. E. 586.

[e] (Sup. 1907)

In an action for injuries caused by the operation of a railroad, whether defendant was guilty of negligence in failing to block a frog of a passing switch, lying in a path used by the public generally and on which plaintiff was injured, was a question for the jury.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Simons*, 168 Ind. 333, 79 N. E. 911.

Whether a person injured by being run over by one of defendant's trains while attempting to cross its railroad tracks was on such tracks as a mere licensee or by invitation, *held*, under the evidence, to be a question for the jury.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1365-1381.

See, also, 33 Cyc. p. 1158.

§ 401. — Instructions.

Assumption by judge as to facts, see TRIAL, § 191.

Form, requisites, and sufficiency of instructions, see TRIAL, § 233.

[a] (Sup. 1834)

In an action for injuries occasioned by being struck by an approaching train while plaintiff was trespassing on the defendant's track, an instruction stating that if, under certain circumstances, plaintiff's own negligence contributed to the injury which he received, he cannot recover, unless the injury was produced by the gross negligence of those managing the train—that is, unless it was willfully, wantonly and recklessly done—was improper, as it was based on the theory that there was a middle ground of liability between ordinary negligence and willfulness on which plaintiff might recover notwithstanding his negligence.—*Terre Haute & I. R. Co. v. Graham*, 95 Ind. 236, 48 Am. Rep. 719.

[b] (Sup. 1908)

In an action against a railroad for injuries received while working as a section hand for another road, an instruction that contributory negligence must be shown by affirmative proof, and, to show such negligence, the jury could consider all the circumstances of the case, the character of the work, the time of day, the

condition of the weather, and the ground where he was injured, plaintiff's age and infirmity, etc., and all the circumstances attending the action, was at least misleading as tending to limit the jury's consideration to certain kinds of evidence to establish contributory negligence.—*Pittsburgh, C., C. & St. L. Ry. Co. v. O'Conner*, 171 Ind. 686, 85 N. E. 909.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1382-1390.

See, also, 33 Cyc. p. 1159.

§ 402. — Verdict and findings.

[a] (Sup. 1891)

In an action against a railroad company for negligently blowing the whistle and allowing steam to escape from its engine, whereby plaintiff's horse was frightened, the answers of the jury to interrogatories showed that defendant's employes in charge of the engine allowed the steam to escape and blew the whistle at an unusual time, and negligently and willfully blew the whistle. *Held*, that the answers to the interrogatories were not inconsistent with a general verdict for plaintiff, and a motion by defendant for judgment on the answers to the interrogatories notwithstanding the general verdict was properly refused.—*Indianapolis Union Ry. Co. v. Boettcher*, 131 Ind. 82, 28 N. E. 551.

In an action against a railroad company for negligently blowing the whistle and allowing steam to escape from its engine, whereby plaintiff's horse was frightened, an answer to one interrogatory, that the whistle was blown negligently, is not inconsistent with the answer to another interrogatory, that the whistle was blown willfully, in that the same act was at once found to be negligent and willful, there being no finding that the whistle was blown but once.—*Id.*

[b] (Sup. 1892)

In an action against a railroad company for personal injuries, it appeared that plaintiff was a section hand in the employ of another company, whose track crossed defendant's at grade, and whose duty it was to keep the common track at the crossing in repair; and that, while plaintiff was at work at this crossing, he was struck by a train moving on defendant's track. It was shown that defendant was negligent, and there was a general verdict for plaintiff; but the jury further found, in answer to special interrogatories, that plaintiff did not look for approaching trains from the time he began his work until he was struck, a period of about five minutes; that, had he looked, he might have seen the train approaching in time to get out of the way; and that he lived near the crossing, and had for a long time been familiar with the running of the train by which he was hurt. *Held*, that, in view of the requirement of Rev. St. 1881, § 2172, that an engineer, before running over a railroad crossing, shall stop his engine, and ascertain whether there is any other train on the crossing, the inference of plaintiff's

contributory negligence is not so conclusive, from the finding that he failed to keep a sharp lookout while he was on the crossing, as to warrant the court in disregarding the general verdict, and rendering judgment for defendant on the special findings.—*Shoner v. Pennsylvania Co.*, 130 Ind. 170, 28 N. E. 616, 29 N. E. 775.

[c] (Sup. 1894)

Special findings of a jury that a person killed on a railroad track failed to look and listen for an approaching train show him guilty of contributory negligence, and control a general verdict in favor of his administratrix, and the railroad company is entitled to judgment, notwithstanding the general verdict.—*Pennsylvania Co. v. Myers*, 136 Ind. 242, 36 N. E. 32.

[d] (App. 1894)

In an action for the death of plaintiff's decedent, alleged to have been caused by defendant's willful conduct, the findings in the special verdict were that deceased entered onto defendant's track about half a mile in front of an approaching train going at about 20 miles an hour, and walked rapidly towards it. There was another person between deceased and the train, who stepped from the track in time to avoid being run over. Deceased, as he approached the train, waved his arms and hands above his head. The engineer saw the deceased at the time he entered on the track and signaled. There was no finding that the engineer's conduct was willful. *Held*, that judgment was properly rendered for defendant.—*Barr v. Chicago, St. L. & P. R. Co.*, 10 Ind. App. 433, 37 N. E. 814.

[e] (Sup. 1898)

Special findings that plaintiff, a boy 7½ years old, went to sleep on a railroad track, and that he knew that trains were run thereon, and had capacity sufficient to understand that, if he remained on the track, he was liable to be run over, show contributory negligence so conclusively as to prevail over a general verdict for plaintiff.—*Krenzer v. Pittsburgh, C. C. & St. L. Ry. Co.*, 43 N. E. 649, 52 N. E. 220, 151 Ind. 587, 68 Am. St. Rep. 232.

[f] (Sup. 1899)

Where, in an action by one injured by an iron pin thrown from the tender by the speed of a passing train, one paragraph of the complaint alleged negligence in permitting the pin to "be and remain" on the tender, and another in "permitting it to be placed" there, special answers that the evidence failed to show when and where, and by whom, the pin was placed on the tender, and where the tender was, do not control a general verdict of defendant's negligence; the fireman seeing and knowing of the pin "being on" the tender before the accident.—*Cleveland, C. C. & St. L. Ry. Co. v. Berry*, 53 N. E. 415, 152 Ind. 607, 46 L. R. A. 33.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 1391.

See, also, 33 Cyc. p. 1160.

(H) INJURIES TO ANIMALS ON OR NEAR TRACKS.

Animals on or near street railroad tracks, see STREET RAILROADS, §§ 89, 90.

Animals on tracks causing accidents to trains, see ante, § 291.

Assignment of cause of action, see ASSIGNMENTS, § 26.

Companies and persons liable, see ante, §§ 256-273.

Construction and operation of contracts of indemnity, see INDEMNITY, § 8.

Danger of injury as element of compensation for property injured by construction and operation of railroad, see EMINENT DOMAIN, § 110.

Exemption of railroad company from statute imposing liability for killing stock, see ante, § 224.

Injuries to persons at crossing caused by frightening animals, see ante, § 305.

Injuries to persons on or near tracks by frightening animals, see ante, § 360.

Laws imposing liability as impairing obligation of contracts, see CONSTITUTIONAL LAW, § 129.

Local and special laws giving compensation to owners of animals killed or injured by trains, see STATUTES, § 80.

Release of claim for, see RELEASE, § 5.

Right to jury trial on motion for writ to require agent of company against which judgment has been recovered to appear and answer as to money in his hands, see JURY, § 19.

Statutes impairing obligation of contract, see CONSTITUTIONAL LAW, § 133.

Subjects and titles of acts, see STATUTES, § 113.

§ 405. Care required and liability as to animals in general.

[a] (App. 1904)

Burns' Ann. St. 1901, § 5313, providing that whenever any animal shall be killed or injured by the locomotives or cars on any railroad, whether they be run by the company, or by its lessee, assignee, receiver, or other person, the owner of the animal shall have a right of action against the company, does not render the company liable for such damages caused by a locomotive or car run by a trespasser.—*Cleveland, C. C. & St. L. Ry. Co. v. Wasson*, 66 N. E. 1020, 70 N. E. 821, 33 Ind. App. 316.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § § 1393-1398.

See, also, 33 Cyc. p. 1161.

§ 406. Effect of stock laws or fence laws in general.

As to duty to fence tracks, see post, § 411.

Contributory negligence, see post, § 424.

[a] (Sup. 1866)

Where plaintiff's cattle were killed by defendant's train at a public crossing, the fact that the board of county commissioners had passed an order allowing cattle to run at large did not impose upon the railroad any greater

obligation as to care in the use of its property than rested upon it at common law.—*Michigan Southern & N. I. R. Co. v. Fisher*, 27 Ind. 96.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1400, 1401.

See, also, 33 Cyc. p. 1165.

§ 407. Frightening animals near railroad.

Proximate cause of injury, see post, § 425.

Willful injury, see post, § 427.

[a] (Sup. 1858)

St. 1853, making railroad companies liable for injuries to domestic animals, whether negligent or not, does not apply to an injury from fright, where the animal is not touched.—*Peru & I. R. Co. v. Hasket*, 10 Ind. 409, 71 Am. Dec. 335.

[b] (Sup. 1872)

To render a railroad company liable, under the statute, for animals killed or injured by its cars, locomotives, or other carriages, there must be actual collision of the cars, locomotives, or other carriages with such animals. A company is not liable where a train caused the animal to take fright, and the injury was the result of the fright, as where a colt, frightened by a train, ran from an adjoining field upon the railroad track, which was not properly fenced, and there broke its leg between the bars of a cow pit.—*Ohio & M. Ry. Co. v. Cole*, 41 Ind. 331.

[c] (Sup. 1877)

The killing or injury "by the locomotives," etc., for which, under 1 Rev. St. 1876, p. 751, § 1, railroad companies are liable, does not include a case where an animal becomes so frightened thereby as to injure or kill itself.—*Baltimore, P. & C. Ry. Co. v. Thomas*, 60 Ind. 107.

[d] (Sup. 1881)

If the engineer of a locomotive engine unnecessarily and wantonly sounds the whistle near a highway, and thus frightens a team of horses on the highway, causing it to run away and kill another horse, the owner of the latter may recover therefor from the railroad company.—*Billman v. Indianapolis, C. & L. R. Co.*, 76 Ind. 166, 40 Am. Rep. 230.

[e] (App. 1892)

In an action against a railroad company for negligently killing a horse, the complaint alleged that defendant's employes carelessly and negligently left a freight train standing on and across the entire width of a street for an unreasonable length of time; that, after the train had been so standing for 40 minutes, plaintiff's servant, who was a good horseman, started to drive plaintiff's horse from his barn to the street, when the horse became frightened and unmanageable, without fault of plaintiff or his servant, and ran away; that the horse ran into the street, and then towards the railroad crossing, which was in the direction in which it was usually driven; and that on reaching

the place where the train was standing across the street the horse attempted to jump through one of the spaces between two coupled cars, and was fatally injured. *Held*, that the complaint stated facts sufficient to constitute a cause of action, as under Rev. St. 1881, §§ 1964, 2170, the obstruction of the street by defendant was unlawful.—*Grimes v. Louisville, N. A. & C. Ry. Co.*, 3 Ind. App. 573, 30 N. E. 200.

[f] (App. 1892)

Where a railroad track passes along a street, both the railroad trains and teams are entitled to the use of the street and if horses are frightened by the appearance of a train, or the ordinary noise of its passage the company is not liable for the damages.—*Leavitt v. Terre Haute & I. R. Co.*, 31 N. E. 860, 32 N. E. 866, 5 Ind. App. 513.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1402, 1403.

See, also, 33 Cyc. p. 1166.

§ 409. Accidents at places open to public in general.

[a] (App. 1891)

A complaint in an action for injury to a horse alleged that plaintiff was engaged with his team in loading on defendant's cars; that a wooden stake which had been placed in the ground by defendant within its right of way near the loading place was removed by defendant leaving a hole in the ground, which defendant had negligently omitted to fill; that while plaintiff was engaged with his horses in loading timber with them one of them stepped into the hole, and was injured; that, by reason of the snow which covered the ground, the plaintiff could not see the hole, and the injury to the horse was without negligence on his part. *Held*, that such complaint was good, as it sufficiently showed negligence.—*Chicago & I. Coal Ry. Co. v. De Baum*, 28 N. E. 447, 2 Ind. App. 281.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1405, 1408.

See, also, 33 Cyc. p. 1168.

§ 410. Accidents at or near public crossings.

Frightening animals, see ante, § 407.

Pleading, see post, § 439.

Rate of speed, see post, § 417.

Sufficiency of evidence, see post, § 443.

[a] (Sup. 1858)

Where it appears that without any negligence on the part of defendant an animal was killed within the limits of a town, through which defendants' railroad ran, which was laid off, platted, and recorded, but not incorporated, and that the killing was within the boundaries of a street, which street had not been opened and worked, nor ordered to be so by the proper authorities, but was to some extent

traveled by the public, plaintiff cannot recover.—*Madison & I. R. Co. v. Kane*, 11 Ind. 375.

[b] (*Sup.* 1866)

In an action against a railroad company for killing a cow, the complaint alleged the injury to have been caused by the negligence of the company's servants. It appeared in evidence that the county board had passed an order allowing such animals to run at large; that the cow was killed at the crossing of a public highway; that the whistle was not sounded, nor the bell rung, and that the train was running at unusual speed; and that at the time of the accident it was storming, making it difficult to see or hear at any great distance. *Held*, that the action could not be maintained. The company was in the lawful use of its own property, and in such a manner that the injury complained of was not the natural or probable consequence of the act.—*Michigan Southern & N. I. R. Co. v. Fisher*, 27 Ind. 96.

[c] (*Sup.* 1887)

A railroad company, in constructing its track across a highway, left it nine inches above the surface of the highway, and in plaintiff's attempt to cross the track with a loaded wagon his horse was injured; plaintiff being without fault. *Held*, that the company was liable, under Rev. St. 1881, § 3903, subd. 5, which, in empowering a railroad to construct its track across a highway, imposes upon it the duty of restoring the highway to its former state as nearly as possible.—*Evansville & T. H. R. Co. v. Carverner*, 113 Ind. 31, 14 N. E. 738.

[d] (*App.* 1892)

Railroad companies are bound to exercise ordinary care to prevent injury to an animal on a highway crossing without the owner's fault.—*Chicago, St. L. & P. R. Co. v. Fenn*, 29 N. E. 790, 3 Ind. App. 250.

[e] (*App.* 1894)

A railroad company owes ordinary care to prevent injury to an animal on a highway crossing without the owner's fault, though unattended, such animal not being a trespasser on the track.—*Louisville, N. A. & C. Ry. Co. v. Ousler*, 15 Ind. App. 232, 36 N. E. 290.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1406, 1407.

See, also, 33 Cyc. p. 1169.

§ 411. Requirements as to fences and cattle guards in general.

Admissibility of evidence, see post, § 442.

Companies affected by regulations, see ante, § 224.

Contributory negligence, see post, §§ 421, 422.

Fence laws as denial of due process of laws, see CONSTITUTIONAL LAW, § 297.

Fence laws as violation of vested rights, see CONSTITUTIONAL LAW, § 101.

Fencing railroad, as affecting care required as to animals seen on or near track, see post, § 419.

Fencing track, as affecting duty to keep lookout for animals, see post, § 415.

Pleading, see post, § 439.

Pleading matters of fact or conclusions relating to, see PLEADING, § 8.

Presumptions and burden of proof, see post, § 441.

Questions for jury, see post, § 446.

Sufficiency of evidence, see post, § 443.

§ 411 (1). Duty to fence railroad in general.

[a] (*Sup.* 1859)

Although the statute does not expressly provide that cattle guards shall be constructed at road crossings, they may, perhaps, be embraced under the general term, fence.—*New Albany & S. R. Co. v. Pace*, 13 Ind. 411.

[b] (*Sup.* 1884)

A railroad company's obligation to fence includes the duty of maintaining cattle guards when they are necessary to prevent access from intersecting highways.—*Wabash, St. L. & P. Ry. Co. v. Tretts*, 96 Ind. 450.

[c] (*Sup.* 1884)

Railroad companies are held to the exercise of ordinary care, prudence, and diligence in the location and construction of fences and cattle guards.—*Ft. Wayne, C. & L. R. Co. v. Herbold*, 99 Ind. 91.

[d] (*Sup.* 1886)

The failure on the part of a railroad company to construct suitable cattle guards where it is its duty to construct them is regarded as a failure to fence.—*Welty v. Indianapolis & V. R. Co.*, 4 N. E. 410, 105 Ind. 55.

[e] (*Sup.* 1887)

Rev. St. 1881, § 4025, is still in force so far as it concerns portions of a railroad other than those portions required to be fenced by Act April 13, 1885, and the corporation owning the railroad and the lessee, etc., are jointly liable for injury or killing of animals as formerly, and for failure to fence at all places required by the prior act railroad companies are liable for the injury or death of animals as formerly, except as to farm crossings and gates, the duty of keeping them closed having been expressly transferred by the act of 1885 from the railroad company to the landowner.—*Jeffersonville, M. & I. R. Co. v. Dunlap*, 13 N. E. 403, 112 Ind. 93.

[f] (*Sup.* 1892)

Act April 8, 1885, and Act April 13, 1885 (Acts 1885, pp. 148, 224), do not repeal the law rendering railroad companies liable for stock killed or injured by their locomotives or cars, where they do not securely fence in their railroads and properly maintain the fences.—*Louisville, N. A. & C. Ry. Co. v. Consolidated Tank Line Co.*, 30 N. E. 159, 4 Ind. App. 40.

[g] (*Sup.* 1905)

Burns' Ann. St. 1901, § 5323, requiring railroad companies to erect cattle guards, is a

police regulation, and requires such companies, in so far as they can do so consistently with their obligation to protect life and freight on their trains, to provide cattle guards sufficient to prevent stock from getting on their railroad.—*Pennsylvania Co. v. Newby*, 72 N. E. 1043, 164 Ind. 109.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1409-1450.

See, also, 33 Cyc. pp. 1170-1196.

§ 411 (2). *Agreement of railroad company to erect and maintain fences.*

[a] (Sup. 1877)

In an action against a railroad company for stock killed by its cars, and which went on defendant's right of way at a point on plaintiff's land where the railroad was not fenced, it was error not to admit in evidence a deed from plaintiff to defendant of the right of way, which recited that defendant should make a good fence along its roadway on such premises within a reasonable time after the completion of the railroad, and also evidence of the time when such railroad was completed.—*Baltimore, P. & C. Ry. Co. v. McClellan*, 59 Ind. 440.

[b] (Sup. 1888)

Where a railroad company obtains a right of way through a farm and in consideration of the grant agrees to erect and maintain a secure fence, it is bound to pay for animals killed by its trains in cases where the animals enter upon the track through the fault of the company in failing to fence the crossing in accordance with the terms of the contract.—*Chicago & A. Ry. Co. v. Barnes*, 18 N. E. 459, 116 Ind. 120.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1409-1450.

See, also, 33 Cyc. pp. 1170-1196.

§ 411 (3). *Effect of failure to erect fences in general.*

[a] Where a railroad company is required by statute to fence its tracks, it is liable for injuries to animals on the track through its neglect to fence the same, regardless of the care and diligence exercised by its servants to prevent such injuries.—(Sup. 1854) *Williams v. New Albany & S. R. Co.*, 5 Ind. 111; (1855) *Lafayette & I. R. Co. v. Shriner*, 6 Ind. 141; (1856) *Smith v. Terre Haute & R. R. Co.*, 7 Ind. 553; (1856) *Terre Haute & R. R. Co. v. Jones*, 8 Ind. 183; (1857) *Indianapolis & C. R. Co. v. Kinney*, 8 Ind. 402; (1857) *Same v. Caldwell*, 9 Ind. 397; (1858) *Same v. Townsend*, 10 Ind. 38; (1860) *Same v. Means*, 14 Ind. 30; (1860) *Indianapolis, P. & C. R. Co. v. Williams*, 15 Ind. 486; (1861) *Indianapolis & C. R. Co. v. Kercheval*, 16 Ind. 84; (1861) *Indianapolis, P. & C. R. Co. v. Shimer*, 17 Ind. 295; (1862) *Toledo & W. Ry. Co. v. Thomas*, 18 Ind. 215; (1863) *Toledo & W. Ry. Co. v. Daniels*, 21

Ind. 256; (1864) *McKinney v. Ohio & M. R. Co.*, 22 Ind. 99; (1864) *Toledo & W. Ry. Co. v. Reed*, 23 Ind. 101; (1865) *Indianapolis & C. R. Co. v. Guard*, 24 Ind. 222, 87 Am. Dec. 327; (1866) *Indianapolis, P. & C. R. Co. v. Marshall*, 27 Ind. 300; (1868) *Indianapolis & C. R. Co. v. Parker*, 29 Ind. 471; (1870) *Bellefontaine Ry. Co. v. Reed*, 33 Ind. 476; (1871) *Jeffersonville, M. & I. R. Co. v. Ross*, 37 Ind. 545; (App. 1892) *Terre Haute & I. R. Co. v. Schaefer*, 5 Ind. App. 86, 31 N. E. 557.

[b] Though, by the common law, a railroad corporation is entitled to the exclusive possession of its roadway, and is not bound to fence against the adjoining proprietors, and would not be liable for killing animals wrongfully on the railroad track, there being no negligence on the part of the corporation, yet, under the acts of May 11, 1852, and March 1, 1853, such corporations must fence in their roads, or pay for all animals, straying from adjoining lands without fault of the owner, killed or injured in running the road, without regard to the question of negligence, misconduct, or inevitable accident.—(Sup. 1854) *Williams v. New Albany & S. R. Co.*, 5 Ind. 111; (1856) *Smith v. Terre Haute & R. R. Co.*, 7 Ind. 553; (1856) *Terre Haute & R. R. Co. v. Jones*, 8 Ind. 183.

[c] (Sup. 1859)

Where a railroad company fails to build fences, as required by law, it is liable for stock killed due to such failure.—*New Albany & S. R. Co. v. Pace*, 13 Ind. 411.

[d] (Sup. 1871)

In an action against a railroad for killing plaintiff's horse, an instruction that defendant would be liable if the horse was killed at a point on the road not securely fenced, and where it could have been fenced without interfering with the rights of the public, was not erroneous.—*Cleveland, C., C. & I. Ry. Co. v. Crossley*, 36 Ind. 370.

[e] (Sup. 1883)

Under Rev. St. 1881, § 4025, where a railroad company can fence its road without injury or obstruction to its business or to public rights or easements, it must securely fence it, or it will be held liable in damages for any and all animals killed or injured, for the want of such fence, by its locomotive or cars on the line of its road.—*Baltimore, O. & C. R. Co. v. Kreiger*, 90 Ind. 380.

[f] (App. 1898)

A finding by the jury that defendant railroad was not fenced at a point where it could be fenced without interfering with the use of the road; that plaintiff was the owner of horses killed by entering on the road at the point where it was unfenced, and being struck by defendant's locomotive; and that the value of the horses was a certain sum,—justifies a judgment for such sum, where plaintiff was free from fault.—*Pittsburg, C., C. & St. L. Ry. Co. v. Thompson*, 50 N. E. 828, 21 Ind. App. 355.

[g] (App. 1904)

An action against a railroad company for the killing of stock is not affected by Acts 1885, p. 224, c. 91 (Burns' Ann. St. 1901, § 5323), which requires the construction of fences and cattle guards, but does not change the liability of a company under prior statutes for the killing of stock.—Chicago, I. & L. Ry. Co. v. Brown, 71 N. E. 908, 33 Ind. App. 603.

[h] (App. 1906)

Where an interurban electric railroad fails to inclose its right of way by a sufficient fence to exclude horses, as required by Burns' Ann. St. Supp. 1905, § 5479d, it is liable for injuries caused by its negligence, though not wantonly or willfully inflicted, to a horse straying upon its track.—Campbell v. Indianapolis & N. W. Traction Co., 39 Ind. App. 66, 79 N. E. 223.

Under Burns' Ann. St. Supp. 1905, § 5479d, requiring interurban electric railroads to inclose their rights of way by sufficient fences to exclude horses or other stock, the failure of a railroad to fence its track is not alone sufficient to render it liable for injuries to a horse straying thereon, but it must be shown that the injury was caused by negligence.—Id.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1409-1450.

See, also, 33 Cyc. pp. 1170-1196.

§ 411 (4). *Effect of erection of fences as to liability and care required.*

[a] (Sup. 1858)

A railroad company is not liable for cattle killed on the public highway, where sufficient fences and cattle guards are maintained, without negligence on their part.—Northern Indiana R. Co. v. Martin, 10 Ind. 460.

[b] (Sup. 1859)

Where a railroad company has built fences as required by law, and has kept them in repair, it will be held to the common-law liability with respect to injuries to animals on its track.—New Albany & S. R. Co. v. Pace, 13 Ind. 411.

[c] (Sup. 1862)

Where a railroad company keeps such a fence as "good husbandmen generally keep," they are liable for death or injury of cattle only upon proof of their negligence, and perhaps not always even then.—Toledo & W. Ry. Co. v. Thomas, 18 Ind. 215.

[d] (Sup. 1864)

Where a proper fence is maintained, and in places where it is not required to be, a railroad company is not liable for animals injured, except, as at common law, where there is negligence on its part, and the negligence of the owner of the stock does not contribute to its immediate injury.—Thayer v. St. Louis, A. & T. H. R. Co., 22 Ind. 26, 85 Am. Dec. 409.

[e] (Sup. 1866)

When the usual and ordinary cattle pit has been constructed as near the highway as can conveniently be done, a railroad company is not liable, without proof of negligence, for an injury happening to an animal which strays upon the track.—Indianapolis, P. & C. R. Co. v. Irish, 26 Ind. 268.

[f] (App. 1909)

Railroad company is not liable for injuries to animals trespassing on its right of way, when the same is properly fenced, unless its employes have been guilty of wanton and reckless misconduct.—Indianapolis & E. Ry. Co. v. Goar, 43 Ind. App. 89, 86 N. E. 968.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1409-1450.

See, also, 33 Cyc. pp. 1170-1196.

§ 411 (5). *Care required and liability where fencing is not required.*

[a] (Sup. 1857)

A railroad company is not bound, by the act of March 1, 1853, to pay for a hog killed on their track at a place where a fence ought not to be erected.—Indianapolis & C. R. Co. v. Kinney, 8 Ind. 402.

[b] (Sup. 1857)

Where cattle running at large stray upon a railroad at a point not fenced, nor required by law to be fenced, and are killed by an engine, common-law principles must determine the rights and liabilities of the parties.—Indianapolis & C. R. Co. v. Caldwell, 9 Ind. 397.

[c] (Sup. 1866)

A railroad company is not liable for an animal killed on the track at a point where the company was not bound to fence, unless it was killed by the gross negligence or willful misconduct of the company's agents.—Indianapolis & C. R. Co. v. McClure, 26 Ind. 370, 89 Am. Dec. 467.

[d] (Sup. 1868)

The statute provisions, imposing a liability upon railroad companies for injuries to animals through defect of fences, only apply where the casualty occurs at a point where the company ought by law to maintain a fence. For an animal killed at a spot where the company is not bound to fence, a recovery can be had only upon common-law grounds; e. g., proof of negligence or of a willful killing.—Jeffersonville, M. & I. R. Co. v. Brevoort, 30 Ind. 324.

[e] (Sup. 1871)

The statutory liability for animals killed where the fencing is insufficient does not extend beyond the right to fence the track. If animals stray upon the road at a point where the company have not a right to fence, the company is only liable in case they are chargeable with negligence in doing the injury.—Indianapolis, C. & L. R. Co. v. Warner, 35 Ind. 515; Same v. Johnson, 36 Ind. 267.

[f] (Sup. 1873)

Where an animal is killed on a railroad at a point where the railroad crosses a public highway, where the road cannot be legally fenced, the owner of the animal cannot recover on account of the road not being fenced; he must show negligence on the part of the company, and the absence of it on his own part. If he knowingly allows it to stray upon the track of a railroad at a point where it cannot be legally fenced, and it is killed, he cannot recover unless the animal was killed by the gross negligence or willfulness of the railroad company.—*Jeffersonville, M. & I. R. Co. v. Huber*, 42 Ind. 173.

[g] (Sup. 1877)

Where stock is killed within the limits of an incorporated town or city, or at other places, where the law does not require the company to fence its road, there can be no recovery against the company without proof that the killing was caused by its negligence.—*Indianapolis, P. & C. Ry. Co. v. Caudle*, 60 Ind. 112.

[h] (Sup. 1883)

A railroad company is not liable for killing stock that came upon the track at a point where the track necessarily was left exposed.—*Indiana, B. & W. Ry. Co. v. Leak*, 89 Ind. 596.

[i] (App. 1891)

Act April 8, 1885, and Act April 13, 1885, relating to the fencing of railroad rights of way, did not repeal the law making railroad companies liable for injury to stock within the corporate limits of a city.—*Jeffersonville, M. & I. R. Co. v. Peters*, 27 N. E. 209, 1 Ind. App. 69.

[j] Act April 13, 1885, which compels railroad companies to fence their roads "except where the road runs through unimproved and uninclosed land," does not relieve railroad companies from liability for cattle killed by their trains because of an absence of a fence, even though the unfenced portion of the road runs through unimproved and uninclosed land.—(App. 1891) *Louisville, E. & St. L. R. Co. v. Hart*, 2 Ind. App. 130, 28 N. E. 218, following *Jeffersonville, M. & I. R. Co. v. Dunlap* (Sup. 1887) 112 Ind. 93, 13 N. E. 403.

[k] (App. 1892)

Acts April 8 and 13, 1885, providing for farm crossings, and for fencing railroads for the benefit of the adjoining landowners, do not relieve railroad companies from liability under the police laws for killing stock which enter on the track where it is unfenced, through uninclosed lands.—*Ohio & M. Ry. Co. v. Wrape*, 4 Ind. App. 108, 30 N. E. 427.

[l] (App. 1894)

Rev. St. 1804, § 5323, relating to the fencing by a railroad company of its tracks, though it does not compel them to fence their road through uninclosed and unimproved lands, leaves them none the less liable for stock killed by a failure to fence through such lands.—*New*

York, C. & St. L. R. Co. v. Zumbaugh, 11 Ind. App. 107, 38 N. E. 531.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1409-1450.

See, also, 33 Cyc. pp. 1170-1196.

§ 411 (5½). *Construction and operation of statutory provisions in general.*

[a] (Sup. 1853)

Acts 1853, p. 113, which provides that, where an animal is killed or injured by a railroad locomotive, the owner may sue before a justice of the peace, and judgment may be rendered for plaintiff without regard to the issue of defendant's negligence, does not apply to a case brought in the common pleas, because the amount involved is beyond a justice's jurisdiction.—*Jeffersonville R. Co. v. Martin*, 10 Ind. 416.

[b] (Sup. 1859)

St. 1853, with regard to the liability for killing cattle when the road is not fenced, applies only to cases before a justice; in other courts the plaintiff must rely only on his rights at common law.—*Evansville & C. R. Co. v. Ross*, 12 Ind. 446.

[c] (Sup. 1860)

The act of March 1, 1853, providing compensation to the owners of animals killed or injured by the cars of any railroad company, did not apply to causes commenced in the court of common pleas or circuit courts.—*Toledo, W. & W. R. Co. v. Hibbert*, 14 Ind. 509; *Indianapolis, P. & C. R. Co. v. Fisher*, 15 Ind. 203.

[d] (Sup. 1862)

In a suit for stock killed by a railroad prior to Act 1859, p. 105, the killing must have been through the negligence of the company and without the immediate fault of the plaintiff.—*Wright v. Indianapolis & C. R. Co.*, 18 Ind. 168.

[e] (Sup. 1863)

Act 1859, p. 105, is prospective only; not embracing animals previously killed.—*Indianapolis & C. R. Co. v. Elliott*, 20 Ind. 430.

[f] (Sup. 1887)

Rev. St. 1881, §§ 4025-4031, respecting the liability of railroad companies for killing stock, are not repealed by the act of April 13, 1885 (Acts 1885, p. 224), but both laws are in force, and railway companies are liable, as formerly, for the death of stock caused by their failure to fence, at any place where a fence is required by such prior statute, except in the case of farm crossings and gates, which are now by said act of 1885 required to be kept closed by the landowner instead of the railway company.—*Jeffersonville, M. & I. R. Co. v. Dunlap*, 112 Ind. 93, 13 N. E. 403; *Pennsylvania Co. v. McCarty*, 112 Ind. 322, 13 N. E. 409.

[g] (App. 1891)

Rev. St. §§ 4025-4031, respecting the liability of railroad companies for killing stock,

are not repealed by Acts April 8 and 13, 1885, requiring railroads to be fenced.—*Jeffersonville, M. & I. R. Co. v. Peters*, 1 Ind. App. 69, 27 N. E. 290.

[h] (App. 1891)

Acts 1885, p. 148, which provides that the owners of tracts of land separated by a railroad may construct and maintain wagon and drive ways across such road, and, if the road is fenced, shall erect and maintain substantial gates therein, does not repeal the law rendering railroad companies liable for stock killed by their trains where they do not securely fence their roads.—*Louisville, N. A. & C. Ry. Co. v. Hughes*, 2 Ind. App. 68, 28 N. E. 158.

[i] (App. 1905)

The statute (Burns' Ann. St. 1901, § 5323; Acts 1885, p. 224, § 1) requiring a railroad company to provide cattle guards at all highway crossings is remedial, and will be liberally construed.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Newsom*, 35 Ind. App. 290, 74 N. E. 21.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1409-1450.
See, also, 33 Cyc. pp. 1170-1196.

§ 411 (6). *Trespassing animals and effect of stock laws.*

[a] (Sup. 1857)

Where an order of the county board specifying what animals shall be allowed to run at large on the public common is shown to have been made, and an animal killed or doing damage, was one licensed to run at large, then the court will, in connection with that act, consider the act relative to fencing against such animals, and the question whether the Legislature can authorize the depasturage of cattle of one man upon the uninclosed lands of another.—*Indianapolis & C. R. Co. v. Caldwell*, 9 Ind. 397.

[b] (Sup. 1859)

Under Acts 1853, p. 113, requiring railroad companies to fence their tracks or to be liable to a certain extent for injuries to animals due to the want of fences, a railroad company is liable for damages for killing cattle at a place where the road was not fenced, though such cattle were trespassing on the track.—*New Albany & S. R. Co. v. Tilton*, 12 Ind. 3, 74 Am. Dec. 195; *Same v. Maiden*, Id. 10; *Same v. Mead*, 13 Ind. 258.

[c] (Sup. 1871)

Under the statute, a railroad company is liable for cattle killed where it has not discharged its duty of fencing, whether the county commissioners have made any order as to the running at large of cattle or not.—*Jeffersonville, M. & I. R. Co. v. O'Connor*, 37 Ind. 95; *Toledo, W. & W. Ry. Co. v. Cary*, Id. 172; *Jeffersonville, M. & I. R. Co. v. Sullivan*, 38 Ind. 262.

[d] (App. 1892)

It is immaterial whether the stock was legally at large or not, where the road is not

fenced.—*Terre Haute & I. R. Co. v. Schaeffer*, 5 Ind. App. 86, 31 N. E. 557.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1409-1450.
See, also, 33 Cyc. pp. 1170-1196.

§ 411 (6½). *Character or species of animals injured.*

[a] (Sup. 1866)

The liability of a railroad company for defect of fences extends to all kinds of animals that would be kept from the track by an ordinary fence, without reference to the question whether they are large enough to throw a train off the track when run over by it.—*Indianapolis P. & C. R. Co. v. Marshall*, 27 Ind. 300.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1409-1450.
See, also, 33 Cyc. pp. 1170-1196.

§ 411 (6¾). *Delegation of duty to third person.*

[a] (Sup. 1876)

The fact that a railroad company holds a contract or covenant against a third person, requiring him to maintain a fence, and that the cattle killed got upon the track through such person's failure to perform his engagement, does not shield the company from the statutory liability to the owner.—*Cincinnati, H. & I. R. Co. v. Ridge*, 54 Ind. 39.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1409-1450.
See, also, 33 Cyc. pp. 1170-1196.

§ 411 (8). *Waiver or agreement of adjoining landowner.*

[a] (Sup. 1859)

A railroad company cannot relieve itself from liability under Act March 1, 1853, providing compensation to the owners of animals killed or injured by the cars by making private contracts with the landholders along their road by which the latter separately agreed to make and keep up fences.—*New Albany & S. R. Co. v. Maiden*, 12 Ind. 10.

[b] (Sup. 1865)

Where by contract with a railroad company the owner of the land through which the road passes has undertaken to maintain the fence, the tenant of such landowner thus bound by the contract is in no position to maintain an action against the railroad company for an injury to his animals resulting from a failure to fence.—*Indianapolis, P. & C. R. Co. v. Petty*, 25 Ind. 413.

[c] (Sup. 1871)

A landowner released to a railroad company the right of way through his land, and further released and relinquished to the company "all damages and rights of damages, actions and causes of action, which I might sustain or be entitled to by reason of anything

connected with, or consequent upon, the location or construction of said work, or the repairing thereof when finally established or completed." *Held*, that such release in no manner related to actions for damages for the injury or destruction of cattle by the running of cars along the railroad, at a point insecurely fenced; the fences through the lands along the track not having been made, by such release, partition fences, which it was the duty of the plaintiff to keep up.—*Cleveland, C., C. & I. Ry. Co. v. Crossley*, 36 Ind. 370.

[d] (Sup. 1881)

In an action against a railroad for injury to cattle through failure to fence, an agreement of plaintiff to pay the company \$200 if they would put in six cattle guards "as its only obligation in regard to fencing" did not release the company from liability; the duty to fence being imposed by law.—*Cincinnati, H. & I. R. Co. v. Hildreth*, 77 Ind. 504.

[e] (Sup. 1882)

In an action against a railroad for stock killed through its failure to fence, defendant could not show a contract with an adjoining owner to maintain a fence; the owner of the stock not being a party to the contract.—*Indianapolis, P. & C. Ry. Co. v. Thomas*, 84 Ind. 194.

[f] (App. 1891)

A railroad company cannot make a contract with a private person to make openings in its fence for private purposes, and thereby relieve itself from a duty it owes to the general public to keep the road securely fenced, except at private farm crossings, where the railroad right of way separates tracts of land into two parcels and to enable the owner to go from one piece to another so separated.—*Wabash R. Co. v. Williamson*, 29 N. E. 455, 3 Ind. App. 190.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1409-1450.

See, also, 33 Cyc. pp. 1170-1196.

§ 411 (9). *Effect of award of damages to adjoining owner for fencing.*

[a] (Sup. 1861)

A railroad company took land of an individual for its track, and by award of a party, agreed upon by each, paid \$500; \$200 as the value of the land, \$300 as a consideration for the building and keeping in repair, by the individual, of the fences along the line of the track and his remaining land. *Held*, that the railroad was not liable to him for damages for the killing of a horse by the cars, when such horse had leaped over his fences.—*Terre Haute & R. R. Co. v. Smith*, 16 Ind. 102; *Toledo, W. & W. R. Co. v. Brown*, 17 Ind. 353.

[b] (Sup. 1877)

A railroad company is not relieved of its duty, under the statute, to fence, by the fact that in the award for the taking of the land a

sum had been allowed the owner for fencing.—*Baltimore, P. & C. Ry. Co. v. Johnson*, 59 Ind. 188.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1409-1450.

See, also, 33 Cyc. pp. 1170-1196.

§ 411 (10). *Persons entitled to benefit of fences.*

[a] (Sup. 1853)

The law (Laws 1853, p. 113) requiring railroad companies to fence is a police regulation, making them liable without regard to the negligence of the owner of cattle killed, or his being or not a proprietor of adjoining land.—*Indianapolis & C. R. Co. v. Townsend*, 10 Ind. 38; *Jeffersonville R. Co. v. Applegate*, Id. 49; *Indianapolis & C. R. Co. v. Meek*, Id. 502; *Jeffersonville R. Co. v. Dougherty*, Id. 549.

[b] (Sup. 1859)

Acts 1853, p. 113, requiring railway companies to fence their tracks or be liable for injuries to animals due to the want of fences, is more for the benefit of the public to guard against injury to passengers than for the benefit of the owners of animals.—*New Albany & S. R. Co. v. Maiden*, 12 Ind. 10.

[c] (Sup. 1859)

A railroad company is liable for killing stock, where their road was not fenced, to one who is not an occupant or proprietor of the adjoining lands.—*New Albany & S. R. Co. v. Aston*, 13 Ind. 545; *Same v. Bishop*, Id. 566.

[d] (Sup. 1861)

The statute requiring railroad companies to fence is not to be taken solely as a police regulation for the benefit of passengers to the exclusion of its application to cases of stock killed by freight trains.—*Indianapolis & C. R. Co. v. Snelling*, 16 Ind. 435.

[e] (Sup. 1864)

The statute requiring railroads to be kept fenced is not intended to change the common-law rule as to the duty of the owner of cattle, nor merely to give them compensation for animals killed or injured on the track where the road is not fenced, but chiefly as a police regulation for the benefit of the public, to secure the safety and freedom from obstructions to the passage of carriages along the track.—*Toledo & W. R. Co. v. Fowler*, 22 Ind. 316.

[f] (Sup. 1868)

The provisions of the statute allowing the recovery, by the owner, of compensation for animals killed or injured by railroads, through defect of fences, are not intended merely for the protection of owners of cattle, but are in the nature of a police regulation, designated to promote the security of persons and property passing upon the road; and must be enforced when the company fails to comply with the require-

ment.—Jeffersonville, M. & I. R. Co. v. Nichols, 30 Ind. 321.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1409-1450.

See, also, 33 Cyc. pp. 1170-1196.

§ 411 (10½). *Nature and cause of injury.*

[a] It is essential to the liability of a railroad company, under the acts of 1853 (1 Gav. & H. St. p. 522) and 1863 (Davis' Rev. St. Supp. 1870, p. 413), imposing liability on railroad companies for killing stock where their tracks have not been fenced, for the death or injury of an animal, that the animal should be actually touched by the engine, cars, or other carriages.—(Sup. 1874) Indianapolis, B. & W. Ry. Co. v. McBrown, 46 Ind. 229; (1877) Louisville, N. A. & C. Ry. Co. v. Smith, 58 Ind. 575.

[b] (Sup. 1878)

Only one of two mules that had been turned loose to graze, tied together by a strap around their necks, was struck by a locomotive, and both were dragged along the track and killed. *Held*, that under 1 Rev. St. p. 75, imposing liability on railroad companies who have not fenced their tracks for killing stock which wander thereon, the owner could recover only for the one struck by the train.—Jeffersonville, M. & I. R. Co. v. Downey, 61 Ind. 287.

[c] (Sup. 1884)

Under Rev. St. 1881, § 4025, giving a right of action for the killing or injuring of animals by locomotives, cars, etc., used on the railroad, proof is required that the animal killed or injured was actually touched by the locomotive, cars, or other carriages.—Croy v. Louisville, N. A. & C. Ry. Co., 97 Ind. 126.

[d] (Sup. 1886)

Rev. St. 1881, § 4025, provides that, if a railroad company does not keep its track "inclosed on both sides by a proper fence and securely fenced in," it is liable for accident happening to cattle entering through any defective place. *Held* that, in an action against a railroad company under this statute, the plaintiff must prove that the animal was injured by actual contact with defendant's locomotive or cars.—Louisville, E. & St. L. Ry. Co. v. Thomas, 106 Ind. 10, 5 N. E. 198.

[e] (Sup. 1887)

In order to hold a railway company liable under the act of April 13, 1885 (Acts 1885, p. 224), for killing or injuring stock on its track, the animals must, as formerly, have been killed or injured by the engine or cars.—Jeffersonville, M. & I. R. Co. v. Dunlap, 112 Ind. 93, 13 N. E. 403.

[f] (App. 1886)

Under Rev. St. 1894, § 5323 (Elliot's Supp. § 1077), requiring railroad companies to fence in their right of way, and section 5312, Rev. St. 1894 (section 4025, Rev. St. 1881), making a railroad company liable when it fails

so to do for stock which get on its track and are killed by its cars or locomotives, recovery cannot be had unless the death or injury was caused by contact with the cars or locomotive.—Childer v. Louisville, N. A. & C. Ry. Co., 12 Ind. App. 686, 41 N. E. 21.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1409-1450.

See, also, 33 Cyc. pp. 1170-1196.

§ 411 (11). *Place of entry of animals on right of way.*

[a] (Sup. 1865)

Where an animal passes upon a railroad track at the crossing of a public street or highway, or other place where, from any cause, it would be improper that the railroad should be fenced, and is killed by the locomotive or cars, the company is not liable, except for the negligence or misconduct of those having charge of the train.—Indianapolis & C. R. Co. v. McKinney, 24 Ind. 283.

[b] (Sup. 1869)

Where an animal was killed by the cars of a railroad company at a point where the road was securely fenced to within 10 feet on one side of the track, and within 20 steps on the other, of a public crossing, but the testimony showed that the fences did not extend to the cattle guard at the public crossing, *held*, that the company was not relieved from liability by the fact that the road was securely fenced at the point where the animal was killed.—Jeffersonville, M. & I. R. Co. v. Avery, 31 Ind. 277.

[c] (Sup. 1872)

If cattle come on a railroad where there should be a sufficient fence, but there is not, and wander on the road to a point where the road is not fenced, and cannot lawfully be fenced, and are there injured, the company is liable, and an answer to an action for such injury under the statute must show that they did not thus enter on the road.—Toledo, W. & W. Ry. Co. v. Howell, 38 Ind. 447.

[d] (Sup. 1878)

In order to make a railroad liable under the statute for stock killed upon the road, the animals must enter upon the road at a point where it is not securely fenced.—Toledo, W. & W. Ry. Co. v. Stevens, 63 Ind. 337.

[e] (Sup. 1880)

Under the statute relating to the liability of railway companies for killing stock, it is not the place of the killing that governs the liability of the company, but the place of entry upon the track.—Jeffersonville, M. & I. R. Co. v. Lyon, 72 Ind. 107.

[f] (Sup. 1881)

Where cattle came on a railroad track where it was the duty of the company to fence, and wandered to and were killed at a place where the company was not bound to fence, *held*, that the company was liable.—Wabash Ry. Co. v. Forshee, 77 Ind. 158.

[g] (Sup. 1886)

Rev. St. 1881, § 4025, provides that if a railroad company does not keep its track "inclosed on both sides by a proper fence and securely fenced in," it is liable for accident happening to cattle entering through any defective place. *Held*, that in an action against a railroad company under this statute, the plaintiff must prove that the animal entered through such defective place.—*Louisville, E. & St. L. Ry. Co. v. Thomas*, 106 Ind. 10, 5 N. E. 198.

[h] (Sup. 1887)

It is the condition of the road at the place where the animals entered upon the track, and not that where they were killed, that is material in determining the liability of a railroad company for failure to maintain fences.—*Indiana, B. & W. Ry. Co. v. Quick*, 109 Ind. 295, 9 N. E. 788, 925.

[i] (App. 1891)

Where an animal which was killed or injured by a railroad train entered on the track at a point where the company was not bound to maintain a fence, it was not liable for damages, unless the killing or injury was willful.—*Pennsylvania Co. v. Lindley*, 28 N. E. 106, 2 Ind. App. 111.

[j] (App. 1891)

Plaintiff drove a herd of cattle along the railroad track to a highway, and thence to a point 64 yards from the track, whereupon a train came along and frightened the cattle, who ran through some vacant land to the track at a point where it was unfenced, and were killed by the train. *Held*, that the fact that the cattle had been previously driven on the track did not relieve the company from liability for its neglect to fence.—*Louisville, E. & St. L. R. Co. v. Hart*, 2 Ind. App. 130, 28 N. E. 218.

[k] (App. 1892)

In an action under the statute against a railroad company for killing mules which had entered on the track at a crossing where the company had neglected to maintain fences and guards, it is no defense that the mules passed along the track, and were killed at a point thereon where the company was not bound to maintain such fences and guards.—*Louisville, N. A. & C. Ry. Co. v. Etzler*, 3 Ind. App. 562, 30 N. E. 32.

In an action under the statute against a railroad to recover damages for the killing or the injury of animals, the defendant's liability depends on the question whether the railroad was securely fenced at the place where the animals killed or injured by the passing train entered on the road. The question concerning a sufficient fence always relates to the place of entry, not to the place of killing or injury if it be other than the place of entry.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1409-1450.

See, also, 33 Cyc. pp. 1170-1196.

§ 411 (12). *At what places required.*

[a] A railroad company is bound to fence at a place where its road intersects a canal.—(Sup. 1868) *White Water Valley R. Co. v. Quick*, 30 Ind. 384; (1869) *Id.*, 31 Ind. 127.

[b] (Sup. 1882)

A railroad company is bound to fence where practicable, and is liable for the value of stock killed by reason of a neglect to fence.—*Louisville, N. A. & C. Ry. Co. v. Zink*, 85 Ind. 219.

[c] (Sup. 1884)

A railroad company is not required to fence its road where such fence interferes with its own rights in operating its road or transacting its business, nor where the rights of the public in traveling or doing business with the company are interfered with.—*Evansville & T. H. Ry. Co. v. Willis*, 93 Ind. 507.

[d] (Sup. 1884)

A railroad company is not bound to fence its road at highway crossings, nor at any place where such fencing would interfere with the rights of the public or the proper management of the business of the railroad.—*Louisville, N. A. & C. Ry. Co. v. Shanklin*, 94 Ind. 297, affirmed *Same v. Pixley*, *Id.* 603.

[e] (Sup. 1884)

If the place is one that cannot be fenced without endangering employes or interfering with the railroad company in the discharge of its duty to the public, or if the place is one that cannot be fenced without interfering with the use of the highway, then there is no obligation to fence resting upon the company.—*Ft. Wayne, C. & L. R. Co. v. Herbold*, 99 Ind. 91.

Where cattle guards are necessary to prevent animals from entering upon the roadway, and fences cannot be built, then it is the duty of the company to construct proper cattle guards provided the place is one where it is practicable to do so without interfering with its business or endangering the safety of its employes.—*Id.*

[f] (Sup. 1886)

Rev. St. 1881, § 4025, provides that if a railroad company does not keep its track inclosed on both sides by a proper fence, and securely fenced in, it is liable for accidents happening to cattle entering through any defective place. In an action against a railroad for injuries to a horse, it appeared that there were no wing fences on either side of the cattle guard leading from it to the east and west fences on the north and south sides of the railroad track. *Held* that, if there had been such wing fences leading out from the cattle guard and connecting with the east and west fences on each side of the railroad track, it could have been correctly said that such track at the point where plaintiff's horse entered thereon was, in the language of the statute, "securely fenced in."—*Louisville, Evansville & St. Louis Ry. Co. v. Thomas*, 5 N. E. 198, 106 Ind. 10.

[a] (Sup. 1890)

Railroad companies cannot be required to erect and maintain fences along uninclosed and unimproved lands, nor in the platted portions of cities, towns, and villages, but they are nevertheless liable for injury to animals that enter on their tracks at such places in case the tracks were not, but might have been, securely fenced without interfering with the discharge of its duty to the public, or without increasing the danger to its employes in the discharge of their duties.—*Pennsylvania Co. v. Mitchell*, 24 N. E. 1065, 124 Ind. 473.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1409-1450.

See, also, 33 Cyc. pp. 1170-1196.

§ 411 (14). — *Public or private convenience in general.*

[a] (Sup. 1871)

A railroad company is not obliged by statute to fence its tracks where the result thereof would be to deprive itself of the use of its own property, consisting partly of buildings, though such buildings may not be in present use, and, therefore, if cattle are killed at such point by the cars of the company, it is not liable in the absence of affirmative proof of negligence.—*Jeffersonville, M. & I. R. Co. v. Beatty*, 36 Ind. 15.

[b] (Sup. 1875)

In a stock-killing case against a railroad company, it was not error to give a charge applicable to the evidence, that a railroad company is not bound to build and maintain a fence at a point in a town or village where it will obstruct or interfere with the free use of the public street or a highway, or interfere in any way with the free use of such highway whether such highway is in a town or village or in the country; that the law does not require a railway company to build and maintain a fence at a point where it will interfere with the free use of a switch or side track which is a part of the road, or where it will interfere with the free use of a parcel of ground kept and used by the company as a coal or wood yard, or for the purpose of loading and unloading staves, lumber, timber, wood, or other kinds of freight shipped or to be shipped on the company's cars; that when there is a mill or hay press on or near a railroad track, if the maintaining of a fence at or near the mill or press would interfere with the free use of the same, the company is not required to build or maintain a fence so as to interfere with the free use of the mill or press; that if there is a lot or yard used in connection with the mill or press, the company is not bound to fence at any point where it will interfere with the free use of such lot or yard; and that whenever a railroad company can build and maintain a fence without interfering with the rights of the public or with the free use of property belonging to private individuals or of its own property, it is bound to maintain a fence, whether it

be in a town or village or in the country.—*Ohio & M. Ry. Co. v. Rowland*, 50 Ind. 349.

[c] (Sup. 1882)

A railroad company is not required by Rev. St. 1881, § 4031, to fence, where a fence would hinder the free use of its property, or income-mode individuals in the use of their property, or interfere with the rights of the public.—*Cincinnati, R. & Ft. W. R. Co. v. Wood*, 82 Ind. 593.

[d] (Sup. 1884)

If the railroad company specially pleads by way of answer its right to omit fencing at the point where the animal strayed upon the track, it must clearly show that it could not have fenced at that point without injury or obstruction to its own business or to public rights or easements.—*Banister v. Pennsylvania Co.*, 98 Ind. 220.

[e] (Sup. 1885)

A railroad company is not required to fence its right of way at places where the fence would interfere with the transaction of its business, and it is not liable to the owners of animals injured or killed at such places by its locomotives or cars in consequence of the absence of a fence.—*Evansville & T. H. R. Co. v. Tipton*, 101 Ind. 197.

[f] (Sup. 1888)

Railroads are not required to fence their tracks at places where public convenience will not permit it.—*Bechdolt v. Grand Rapids & I. R. Co.*, 113 Ind. 343, 15 N. E. 686.

[g] (Sup. 1890)

A railroad company is not liable for injuries to animals that enter on its track at places where there are no fences, and where the maintenance of fences would interfere with the discharge of its duty to the public, or with the rights of the public in the use of the highway, or in doing business with the company, or make the running and handling of trains, or the necessary and proper switching of cars more hazardous to its employes.—*Pennsylvania Co. v. Mitchell*, 24 N. E. 1065, 124 Ind. 473.

[h] (App. 1892)

A railroad company is not required to fence its track at a point where a fence would interfere with the operation of the road in the discharge of its duty to the public, or endanger the safety of its employes in operating it.—*Indianapolis, D. & W. Ry. Co. v. Clay*, 28 N. E. 567, 30 N. E. 916, 4 Ind. App. 232.

[i] (App. 1894)

A railroad company is not required to fence its track at a point where a fence would materially interfere with the operation of the road in the discharge of its duty to the public, or endanger the safety of its employes in operating it, but the burden of showing that the road ought not to be fenced at the given place is upon the railroad company.—*Toledo, St. L. & K. C. R. Co. v. Fly*, 36 N. E. 215, 8 Ind. App. 602.

[j] (App. 1894)

Where a fence or cattle guard would make a railroad track and right of way dangerous to its employes in a high or to a considerable degree, exemption from fencing might be required as a matter of law.—*Toledo, St. L. & K. C. R. Co. v. Cupp*, 36 N. E. 445, 9 Ind. App. 244.

[k] (App. 1909)

A railroad need not fence its track at a point where a fence would interfere with the discharge of its duty to employes in the operation of trains.—*Baltimore & O. S. W. R. Co. v. Dickey*, 43 Ind. App. 509, 87 N. E. 1047.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1409-1450.

See, also, 33 Cyc. pp. 1170-1196.

§ 411 (15). — *In cities, towns, and villages.*

[a] The act of March 1, 1853, imposing on railroad companies liability for injuries to animals, but providing that the act shall not apply to any railroad securely fenced, does not apply to places where a railroad crosses the streets of the town, and cases arising from collisions at such places are governed by common-law rules.—(Sup. 1855) *Lafayette & I. R. Co. v. Shriner*, 6 Ind. 141, followed *Smith v. Terre Haute, & R. R. Co.* (1856) 7 Ind. 553.

[b] (Sup. 1868)

A portion of a railroad is not excepted from the requirements of the statute as to fences merely because it is within city limits. The exception only extends to places where it is unreasonable or improper that the road should be fenced, whether within or without the limits of cities or towns.—*Indianapolis & C. R. Co. v. Parker*, 29 Ind. 471.

[c] (Sup. 1870)

The statute making railroad companies liable for injuries to animals without regard to willful misconduct, negligence, or accident, where the railroad is not fenced, applies to a place within the limits of a city where it would not be illegal or improper to maintain a fence.—*Jeffersonville, M. & I. R. Co. v. Parkhurst*, 34 Ind. 501.

[d] (Sup. 1871)

The fact that the streets or alleys of a town terminate at a railroad track is no objection to the erection of a fence. The public right to travel on streets or alleys can extend no further than they extend, and at their termini at a railroad track at a point which cannot be used for the purpose of loading or unloading cars, it is the duty of the railroad company to fence.—*Toledo, W. & W. Ry. Co. v. Cary*, 37 Ind. 172.

[e] (Sup. 1872)

Under the statute requiring railroad companies to fence their tracks, a railroad company must fence tracks which cross large tracks of vacant land, though they are within the limits

of a city.—*Toledo, W. & W. Ry. Co., v. Howell*, 38 Ind. 447.

[f] (Sup. 1873)

That a place on a railroad where an animal is killed is within a city is not sufficient to excuse the company from fencing the road.—*Toledo, W. & W. Ry. Co. v. Owen*, 43 Ind. 405.

[g] (Sup. 1881)

The evidence showed that stock was killed between two streets of a city on defendant's track, which was not there fenced, though a fence might have been built there without interfering with any street or alley, or with the usual running of the road. *Held*, that the company was liable.—*Indianapolis, P. & C. R. Co. v. Lindley*, 75 Ind. 426.

[h] (Sup. 1881)

That the place where an animal was killed was within the limits of an incorporated town does not conclusively show that the railroad company was not required to fence its tracks at that place, but, to relieve it from that duty, it must appear that it would have been unreasonable or improper to maintain a fence at that place.—*Wabash Ry. Co. v. Forshee*, 77 Ind. 158.

[i] (Sup. 1881)

Railroads are liable for cattle killed between crossings in towns and cities, if the road could be and was not fenced.—*Pittsburgh, C. & St. L. Ry. Co. v. Laufman*, 78 Ind. 319.

[j] (App. 1894)

The fact that a railroad passes through an addition to a city, which is platted into lots, streets and alleys, does not, of itself, absolve the railroad company from fencing its track.—*Toledo, St. L. & K. C. R. Co. v. Cupp*, 9 Ind. App. 244, 36 N. E. 445.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1409-1450.

See, also, 33 Cyc. pp. 1170-1196.

§ 411 (16). — *Stations, switchyards, and depot grounds.*

[a] (Sup. 1863)

A railroad company is not required to fence its road where the engine house and machine shop, car house, and wood house and yard are situated, and are not liable for cattle killed there, for want of a fence.—*Indianapolis & C. R. Co. v. Oestel*, 20 Ind. 231.

[b] Railroads are not required to fence their tracks at stations and sidings where freight or passengers are received, and are not liable for killing animals on their tracks at such places, without negligence on their part.—(Sup. 1873) *Indianapolis & St. L. R. Co. v. Christy*, 43 Ind. 143; (1887) *Indiana, B. & W. R. Co. v. Sawyer*, 109 Ind. 342, 10 N. E. 105; (1888) *Becholdt v. Grand Rapids & I. R. Co.*, 113 Ind. 343, 15 N. E. 686.

[c] (Sup. 1874)

Where a cow got upon a railroad track and was killed by a passing locomotive at a point on the railroad where there was a sawmill located and in operation 50 feet from the track, the intervening ground being used by the owners of the mill for piling their lumber and for loading lumber upon the cars of the railroad company for transportation, and by the public for passing to and from the mill with logs and lumber, and for piling wood to be sold to the railroad company, the railroad company was not bound to fence in the track at such point, and, in the absence of negligence, was not liable for the killing of the cow.—*Pittsburgh, C. & St. L. Ry. Co. v. Bowyer*, 45 Ind. 496.

[d] (Sup. 1884)

A railroad company is not bound to fence at a place used for switching and loading and unloading freight, where a fence would seriously interfere with its business or the safety of its employes.—*Evansville & T. H. R. Co. v. Willis*, 93 Ind. 507.

[e] (Sup. 1884)

A railroad company is not bound to fence opposite a grain elevator, where there are side tracks and freight constantly being received and unloaded.—*Lake Erie & W. Ry. Co. v. Kneadle*, 94 Ind. 454.

[f] (Sup. 1884)

Where a railroad company had a side track extending from its depot about 250 yards, and in connection with such track it had built and maintained stockyards, it was not bound to fence its road between the depot and the cattle yards.—*Wabash, St. L. & P. Ry. Co. v. Nice*, 99 Ind. 152.

[g] (Sup. 1887)

Railroad companies are not required to fence their depot grounds where the nature of their business is such as to make a fence not only inconvenient to them, but to the public as well.—*Indiana, B. & W. Ry. Co. v. Quick*, 109 Ind. 295, 9 N. E. 788, 925.

[h] (App. 1891)

The fact that part of a railroad's main line is situated within a city, and within the road's "switch limits," does not relieve the company from the duty of fencing its line, under Acts April 8 and 13, 1885, at that point, where the nearest objects are a building 175 feet to the north, a crossing 175 feet to the south, and a yard track parallel to the main track, and 60 feet east of it, and the ground between those points is unoccupied.—*Jeffersonville, M. & I. R. Co. v. Peters*, 1 Ind. App. 69, 27 N. E. 299.

[i] (App. 1891)

Where to maintain fences at a point close to a switch would require the construction of cattle guards, over which employes must pass in switching trains, thus increasing their hazard, the company is not liable for stock there killed.—*Pennsylvania Co. v. Lindley*, 2 Ind. App. 111, 28 N. E. 106.

[j] (App. 1891)

In an action against a railroad company for killing a mare, a special verdict that the place where the mare entered the track was a station on defendant's railroad, used as such at times of camp meeting for about three weeks in each year, and occasionally by picnickers; that tickets for such station were sold at all regular stations; and that it was also a freight station for such packages of freight as might occasionally be prepaid thereto—is conclusive as to the company's right to leave the track unfenced at such place, since a railroad station is a public place, regardless of the amount of business transacted there.—*Stewart v. Pennsylvania Co.*, 2 Ind. App. 142, 28 N. E. 211, 50 Am. St. Rep. 231.

A railroad company is not required to fence its tracks at a station, where the fencing would interfere with the business of the road and with the public, and endanger the lives and safety of employes of the railroad and its officers in operating it.—*Id.*

Where it appears that a place in controversy was a station where passengers and freight were received and discharged, the railroad company as a question of law is absolved from the duty of fencing at that place.—*Id.*

[k] (App. 1894)

The fact that the place at which plaintiff's horse entered defendant's railroad track and was killed was but 470 feet distant from a switch used by a factory near by does not conclusively show that the maintenance of a fence at such place would so materially interfere with the operation of the switch as to excuse the failure to maintain it.—*Toledo, St. L. & K. C. R. Co. v. Fly*, 8 Ind. App. 602, 36 N. E. 215.

FOR CASES FROM OTHER STATES.

SEE 41 CENT. DIG. R. R. §§ 1409-1450.

See, also, 33 Cyc. pp. 1170-1196.

§ 411 (17). — *Improved or inclosed lands.*

[a] (App. 1891)

In an action against a railroad company for the killing of stock, an answer based on the assumption that the company was not bound to fence its track through uninclosed lands was bad.—*Louisville, E. & St. L. Ry. Co. v. Hart*, 28 N. E. 218, 2 Ind. App. 130.

FOR CASES FROM OTHER STATES.

SEE 41 CENT. DIG. R. R. §§ 1409-1450.

See, also, 33 Cyc. pp. 1170-1196.

§ 411 (18). — *Highways.*

[a] (Sup. 1858)

Though a highway had been changed, and the old crossing abandoned by the public for more than two years, yet, it not appearing that it was vacated in the mode prescribed by law, the railroad company were not authorized to fence their track across it, and consequently are not liable for injuries to domestic animals, in

the absence of negligence.—*Indiana Cent. R. Co. v. Gapen*, 10 Ind. 292.

[b] (Sup. 1865)

A railroad company which has not fenced its road where it runs alongside a highway is liable under the statute for killing an animal which its owner has permitted to stray in the road, and which went from thence upon the railroad track.—*Indianapolis & C. R. Co. v. Guard*, 24 Ind. 222, 87 Am. Dec. 327; *Same v. McKinney*, 24 Ind. 283.

[c] (Sup. 1865)

The fact that a public highway runs along the side of a railroad track does not of itself show a valid reason why a fence could not be maintained between the highway and the track, but rather shows the stronger reason why the railroad should be fenced.—*Indianapolis & C. R. Co. v. McKinney*, 24 Ind. 283.

[d] (Sup. 1866)

The requirement that cattle guards shall be placed near public crossings of railroad tracks where a fence cannot be erected is derived by construction from the words "securely fenced" used in the statute, and the expense in which railroad companies are required to involve themselves in the construction of guards should bear some reasonable proportion to the fencing required by the act.—*Indianapolis, P. & C. R. Co. v. Irish*, 26 Ind. 268.

[e] (Sup. 1867)

Railroad companies are bound to maintain cattle guards at crossings to highways.—*Indianapolis & C. R. Co. v. Kibby*, 28 Ind. 479.

[f] (Sup. 1869)

A railroad company should build a fence between its track and a public highway.—*Jeffersonville, M. & I. R. Co. v. Sweeney*, 32 Ind. 430.

[g] (Sup. 1871)

The fencing of a railroad contemplated by St. March 4, 1863, rendering railroad companies liable to the owners of animals killed or injured by their cars, includes the putting in of proper cattle guards to prevent animals from passing from streets and highways upon the railroad track on each side of such highways.—*Pittsburgh, C. & St. L. R. Co. v. Ehrhart*, 36 Ind. 118.

[h] (Sup. 1877)

At a place where a railroad track coincides with and runs along a highway, the company is not bound to fence the track, and hence is not liable, under the statute, for killing live stock which there come upon the track.—*Indianapolis, P. & C. Ry. Co. v. Crandall*, 58 Ind. 365; *Louisville, N. A. & C. Ry. Co. v. Francis*, Id. 389; *Same v. Wyson*, Id. 597.

[i] (Sup. 1881)

The duty to fence extends to the case of animals on a highway as well as to those in fields and woods adjoining the track. Proper cattle pits are necessary at highway crossings to prevent cattle from passing to the track from

the highway.—*Evansville & C. R. Co. v. Barbee*, 74 Ind. 169.

[j] (Sup. 1881)

A railroad company is required to fence its tracks at a place where a highway runs along and parallel with the tracks if it is practicable to do so, and the fact that the fence must be built on its right of way will not absolve it from the duty to fence.—*Wabash Ry. Co. v. Forshee*, 77 Ind. 158.

[k] (Sup. 1884)

In a stock-killing case the railroad cannot justify itself in not fencing because of a public highway crossing, if the way had been abandoned for 30 years.—*Louisville, N. A. & C. Ry. Co. v. Shanklin*, 94 Ind. 297.

Where there is room to fence between a railroad and an adjoining parallel highway, the railroad company is bound to fence.—Id.

[l] (Sup. 1884)

Where there is a sufficient space between a railroad and an adjoining highway for the construction of a fence to prevent the ingress of animals from the highway to the railroad track, the company must erect such fence, and the fact that in constructing the fence it would be compelled to locate it upon part of its reservation for right of way would furnish no excuse for not building it.—*Banister v. Pennsylvania Co.*, 98 Ind. 220.

A railroad company must fence against animals on highways as well as against those in adjoining fields, and is bound to erect and maintain cattle guards to preclude the ingress of animals from highways to the track of the railroad.—Id.

[m] (Sup. 1884)

A railway company is not bound to fence its road where a public highway would thereby be obstructed, and its failure to do so will not render it liable for domestic animals killed or injured.—*Louisville, N. A. & C. Ry. Co. v. Hurst*, 98 Ind. 330.

[n] (Sup. 1888)

Railroads are not required to fence their roads across highways where public convenience will not permit it.—*Bechdolt v. Grand Rapids & I. R. Co.*, 113 Ind. 343, 15 N. E. 686.

[o] (App. 1892)

Where a railroad crosses a lane which has become a highway by user, the company is bound to maintain fences and cattle guards at such crossing.—*Louisville, N. A. & C. Ry. Co. v. Etzler*, 3 Ind. App. 562, 30 N. E. 32.

[p] (App. 1892)

If such street is a public street, and the openings are necessary for foot travelers, who have a right to use the street, the company is bound to maintain wing fences and cattle guards, and, if it fails to do so, and a horse enters on the track through the opening, and is driven along the track and killed by a train of cars, the company is liable.—*Ohio, I. & W. Ry. Co. v. Neady*, 5 Ind. App. 328, 32 N. E. 213.

[q] (App. 1895)

The fact that the right of way of a railroad company is parallel to and overlaps a public highway will not excuse it from securely fencing its right of way as required by Rev. St. 1894, § 5323, if there is room between the tracks and the highway for the fence.—*Lake Erie & W. R. Co. v. Rooker*, 13 Ind. App. 600, 41 N. E. 470.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1409-1450.

See, also, 33 Cyc. pp. 1170-1196.

§ 411 (19). — *Fences already constructed, and fencing both sides of track.*

[a] (Sup. 1884)

The mere fact that adjoining landowners have erected a fence along a railroad does not excuse the company from its liability to fence.—*Louisville, N. A. & C. Ry. Co. v. White*, 94 Ind. 237.

[b] (Sup. 1884)

A railroad which is not required on account of its peculiar surroundings and use to be fenced on one side need not be fenced on the opposite side.—*Wabash, St. L. & P. Ry. Co. v. Nice*, 99 Ind. 152.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1409-1450.

See, also, 33 Cyc. pp. 1170-1196.

§ 412. Defects in fences or cattle guards.

Contributory negligence of owner, see post, § 422.

Instructions, see post, § 447.

Pleading, see post, § 439.

Presumptions and burden of proof, see post, § 441.

Questions for jury, see post, § 446.

Sufficiency of evidence, see post, § 443.

[a] (Sup. 1863)

Where a railroad is kept securely fenced by the company, and the fence is destroyed by unavoidable accident, as by fire, and is repaired by the company within a reasonable time after its destruction, but before it is so repaired stock gets upon the track and is injured, the company will not be held liable therefor.—*Toledo & W. Ry. Co. v. Daniels*, 21 Ind. 256.

[b] (Sup. 1864)

Where a railroad company has caused its road to be securely fenced, and has exercised reasonable care and vigilance to keep it so, and the fence is thrown and left down by third persons, without the authority or knowledge of the company, whereby cattle stray upon the track and get killed or injured, before the company has notice, the company is without fault, and not liable for the stock thus killed, or injured.—*Toledo & W. R. Co. v. Fowler*, 22 Ind. 316.

[c] (Sup. 1865)

If a railroad is securely fenced, and the fence is destroyed by accidental fire, and is re-

paired within a reasonable time afterwards, the railroad company is not liable for injury resulting from the existence of a gap in the fence caused by such fire.—*Indianapolis, P. & C. R. Co. v. Truitt*, 24 Ind. 162.

[d] (Sup. 1871)

In an action to recover the value of a horse killed by the cars of a railroad company, the release of a right of way through his lands by the plaintiff in such an action, and the building of fences along the line of the railroad through the lands by the railroad company, and the use of the fields adjoining for pasturage by the plaintiff, relying on the fences for protection to his cattle, will not make the fences partition fences, which the plaintiff would be bound to keep up.—*Cleveland, C., C. & I. Ry. Co. v. Crossley*, 36 Ind. 370.

[e] (Sup. 1871)

If a railroad company fail to maintain in a proper condition a fence which it is required to maintain, it is liable to the adjoining proprietor for injury to stock going on the track where it is not securely fenced, although the fence has been kept up by said adjoining proprietor without any contract with the company.—*Jeffersonville, M. & I. R. Co. v. Sullivan*, 38 Ind. 262.

[f] (Sup. 1873)

In an action, under the statute against a railroad company, to recover the value of a cow killed by a locomotive, it appeared in evidence that the animal was struck at a place on the railroad 43 feet from the center of a public turnpike, which was legally 66 feet wide, said place not being fenced in, but being in an open space, between a cattle guard and the crossing of the railroad and turnpike. *Held*, that the railroad company was liable under the statute; the railroad not being fenced according to law.—*Indianapolis, C. & L. R. Co. v. Bonnell*, 42 Ind. 539.

[g] (Sup. 1873)

A small portion of a fence along a railroad track was burned on Thursday. On the next Sunday a horse escaped through the opening to the track and was killed by a passing train. The section boss whose duty it was to repair fences had passed over that part of the road twice a day between the time of the injury to the fence and the killing of the horse. *Held*, that under the circumstances the company had sufficient time to repair the fence, and must be held to have notice of the defect.—*Toledo, W. & W. Ry. Co. v. Cohen*, 44 Ind. 444.

A railroad company running its trains on Sunday cannot, in an action to recover for stock killed on that day, claim exemption from the labor of repairing on Sunday the defects in the fence by reason of which such stock obtained access to the road.—*Id.*

[h] (Sup. 1873)

Where a portion of the fence of a railroad was burned, and one week thereafter cattle entered upon the track through the opening so caused,

and were injured by a passing train, the delay in repairing the fence was unreasonably long, and the railroad company was liable for the injury to the cattle.—*Cleveland, C., C. & I. R. Co. v. Brown*, 45 Ind. 90.

[l] (Sup. 1877)

Where, by reason of a railroad company's neglect to repair a cattle guard accidentally put out of repair, of which it has had a reasonable notice, stock enter upon its track over such cattle guard from a highway, and are killed, the company is liable therefor.—*Pittsburgh, C. & St. L. Ry. Co. v. Eby*, 55 Ind. 567.

To keep its road "securely fenced," according to the requirements of the statute, a railroad company must construct and keep in repair sufficient cattle guards on each side of highways crossing its track. If a cattle guard be in such condition that stock can pass over it, from a highway, onto the track of the railroad upon which it is situated, such road is not "securely fenced," within the meaning of the statute.—*Id.*

[j] (Sup. 1881)

Cattle guards constructed by a railroad upon its tracks at from 75 to 100 feet from a traveled highway are not properly located.—*Evansville & C. R. Co. v. Barbee*, 74 Ind. 169.

[k] (Sup. 1882)

In a suit against a railroad company for the value of an animal killed because of an insufficient fence, the questions of negligence and of reasons for not fencing are immaterial.—*Grand Rapids & I. R. Co. v. Jones*, 81 Ind. 523.

[l] (Sup. 1884)

If an animal enters on the track of a railroad from a highway because of insufficient cattle guards, the company is liable for injury received by the animal from its engine or cars.—*Whitewater R. Co. v. Bridgett*, 94 Ind. 216.

[m] (Sup. 1884)

Where a cattle pit could have been placed at the highway without any inconvenience to any one, and the company placed it fifty feet away, *held*, that the company was liable for injury to a horse that was attempting to cross the track from the intervening space.—*Louisville, N. A. & C. Ry. Co. v. Porter*, 97 Ind. 267.

[n] (Sup. 1884)

Where it is obvious that cattle guards are improperly constructed or unsuitably located, the railroad cannot be said to be securely fenced in, as required by Rev. St. 1881, § 4031.—*Ft. Wayne, C. & L. R. Co. v. Herbold*, 99 Ind. 91.

While, under the statute, a railroad need not be fenced at a highway, if the cattle guards are sixty feet away from the highway, where no reason is shown for not having them nearer, except that it would be difficult or expensive, the company is liable for killing an animal which strays upon the track between the highway and cattle guards.—*Id.*

[o] (Sup. 1887)

Unless it appears that it is reasonably impracticable to construct bridges with cattle guards, a railroad company maintaining a bridge in such a condition that animals may enter upon it from a public highway, thus putting in jeopardy the safety of trains as well as the lives of the animals, does not maintain a securely fenced road.—*Cincinnati, H. & I. R. Co. v. Jones*, 12 N. E. 113, 111 Ind. 259.

[p] (App. 1892)

It is immaterial whether the horse was killed by reason of the company's failure to build a fence or repair it.—*Lake Erie & W. Ry. Co. v. Fishback*, 5 Ind. App. 403, 32 N. E. 346.

[q] (App. 1892)

Where the evidence showed that the pit of standard cattle guards should be 28 to 30 inches deep where the crossbars are 7 inches apart, a finding that a guard having a pit but 14 to 22 inches deep, with the bars 7 inches apart, is insufficient to restrain ordinary animals, will not be disturbed for want of evidence.—*Wabash R. Co. v. Ferris*, 6 Ind. App. 30, 32 N. E. 112.

[r] (App. 1897)

A finding that the cattle guard maintained by defendant railroad at the crossing where plaintiff's horses entered on the right of way was inherently insufficient to turn stock is conclusive as to defendant's liability, under Rev. St. 1894, § 5323, for the killing of the horses.—*New York, C. & St. L. Ry. Co. v. Zumbaugh*, 46 N. E. 548, 17 Ind. App. 171.

[s] (Sup. 1905)

A usage, by first-class railroads, as to the form of cattle guards in use, does not fix the standard of care required of a railroad, by Burns' Ann. St. 1901, § 5323, in constructing cattle guards.—*Pennsylvania Co. v. Newby*, 72 N. E. 1043, 164 Ind. 109.

[t] (App. 1905)

Acts 1885, p. 224, c. 91 (Burns' Ann. St. 1901, § 5323), imposing on every railroad company the duty of providing at all highway crossings cattle guards sufficient to prevent cattle from getting on the railroad, requires a guard sufficient to turn the cattle off from the road, and the construction of a cattle guard shown to be of the kind in general use by first-class railroads is not a compliance with the statute if it in fact is insufficient to turn cattle.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Newsom*, 74 N. E. 21, 35 Ind. App. 299.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1451-1458.

See, also, 33 Cyc. pp. 1199-1204; note, 49 L. R. A. 625.

§ 413. Private crossings, gates, and bars. Contributory negligence of owner, see post, § 422.

Presumptions and burden of proof, see post, § 441.

[a] (Sup. 1861)

Where a railroad has securely fenced its road, except at certain places where the owner of the land is permitted to erect drawbars or gates for his own convenience, the company will not be liable for injury done to stock which has passed out upon the railroad track by reason of the neglect of the owner or his tenant to maintain such bars or gates.—*Indianapolis, P. & C. R. Co. v. Shimer*, 17 Ind. 295.

[b] (Sup. 1862)

Where animals are killed on a private road crossing where the railway is not fenced, but which the company has clear authority to fence, the act of 1853 applies, and the company is liable.—*Indiana Cent. Ry. Co. v. Leamon*, 18 Ind. 173.

[c] (Sup. 1862)

A railroad company, wishing to build a small bridge, removed a small piece of fence and left gaps through which the plaintiff's hogs escaped and were killed in the night by the cars. The company was held responsible.—*Indianapolis & C. R. Co. v. Logan*, 19 Ind. 294.

[d] (Sup. 1864)

If bars are erected in a line of a railroad fence, at the instance and for the accommodation of the owner of the adjoining land, the responsibility of keeping them up devolves upon him, and if he neglects to do so and his stock passes through the barway onto the line of the railroad and is killed, he cannot recover therefor against the railroad company. And if, in such a case, the animals of a third person trespass on the land of such owner, and pass through the bars so erected onto the railroad track, and are killed by the train, the owner of such cattle cannot recover.—*Indianapolis & C. R. Co. v. Adkins*, 23 Ind. 340, 345.

[e] (Sup. 1868)

A railroad company is liable for killing stock at a crossing of a private way where they have established no fence, unless the way is established in accordance with statute—as where one person has a way over the land of another.—*Indianapolis & C. R. Co. v. Lowe*, 29 Ind. 545.

[f] (Sup. 1873)

If a railroad company allow an opening to be made in the fence inclosing its road, and left insecure, it cannot be said that the road is securely fenced; and if animals pass through the same and upon the railroad, and are killed, the company is liable without proof of negligence on the part of the company. So held where a panel of the fence had been cut out and made into the form of a gate, but not hung on hinges, and the opening was used by persons hauling wood and placing it near the railroad track, and this was done with the consent of the railroad company, or without objection from it, a subtenant of the plaintiff being one of the persons hauling wood, and while he was so hauling, the gate was so set up that hogs of the

plaintiff passed through the opening and upon the railroad and were killed.—*Cleveland, C., C. & I. R. Co. v. Swift*, 42 Ind. 119.

[g] (Sup. 1882)

If a crossing at a gate is not protected by cattle pits, the road is not securely fenced, as required by statute.—*Grand Rapids & I. R. Co. v. Jones*, 81 Ind. 523.

[h] (Sup. 1883)

A railroad company is not exempt from liability for injury to stock caused by the want of a fence, because the point at which the stock entered on the railroad was at an open gate at a private crossing.—*Baltimore, O. & C. R. Co. v. Kreiger*, 90 Ind. 380.

[i] (Sup. 1884)

A railroad company is not liable for failure to fence where the fence would exclude land-owners from their private passage to a highway.—*Croy v. Louisville, N. A. & C. Ry. Co.*, 97 Ind. 126.

[j] (Sup. 1885)

So far as concerns an individual for whose benefit a railroad company permits a private crossing to be maintained, such company is not required to exercise constant vigilance to keep the gate closed.—*Evansville & T. H. R. Co. v. Mosier*, 101 Ind. 597, 1 N. E. 197.

[k] (Sup. 1885)

While a railroad company owes to third persons and to the public a duty to keep secure fences at private crossings, it owes no such duty to one whom it permits to construct and maintain a private crossing for his own benefit, and is not liable to such person for injury to his stock caused by a gate being left open at such crossing by a third party.—*Louisville, N. A. & C. Ry. Co. v. Goodbar*, 102 Ind. 596, 2 N. E. 337, 3 N. E. 162.

[l] (Sup. 1885)

While a railroad company is not liable for killing stock belonging to one who has been permitted to erect a gate at a private crossing for his own convenience, where the cattle entered upon the track through the gate, yet it is liable in such case for killing stock belonging to a third person.—*Wabash Ry. Co. v. Williamson*, 104 Ind. 154, 3 N. E. 814.

[m] (Sup. 1887)

Under the acts of April 8 and 13, 1885 (Acts 1885, pp. 148, 224), which provide that owners of land separated by a railroad may, of right, maintain crossings over such railroad, and impose upon the owner the duty of repairing and keeping up gates thereto, railway companies, in the absence of negligence, are not liable for injuring or killing cattle at farm crossings, even though the crossings may have been constructed with their consent, and either before or after the passage of such acts.—*Pennsylvania Co. v. Spaulding*, 112 Ind. 47, 13 N. E. 268; *Hunt v. Lake Shore & M. S. Ry. Co.*, 112 Ind. 69, 13 N. E. 263.

[n] (Sup. 1887)

A railway company is not required to maintain cattle guards at private crossings inclosed by gates.—*Pennsylvania Co. v. Spaulding*, 112 Ind. 47, 13 N. E. 268.

[o] (Sup. 1887)

Under Acts April 8 and 13, 1885 (Acts 1885, pp. 148, 224), which provide that owners of land separated by a railroad may, of right, maintain crossings over such railroad, and impose upon the owner the duty of repairing and keeping up gates thereto, railway companies, in the absence of negligence, are not liable for injuring or killing stock at private farm crossings.—*Hunt v. Lake Shore & M. S. Ry. Co.*, 112 Ind. 60, 13 N. E. 263.

[p] (Sup. 1887)

A railroad company is not liable for failure to keep fences and gates at farm crossings closed, since, by the act of 1885, they are required to be kept closed by the landowner.—*Jeffersonville, M. & I. R. Co. v. Dunlap*, 112 Ind. 93, 13 N. E. 403.

[q] (Sup. 1888)

The fact that a railroad long since erected gates in its line fence, and constructed a private crossing, which were used exclusively by the adjacent landowners, does not imply a contract by the company to keep such gates in repair, or constantly closed, for their benefit.—*Evansville & T. H. R. Co. v. Mosier*, 114 Ind. 447, 17 N. E. 100.

A railroad, which has erected gates in its line fence, for the convenience of pasture-land owners in using a private crossing maintained for their benefit, is not bound to keep the gates in repair, and is not liable to the owners for loss of cattle in consequence of the want of repairs.—Id.

[r] (Sup. 1889)

Act April 8, 1885, authorizes persons owning land separated by a railroad to maintain "wagon and drive ways" across the railroad, and requires them to maintain substantial gates, and keep them locked when not in use. The act exempts the railroad company from liability for animals killed or injured on the track, "if such animal entered upon the track * * * through such gates," unless the accident is caused by the negligence of the railroad company or its employes. *Held*, that a company is not liable, if no negligence on its part is shown, for animals killed or injured which entered upon the track at such a private crossing, at which was no gate, cattle-guard, or any obstacle.—*Louisville, N. A. & C. R. Co. v. Etzler*, 119 Ind. 39, 21 N. E. 466.

[s] (App. 1891)

Under the act of 1885, whether stock injured or killed by going through the gate of a private farm crossing belonged to the adjacent landowner and from his lands passed through such gates to the railroad track, or whether the stock belonged to other persons and found its

way upon the lands of the adjacent landowner and from thence through such gateway to the railroad track, a railroad company is not liable in the absence of negligence.—*Louisville, N. A. & C. Ry. Co. v. Thomas*, 27 N. E. 302, 1 Ind. App. 131.

Where a gate is erected at a farm crossing of a railroad by the railway company for the convenience of the adjacent landowner or by the landowner himself with the consent of the railway, and for the convenience of the landowner, under the act of 1885, the railroad company is not liable in the absence of negligence, for injuries to animals, irrespective of whether they belonged to the landowner or to other persons.—Id.

[t] (App. 1891)

Acts 1885, p. 224, § 5, which declares that "all gates and bars at farm crossings shall * * * be constructed, and maintained, and kept closed by the owner of such farm crossing," does not relieve a railroad company from responsibility for leaving open a gateway in a fence separating the railroad from a public highway as an entrance to a private way across the railroad.—*Louisville, N. A. & C. Ry. Co. v. Hughes*, 2 Ind. App. 68, 28 N. E. 158.

A private crossing of land across a railroad to a highway on the opposite side of the railroad is not such a crossing as is contemplated by Act April 13, 1885 (Acts 1885, p. 224, § 5), requiring railroad companies to construct and maintain fences, and providing that all gates and bars at farm crossings, in the absence of a contract or agreement to the contrary, shall be constructed and maintained and kept closed by the owner of such farm crossing.—Id.

[u] (App. 1891)

The act of 1885 applies only to crossings between two adjoining parcels which are separated by the road, and not to a crossing made by opening the fence of an opposite landowner in order to reach lands lying along the track at a distance from any other lands owned by the person making the crossing.—*Wabash R. Co. v. Williamson*, 3 Ind. App. 190, 29 N. E. 455.

The act of 1885, giving to landowners whose lands are separated by a railroad the right to have a farm crossing, and casting upon them the burden of keeping the gates thereof closed, does not apply to openings made upon one side of the road only, for the purpose of allowing the landowner to have access to a side track constructed for his own convenience, and it is still the duty of the company to keep such openings closed; and the company is liable for killing stock of a third person which escapes upon the land of such owner, and passes through such openings onto the track.—Id.

When a railroad company permits or contracts with an individual to put gates in its right of way fence or to make openings therein where it could not be compelled to do so under

the law, it is liable for damages resulting to all except the contracting parties.—Id.

[v] (App. 1892)

Under Act April 8, 1885, § 3, p. 148, providing that, where an animal enters on a railroad track through "gates" erected at private crossings, the company shall not be liable for the killing thereof, except on proof that the killing was due to the negligence of the company's servants, the company's liability is not affected by showing that the animal went on the track at the crossing, unless it is also shown that it passed through one of the gates on its way to the track.—Louisville, N. A. & C. Ry. Co. v. Consolidated Tank Line Co., 4 Ind. App. 40, 30 N. E. 159.

Act April 8, 1885 (Acts 1885, p. 148), does not apply in cases where land separated by a right of way of a railroad company is not owned by the same person.—Id.

[w] (App. 1892)

Where a railroad company maintains a fence where its road crosses a street which is not a public street, but leaves in such fence unguarded openings three feet wide, it is liable if a horse enters on the track through such opening, and is killed by a train of cars. 28 N. E. 212, reversed.—Ohio, I. & W. Ry. Co. v. Neady, 5 Ind. App. 328, 32 N. E. 213.

[ww] (App. 1894)

When, in consideration of the grant of a right of way, the railroad has agreed to make a crossing for the landowner, and in pursuance thereof built a crossing, with cattle guards and wing fences, and maintained it many years, its successor, having torn out the guards and wing fences, and put in gates in the right of way fence, is liable for injuries to the owner's stock that have strayed on the track by reason of the gate's ill repair, and the absence of the guards and wing fences.—Toledo, St. L. & K. C. R. Co. v. Burgan, 9 Ind. App. 604, 37 N. E. 31.

[x] (App. 1896)

Act April 8, 1885, provides (section 1; section 5320, Rev. St. 1894) that owners of land separated by right of way of railroad acquired by condemnation may maintain private crossings across such right of way; (section 2; section 5321, Rev. St. 1894) if right of way is fenced, such owner shall construct substantial gates; (section 3; section 5322, Rev. St.) if animals get upon the tracks through such gates, and are killed or injured by the railroad cars, the company shall not be liable therefor. *Held*, that the railroad company is not liable to a third person for stock killed by reason of the landowner's neglect to maintain a gate across his private crossing.—Crum v. Conover, 14 Ind. App. 204, 40 N. E. 644, 42 N. E. 1020.

Act April 8, 1885 (Rev. St. 1894, § 5320 et seq.) enjoins on railroads the duty of fencing their right of way, gives to an owner of land divided by a right of way the right to maintain a

private crossing over it, and provides that, if the right of way is fenced at that point, he shall erect and maintain a substantial gate in the line of the fence. *Held*, that a landowner, having such private way, owed no duty to a stranger to erect a gate, and was not liable for cattle which, going through the opening, were killed on the track.—Id.

[xx] (App. 1896)

Defendant's road runs north and south. On the east side thereof, and parallel therewith, is a public highway. At a certain crossing plaintiff owns the land west of the road and also east of the highway. The crossing connects with lanes extending both east and west through plaintiff's land, and has been maintained by defendant for 38 years, during which time it has been used by the public in reaching the highway from the west; while the lanes have been maintained by plaintiff. The road is fenced on the east side except for a space of 40 feet at the crossing, and there are no cattle guards on the south side of the crossing. *Held*, that the court could not say that the only inference to be drawn by reasonable men from the facts was that the crossing was a private farm crossing, within Rev. St. 1894, §§ 5320, 5321, at which it was plaintiff's duty to erect and maintain bars or a gate.—Louisville, N. A. & C. Ry. Co. v. McAfee, 15 Ind. App. 442, 43 N. E. 36.

[y] (Sup. 1907)

Since Burns' Ann. St. 1901, § 5322, exempting railroads from liability where stock enters at a private crossing, "unless * * * caused by the negligence * * * of the company," does not define what shall constitute negligence, it must be determined by the rules of the common law.—Chicago, I. & L. Ry. Co. v. Ramsey, 168 Ind. 390, 81 N. E. 79, 120 Am. St. Rep. 379.

In the absence of negligence railroad companies are not liable for killing animals which enter on their tracks through gates erected by adjoining landowners at private farm crossings.—Id.

[yy] (App. 1907)

Where a railroad crew, in the course of the repair of a railroad fence, took off a gate therein, at a farm crossing over the track, and merely set it across the opening, at night, notwithstanding the foreman promised the farmer that it would be securely fastened, by reason of which the farmer's colt escaped on the track and was killed, the company is liable on the ground of negligence.—Baltimore & O. S. W. R. Co. v. Zollman, 40 Ind. App. 233, 80 N. E. 40.

[z] (App. 1908)

Burns' Ann. St. 1901, § 5312 (Sp. Acts 1877, p. 61, c. 30, § 1), provides that a railroad corporation, or other person or corporation operating a railroad, shall be liable for stock killed or injured by locomotives or cars, etc. Section 5318 provides that the act shall not apply

to a railroad securely fenced in, and if such fence be properly maintained by it. Sections 5321, 5327 (Acts 1885, p. 149, c. 44, § 2; *Id.*, p. 227, c. 91, § 5), provide that where a railroad is fenced at the point where a private farm crossing is constructed, the owner shall erect and maintain substantial gates, and keep them locked when not in use, in the absence of an agreement to the contrary. *Held*, that, since the acts of 1885, a railroad is not liable for injuring or killing animals that enter upon its right of way at a private farm crossing, except where the injury or killing is caused by the negligence of its servants.—*Central Indiana Ry. Co. v. Smith*, 42 Ind. App. 365, 85 N. E. 26.

[22] (App. 1908)

Burns' Ann. St. 1901, § 5320 (Acts 1885, p. 148, c. 44, § 1), allows persons owning land on both sides of a railroad to construct private wagonways across the railroad. Section 5321 requires them to erect and maintain substantial gates in the right of way fence when erected. Section 5322 provides that, if animals are injured or killed on the track by the company's trains, the company shall not be liable if the animals entered on the track through the gates, unless the result of the company's negligence; and section 5327 requires gates and bars at farm crossings to be constructed and maintained and kept closed by the owner in the absence of agreement to the contrary. Acts 1903, p. 426, c. 227, requires electric interurban railroads to fence their rights of way and construct farm crossings and provide them with cattle guards. Section 4 (page 428) saves the right of action under existing laws. Section 6 (page 429) provides that, when a railroad has fenced on one or both sides, where a private crossing is constructed, the abutting owner shall erect and maintain substantial gates in the fence across the crossing, and keep them securely fastened when not in use by him or his employees. *Held*, that the liability of an interurban railroad company for the killing of stock entering the right of way through a private crossing is the same as that of railroads under the act of 1885; and, where the gate in a private crossing, through which the owner's horse entered the right of way, had been left insecurely fastened by others than the railroad company, the company was not liable for killing the horse, in the absence of negligence, where there was no agreement relieving the owner from the duty of keeping the gate securely fastened.—*Indianapolis & C. Traction Co. v. Smith*, 42 Ind. App. 605, 86 N. E. 498.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1459-1473.
See, also, 33 Cyc. pp. 1205-1213.

§ 414. Injuries by running on roadbed, trestles, or bridges.

Pleading, see post, § 439.

[a] (Sup. 1880)

A railroad company is not liable where plaintiff's horse had strayed upon the track, and

the speed of the train was slackened, and the whistle blown, in spite of which the horse, instead of leaving the track, ran on ahead of the train, jumped into a bridge and broke its leg.—*Pittsburgh, C. & St. L. Ry. Co. v. Stuart*, 71 Ind. 500.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1474, 1475.
See, also, 33 Cyc. p. 1213.

§ 415. Signals and lookouts.

Pleading, see post, § 439.

Questions for jury, see post, § 446.

Sufficiency of evidence, see post, § 443.

[a] (Sup. 1890)

Where a horse was killed at a highway crossing on a clear day, and if the engineer had been on the lookout he might have seen it in time to frighten it off before reaching it, a judgment for plaintiff will not be reversed.—*Chicago, St. L. & P. R. Co. v. Nash*, 24 N. E. 884.

[b] (App. 1891)

The omission of a railroad company to give the required signals on approaching a crossing creates no liability for the killing of an animal at such crossing, unless the killing was by reason of such omission.—*Lake Shore & M. S. Ry. Co. v. Van Auker*, 27 N. E. 119, 1 Ind. App. 492.

[c] (App. 1892)

Under Rev. St. 1881, § 4020, providing that the locomotive whistle shall be sounded and bell rung within a certain distance of highway crossings, and section 4021, providing that the company shall be liable in damages to any one who shall be injured in person or property by reason of the omission of such crossing signals, a right of action lies for injuries to animals upon highway crossings without contributory negligence upon the part of the owner, resulting from a failure to give the statutory signals.—*Chicago, St. L. & P. R. Co. v. Fenn*, 3 Ind. App. 250, 29 N. E. 790.

[d] (App. 1909)

A railroad company need not keep a lookout for animals at places where its tracks are properly fenced.—*Indianapolis & E. Ry. Co. v. Goar*, 43 Ind. App. 89, 86 N. E. 968.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1476-1482.
See, also, 33 Cyc. pp. 1214-1218.

§ 417. Rate of speed.

Pleading, see post, § 439.

Questions for jury, see post, § 446.

[a] (App. 1890)

Negligence of a railroad company in killing cattle cannot be inferred merely from the fact that a train approached a much-used highway crossing at a distance of 480 feet therefrom at a speed of 20 miles per hour.—*Cleveland, C., C.*

& *St. L. Ry. Co. v. Baker*, 54 N. E. 814, 24 Ind. App. 152.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1484-1487.

See, also, 33 Cyc. pp. 1218-1221; note, 59 C. C. A. 5.

§419. Care as to animals seen on or near track.

Questions for jury, see post, § 446.
Sufficiency of evidence, see post, § 443.

[a] (Sup. 1859)

Even if a railroad be fenced, the corporation is liable for willfully killing animals, as by chasing them on the track, without attempting to stop the train.—*New Albany & S. R. Co. v. McNamara*, 11 Ind. 543.

[b] (Sup. 1876)

Upon the approach of a railroad train to horses which went upon the right of way without the owner's fault, they ran along the side of the track a long distance, and were forced upon the track by an embankment, and were driven into a bridge, and some of them were injured by the train, its speed not having been diminished, but having been increased. The remaining horses were injured on the bridge by another train which followed in a few minutes, the engineer of which did not discover the horses until he was near them, though the conductor jumped off the train, and the fireman deserted his post, and when the signal was given there was no person to apply the brakes. *Held*, that the railroad company was guilty of negligence.—*Toledo, W. & W. Ry. Co. v. Milligan*, 52 Ind. 505.

[c] (Sup. 1880)

In an action against a railroad company for injuries to plaintiff's horse, it appeared that the horse had escaped from his inclosure, and was trespassing on defendant's road at the time of the accident. The horse could easily have left the track, but, instead of doing so, it jumped into a railroad bridge and broke its leg. The defendant's servants in charge of a passenger train slackened the speed of the train so as to avoid any collision with the horse, and they sounded the locomotive whistle with a view of scaring the horse from the track. *Held* insufficient to show any common-law liability of the defendant for the injury to the horse.—*Pittsburgh, C. & St. L. Ry. Co. v. Stuart*, 71 Ind. 500.

[d] (Sup. 1888)

There is no presumption that a horse or cow wandering upon the track of a railroad will step from the track in time to avoid injury.—*Dennis v. Louisville, N. A. & C. Ry. Co.*, 18 N. E. 179, 116 Ind. 42, 1 L. R. A. 448.

[e] (Sup. 1889)

It can hardly be expected that a train approaching a highway must be stopped whenever

animals are seen on the crossing. If the statutory signals have been given, and reasonable efforts made, in the customary manner, to frighten the animals away, the railroad company has discharged its duty, so far as it relates to the owner of animals which are found on a public crossing.—*Hanna v. Terre Haute & I. R. Co.*, 21 N. E. 903, 119 Ind. 316.

[f] (App. 1891)

Where the operatives of a railroad train see an animal in a position of danger, it is their duty to make a reasonable effort to cause it to get out of the way, and to avoid a collision.—*Chicago, St. L. & P. R. Co. v. Nash*, 27 N. E. 564, 1 Ind. App. 298.

[g] (App. 1891)

A locomotive engineer has no right to presume that an animal will leave the track on the approach of an engine.—*Overton v. Indiana, B. & W. Ry. Co.*, 27 N. E. 651, 1 Ind. App. 436.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1489-1500.

See, also, 33 Cyc. pp. 1222-1227.

§ 420. Contributory negligence of owner.

As basis of counterclaim, see post, § 434.

Effect of contributory negligence of owner on liability of railroad under contract of indemnity, see **INDEMNITY**, § 8.

Imputed negligence, see **NEGLIGENCE**, § 90.

Instructions, see post, § 447.

Negating contributory negligence in complaint, see post, § 439.

Pleading, see post, § 439.

Presumptions and burden of proof, see post, § 441.

Questions for jury, see post, § 446.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1501-1510, 1512-1526.

See, also, 33 Cyc. pp. 1228-1244.

§ 421. — In general.

[a] Though cattle are wrongfully on a railroad track, if they are injured by the gross negligence or willful misconduct of the company's agents, the company is liable.—(Sup. 1855) *Lafayette & I. R. Co. v. Shriner*, 6 Ind. 141, followed *Smith v. Terre Haute & R. R. Co.* (1856) 7 Ind. 553.

[b] A railroad company is liable for stock killed or injured at a point where it is required to fence its track, and has not done so, without reference to the question of contributory negligence of the owner of the stock.—(Sup. 1855) *Lafayette & I. R. Co. v. Shriner*, 6 Ind. 141, followed *Smith v. Terre Haute & R. R. Co.* (1856) 7 Ind. 553; (1858) *Indianapolis & C. R. Co. v. Townsend*, 10 Ind. 38; (1863) *Toledo & W. Ry. Co. v. Daniels*, 21 Ind. 256; (1868) *Jeffersonville, M. & I. R. Co. v. Nichols*, 30 Ind. 321; (1870) *Bellefontaine Ry. Co. v. Reed*, 33

Ind. 476; (1871) *Jeffersonville, M. & I. R. Co. v. Ross*, 37 Ind 545

[c] (*Sup.* 1858)

Though a railway company failing to fence its tracks, as required by the statute, is liable for injuries to animals on the track, regardless of the question of the contributory negligence of the owner, yet, should a person voluntarily place his animal on the track, it seems that he cannot recover as he might perhaps be regarded as having abandoned his property.—*Indianapolis & C. R. Co. v. Townsend*, 10 Ind. 38; *Jeffersonville R. Co. v. Applegate*, Id. 49.

[d] The law (Laws 1853, p. 113) requiring railroad companies to fence is a police regulation, making them liable without regard to the negligence of the owner of cattle killed.—(*Sup.* 1858) *Indianapolis & C. R. Co. v. Townsend*, 10 Ind. 38; (1858) *Jeffersonville R. Co. v. Applegate*, Id. 49; (1871) *Toledo, W. & W. Ry. Co. v. Cary*, 37 Ind. 172; (1874) *Indianapolis, P. & C. R. Co. v. Wolf*, 47 Ind. 250; (1878) *Louisville, N. A. & C. Ry. Co. v. Cahill*, 63 Ind. 340; (1879) *Same v. Whitesell*, 68 Ind. 297; (1884) *Same v. Clark*, 94 Ind. 111; (1884) *Same v. Skelton*, Id. 222; (1886) *Welty v. Indianapolis & V. R. Co.*, 4 N. E. 410, 105 Ind. 55; (App. 1892) *Terre Haute & I. R. Co. v. Schaefer*, 5 Ind. App. 86, 31 N. E. 557; (1893) *Chicago & E. R. Co. v. Brannegan*, 5 Ind. App. 540, 32 N. E. 790.

[e] (*Sup.* 1862)

If the negligence of the owner of the stock injured by a railroad train contributed to the immediate injury causing the loss, he cannot recover.—*Toledo & W. Ry. Co. v. Thomas*, 18 Ind. 215.

[f] (*Sup.* 1866)

Hitching a horse by his halter to a car on the track of a railway, which is being operated every few hours, is negligence per se, and where the act contributed directly to the injury of the horse for which the plaintiff sought to recover damages from the railroad, he could not recover, unless the carelessness or negligence of the defendant was so wanton and gross as to imply a willingness to inflict the injury.—*Toledo, W. & W. Ry. Co. v. Bevin*, 26 Ind. 443.

[g] (*Sup.* 1872)

In an action against a railroad company for the killing of cattle by the cars, where the suit is founded on the statute, and the liability of the company is based solely on a failure to fence the track, the question of contributory negligence does not arise; and if cattle are killed or injured at a point on the railway where the company could lawfully fence the track, and it was not fenced, the company is liable.—*Toledo, Wabash & W. Ry. Co. v. Cory*, 39 Ind. 218.

[h] (*Sup.* 1873)

In an action against a railroad company to recover the value of stock killed by defendant's train at a highway crossing, the evidence showed that plaintiff, upon coming to the cross-

ing, stopped the drove of stock, and sent ahead to make inquiries in respect to the time for the passing trains. Learning that the up train had passed and that the down train was behind time, and hearing no sound of its approach, he undertook to drive the stock across the road. Held not sufficient evidence to establish contributory negligence to defeat a recovery of damages.—*Indianapolis, C. & L. R. Co. v. Hamilton*, 44 Ind. 76.

[i] (*Sup.* 1878)

An action against a railroad company for wantonly killing an animal is not defeated by the owner's knowingly permitting it to run at large.—*Detroit, E. R. & I. R. Co. v. Barton*, 61 Ind. 293.

[j] (*Sup.* 1881)

Where a horse is frightened at the noise of steam escaping from an engine, and the owner of the horse, instead of leading the horse away, leads him toward the engine, and he becomes unmanageable, and rears and falls backward and breaks his neck, the owner is guilty of contributory negligence.—*Louisville & N. R. Co. v. Schmidt*, 81 Ind. 264.

In an action for injuries to a horse which became frightened at the escape of steam, etc., from a locomotive, held, that the servants of the owner of the horse assumed the risk in attempting to lead the horse over the crossing in front of the locomotive.—Id.

[k] (*Sup.* 1884)

Where it is the duty of a railway employé, by virtue of his contract, to keep trespassing animals off a certain part of the railway track, he cannot recover for an injury to his own animal occurring through his failure to comply with his contract.—*Louisville, N. A. & C. Ry. Co. v. Skelton*, 94 Ind. 222.

[l] (*Sup.* 1887)

Although a railroad company is in default for not maintaining a fence between its right of way and the pasture land of an adjoining owner, yet, where such owner habitually turns his cattle loose upon such track, through a gate maintained for his accommodation, and thus willingly abandons them to destruction, he cannot recover therefor.—*Ft. Wayne, C. & L. R. Co. v. Woodward*, 112 Ind. 118, 13 N. E. 260.

[m] (*Sup.* 1889)

Contributory negligence is no defense in cases where animals are injured in consequence of the failure of a railroad company to fence its road as the statute requires, or where the injury is purposely or willfully committed.—*Hanna v. Terre Haute & I. R. Co.*, 21 N. E. 903, 119 Ind. 316.

[n] (*App.* 1891)

On the trial of a complaint against a railroad company for negligently allowing its track yards to become out of repair, whereby plaintiff's horse was injured while being used in loading timber on the cars, the fact that plaintiff loaded the cars from the side of the track

which was not designed for that purpose will not preclude his recovery, where he did so with the knowledge and consent of the railroad company, and the ground on that side was not so rough as to make it obvious to a reasonably prudent man that it could not safely be used for that purpose.—*Chicago & I. Coal Ry. Co. v. De Baum*, 2 Ind. App. 281, 28 N. E. 447.

Plaintiff whose horse was injured by stepping into a hole covered with snow while loading timber onto defendants' cars was not at fault in using his horses in loading, though the loading might have been done more speedily without the use of horses, if the method used by him was reasonably well adapted to the particular work, and was in all respects attended to with ordinary care, such as men of ordinary prudence, sense, and discretion would be expected to use under the same circumstances.—*Id.*

[o] (App. 1892)

The fact that plaintiff had permitted his horse to follow him onto defendant's right of way is not an abandonment of the horse by plaintiff, which will prevent a recovery for its death, where it had afterwards followed him from the right of way onto the highway, a safe distance from the track, but had again entered it, because frightened by the approach of a train, at a point which defendant had failed to fence.—*Toledo, St. L. & K. C. R. Co. v. Jackson*, 5 Ind. App. 547, 32 N. E. 793.

[p] (App. 1899)

To recover in an action for cattle killed when being driven by plaintiff's servant over a crossing before an approaching train, the findings of fact should state that the servant acted as a person of ordinary prudence would act under like circumstances.—*Cleveland, C., C. & St. L. Ry. Co. v. Baker*, 54 N. E. 814, 24 Ind. App. 132.

[q] (App. 1909)

It is the duty of a driver approaching railroad tracks to use caution commensurate with the known danger and conditions, not the utmost caution.—*Cleveland, C., C. & St. L. Ry. Co. v. Cyr*, 43 Ind. App. 19, 86 N. E. 868.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1501-1508, 1510.

See, also, 33 Cyc. p. 1228.

§ 422. — Railroad fences, gates, and bars.

[a] (Sup. 1857)

It is not an unreasonable police regulation to require owners of land to fence their premises as a condition precedent to the right to recover damages from a railroad company for killing stock while trespassing on the railroad tracks.—*Indianapolis & C. R. Co. v. Caldwell*, 9 Ind. 397.

[b] (Sup. 1861)

Where the owner of land is permitted, for his own convenience, to maintain drawbars or

gates in the fence along the line of a railroad, the company is not liable for damages done to his stock passing onto the track through such bars or gates, by reason of his own neglect or default in maintaining them.—*Indianapolis, P. & C. R. Co. v. Shimer*, 17 Ind. 295.

[c] (Sup. 1865)

Where by contract with a railroad company the owner of the land through which the railroad passes has undertaken to maintain the fences, no recovery can be had by him against the company for an injury to his animals which resulted from a failure to perform the contract.—*Indianapolis, P. & C. R. Co. v. Petty*, 25 Ind. 413.

[d] (Sup. 1876)

A railroad company is not liable for the killing of stock which have gone on the track by reason of the act of the owner in changing, for his own accommodation, the fence erected by the railroad company.—*Koutz v. Toledo, W. & W. Ry. Co.*, 54 Ind. 515.

[e] (Sup. 1885)

Where gates are maintained in a fence line at a farm crossing for the convenience of the farmer, if he leaves the gates open, and his animals stray upon the track, the railroad company is not liable.—*Bond v. Evansville & T. H. R. Co.*, 100 Ind. 301.

[f] (App. 1894)

The owner's knowledge of the railroad's breach of contract to maintain a safe crossing, the gates having become insufficient to keep out stock, is no bar to his recovery for injuries caused thereby.—*Toledo, St. L. & K. C. R. Co. v. Burgan*, 9 Ind. App. 604, 37 N. E. 31.

[g] (Sup. 1907)

Burns' Ann. St. 1901, § 5321, provides that, when a railroad is fenced where a private way is constructed across the tracks, the owner shall maintain gates and keep them securely locked. Section 5322 provides that, if animals are injured on the track of a railroad, it shall not be liable in damages if the animals entered on the track through gates at a private way, unless through the negligence of the railroad. *Held*, that where plaintiff's animals entered on a right of way at a point where the road had failed to maintain a fence, though it should have done so, and, leaving it, crossed the lands of another, and again entered upon the right of way through a private gate, where they were killed, the two entries were separate and distinct, and the road was not liable.—*Chicago, I. & L. Ry. Co. v. Ramsey*, 168 Ind. 390, 81 N. E. 79, 120 Am. St. Rep. 379.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1512-1515.

See, also, 33 Cyc. pp. 1234-1237.

§ 423. — Escape of animals from inclosure or control.

[a] (Sup. 1859)

A railway company killing an animal on its track at a place where the same was not

fenced, the fact that the owner of the animal had no land near the place where the animal was killed and that the animal broke loose by reason of fright caused by the running of the train, and afterwards went on the track where it was killed, constitutes no defense.—*New Albany & S. R. Co. v. Flx*, 12 Ind. 485.

[b] (Sup. 1859)

In an action against a railroad company to recover for cattle killed by its engines, the following facts were proved: Near where the cattle were killed was a small creek over which the company had built a culvert. Below the culvert was the plaintiff's pasture in which the cattle were kept, and across the creek in this pasture he had made a fence of long poles. A freshet brought down driftwood which floated through the culvert and against the fence, and the company aided it through the culvert to prevent its accumulating above to an unsafe amount. At sunset the plaintiff knew of the exposed situation of his fence, but would not remove his cattle, and in the night the fence was swept away, the cattle went upon the road and were killed. *Held*, that the plaintiff could not recover.—*Indianapolis & C. R. Co. v. Wright*, 13 Ind. 213.

[c] (Sup. 1876)

The owner of horses left them in a pasture adjoining a railroad which was securely fenced, and went to another state, not leaving any person to look after the horses, which went upon the railroad track, through a gate which had been recently left open by trespassers, and the horses were negligently injured by a passing train. *Held*, that the owner was not guilty of contributory negligence.—*Toledo, W. & W. Ry. Co. v. Milligan*, 52 Ind. 505.

[d] (Sup. 1888)

The owner of a horse which escapes upon a railroad track is not guilty of contributory negligence, when the inclosure in which the horse is placed is securely fenced, it not appearing that the horse is not one that an ordinary fence would confine.—*Dennis v. Louisville, N. A. & C. Ry. Co.*, 116 Ind. 42, 18 N. E. 179, 1 L. R. A. 448.

[e] (App. 1891)

In an action for injuring plaintiff's horse and wagon by defendant's train, it appeared that plaintiff had a contract for transferring the United States mail; that he had been directed to occupy, with his horse and wagon, a space at the end of defendant's depot, between two of defendant's tracks; that while one train was standing on one track and another was momentarily expected on the other, he left his horse unattended and unhitched, while he went a distance of 50 feet to see about getting the mails out of the mail car; that he had unhitched one trace, and fastened the lines around the end of the single-tree; that he heard a noise, and, turning, saw the horse and wagon crossing the track in front of the approaching train, which, contrary to the usual custom, was being

backed into place by a switch engine; that upon the rearmost car there was no brakeman or lookout or light, and that air brakes were not connected; that before his horse and wagon could be rescued the injury had occurred. *Held*, that plaintiff was guilty of contributory negligence, and could not recover.—*Louisville & N. R. Co. v. Eves*, 1 Ind. App. 224, 27 N. E. 580.

[f] (App. 1891)

Whether there be an order of the county board permitting animals to run at large or not if the owner of an animal carefully confines it in a well-fenced inclosure, and without his knowledge or fault the animal escapes therefrom, and wanders unattended to a public railway crossing, and is there injured by a passing train through want of ordinary care on the part of the agents or employees of the railroad company, the presence of the animal on the crossing will not be imputed to the owner thereof as a contributory fault.—*Chicago, St. L. & P. R. Co. v. Nash*, 27 N. E. 564, 1 Ind. App. 298.

[g] (App. 1892)

Plaintiff securely hitched his horse in his barn near a highway crossing in a village, and closed and latched the barn door. By some means unknown, and without his knowledge, the horse escaped, and wandered upon the crossing. *Held*, that plaintiff was not guilty of contributory negligence, and for an injury caused by a failure to give the crossing signals plaintiff could recover.—*Chicago, St. L. & P. R. Co. v. Fenn*, 3 Ind. App. 250, 29 N. E. 790.

[h] (App. 1892)

Where a mule escaped from its stable without its owner's fault, and was killed through the negligence of defendant railroad company, the owner can recover, whether or not there was an order of the board of commissioners permitting such animals to run at large.—*Ohio & M. Ry. Co. v. Craycraft*, 5 Ind. App. 335, 32 N. E. 297.

[i] (App. 1896)

An owner is not guilty of contributory negligence when he has securely inclosed his stock, and they escape without his knowledge or fault, and, at a highway crossing, are killed by a passing train.—*Pittsburg, C. & St. L. Ry. Co. v. Shaw*, 15 Ind. App. 173, 43 N. E. 957.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1516-1520.

See, also, 33 Cyc. p. 1242.

§ 424. — **Allowing animals to go at large.**

[a] The common law imposes on the owner of domestic animals the duty of keeping them on his own land.—(Sup. 1855) *Lafayette & I. R. Co. v. Shriner*, 6 Ind. 141, followed *Smith v. Terre Haute & R. R. Co.* (1856) 7 Ind. 553.

[b] (Sup. 1866)

The owner of an animal killed or injured by the cars of a railroad company may recover therefor, if the road is not fenced, though he be not an adjoining proprietor and has been guilty of negligence in permitting the animal to stray upon the railroad.—*Indianapolis & C. R. Co. v. McKinney*, 24 Ind. 283.

[c] (Sup. 1865)

The owner of a blind horse, who allows him to stray near the track of a railroad on which he is liable to wander at any time, and over which trains are passing every few hours, cannot recover from the railroad company for killing the horse.—*Knight v. Toledo & W. Ry. Co.*, 24 Ind. 402.

[d] (Sup. 1868)

The act of 1863, as to the liability of railroad companies for the killing of live stock, must be construed according to the decisions of this court upon the act of 1853, using the same language. Their liability is not affected by the owner's permitting the stock to run at large, unless it appear that he desired the injury to happen.—*Jeffersonville, M. & I. R. Co. v. Dunlap*, 29 Ind. 426.

[e] (Sup. 1870)

Under a statute which makes a railroad company liable for stock killed when the road is not fenced, it is no defense, in an action against the company for stock killed by a passing locomotive, that the owner knew that portions of the fence were down or defective when he allowed his stock to run at large.—*Bellefontaine R. Co. v. Reed*, 33 Ind. 476.

[f] (Sup. 1872)

The general rule is that in the absence of some statutory authority for allowing animals to run at large, every man shall fence in his own stock, and is not required to fence out other stock. Hence, where it appeared that the plaintiff had knowingly permitted his cattle to run habitually at large in the immediate vicinity of a railroad, where fencing was not required, he was guilty of negligence, and if his stock was killed, he had contributed to the injury and could not complain; there being no proof of any wantonness in the management of the train.—*Indianapolis, C. & L. R. Co. v. Harter*, 38 Ind. 557.

[g] (Sup. 1873)

A railroad company is not liable for killing a cow which the owner has knowingly permitted to run at large in the vicinity of the railroad, and which has gone upon the track at a place where it was not the legal duty of the company to fence, unless it appears that the killing was willfully done; and this is true, although the owner may not have known that the railroad was completed.—*Jeffersonville, M. & I. R. Co. v. Adams*, 43 Ind. 402.

[h] (Sup. 1874)

It is negligence in the owner of cattle to allow them to run at large in a city, where

a railroad is not required to be fenced; and, by reason of such contributory negligence, he cannot recover for cattle killed by trains of a railroad company at such place, when the company is guilty of negligence only; otherwise, where the cattle are willfully killed.—*Jeffersonville, M. & I. R. Co. v. Underhill*, 48 Ind. 389.

[i] (Sup. 1875)

The owner of an animal, who voluntarily permits him to run at large contrary to law, cannot recover of a railway company for killing him by one of its trains, upon the ground that such company has failed to fence its track at the place where the animal is killed.—*Cincinnati, H. & D. R. Co. v. Street*, 50 Ind. 225.

[j] (Sup. 1884)

One who permits his cattle to run at large near a point where no fence is required cannot maintain an action against the railroad company if his cattle stray upon the track at that point and are killed.—*Wabash, St. L. & P. Ry. Co. v. Nice*, 99 Ind. 152.

[k] (Sup. 1885)

One who permits his cattle to run at large near a point where no fence is required, and without there being any order of the county board allowing cattle to run at large, cannot maintain an action against the railroad company if his cattle stray upon the track at that point, and are killed.—*Cincinnati, W. & M. Ry. Co. v. Hiltzhauer*, 99 Ind. 486; *Lyons v. Terre Haute & I. R. Co.*, 101 Ind. 419.

[l] Where the county commissioners have made no order prohibiting the running at large of animals, a person who allows his animals to run at large is not guilty of such negligence as will preclude him from recovering damages from a railroad company through whose negligence the animals are killed.—(Sup. 1885) *Lyons v. Terre Haute & I. R. Co.*, 101 Ind. 419; (App. 1891) *Chicago, St. L. & P. R. Co. v. Nash*, 27 N. E. 564, 1 Ind. App. 298; (1892) *Ft. Wayne, C. & L. R. Co. v. O'Keefe*, 30 N. E. 916, 4 Ind. App. 249.

[m] (Sup. 1889)

One who permits his cattle to wander unattended in the highway in the vicinity of a railroad crossing is guilty of contributory negligence, and cannot recover, if they are negligently killed by a passing train.—*Hanna v. Terre Haute & I. R. Co.*, 119 Ind. 316, 21 N. E. 903.

The fact that the cattle were at large in the highway by permission of the township authorities does not affect the rule as to the owner's negligence.—Id.

[n] (App. 1891)

Where an order of a board of county commissioners authorizes an animal to run at large, the owner is not prevented from recovering for negligent injury to the animal at a public railway crossing by the mere fact that he permitted it to run at large. This will not be imputed

ed as contributory fault.—Chicago, St. L. & P. R. Co. v. Nash, 27 N. E. 564, 1 Ind. App. 298.

Where the owner of an animal voluntarily, carelessly, and rashly permits it to roam at large unattended in the vicinity of a railroad where the railroad company cannot be required to fence in its track, he is chargeable with contributory negligence notwithstanding the existence of an order of the county board permitting animals to run at large.—Id.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1521-1526.

See, also, 33 Cyc. p. 1242.

§ 425. Proximate cause of injury.

Questions for jury, see post, § 446.

[a] (Sup. 1881)

In an action against a railway company, defendant alleged that its agent so negligently managed and operated its locomotive as to cause a team of horses to take fright and run against plaintiff's horse, causing its death. *Held*, that the fact that between the wrongful act of the company and the injury complained of there was an intervening cause was not sufficient to defeat a recovery.—Billman v. Indianapolis, C. & L. R. Co., 76 Ind. 166, 40 Am. Rep. 230.

[b] (App. 1892)

Where a horse was frightened by freight cars unlawfully obstructing a street, and ran away and was killed, it was not necessary that the precise injury which occurred should have been foreseen in order to render the unlawful and negligent act of defendant the proximate cause of the injury, as it is sufficient if such injury might reasonably have been expected to occur.—Grimes v. Louisville, N. A. & C. Ry. Co., 3 Ind. App. 573, 30 N. E. 200.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1527-1533.

See, also, 33 Cyc. pp. 1244-1248.

§ 427. Willful, wanton, or unauthorized acts, and gross negligence.

Instructions, see post, § 447.

Pleading, see post, § 439.

Questions for jury, see post, § 446.

Sufficiency of evidence, see post, § 443.

[a] (Sup. 1874)

Where the track of a railroad passed through a cut 80 rods long, and a horse of the owner of the land was near the track at the entrance of the cut, and the whistle of an approaching engine was sounded, and the horse ran upon the track and into the cut, whence it could not escape up the sides, and the engine was run on and the whistle sounded, thereby continuing to frighten the horse until it jumped into a trestlework at the other end of the cut and was killed, when the engine could have been stopped after the horse was in the cut and before it jumped into the trestlework, the company was guilty of such willful negligence as

rendered it liable at common law for the value of the horse.—Indianapolis, B. & W. Ry. Co. v. McBrown, 46 Ind. 229.

[b] (App. 1892)

Plaintiff's colt, being in a field which was not inclosed by a fence sufficient to ordinarily confine stock, got onto defendant's railroad track, adjacent thereto, and, becoming frightened by a locomotive, ran ahead thereof until it fell and lodged in a trestlework forming part of the track, whereupon defendant's employes were requested to wait until sufficient help could be procured to remove the colt with safety. They refused to do this, and kicked and threw the colt off the trestle, resulting in injuries that caused its death. *Held*, that there was sufficient evidence to warrant the jury in concluding that the killing was willful.—Ft. Wayne, C. & L. R. Co. v. O'Keefe, 4 Ind. App. 249, 30 N. E. 916.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1534-1538.

See, also, 33 Cyc. p. 1248.

§ 429. Persons entitled to damages.

Presumptions and burden of proof, see post, § 441.

[a] (Sup. 1886)

An owner who abandons his animal cannot recover, although it entered on the track of a railroad and was killed at a place where the company failed to perform its statutory duty by fencing its track.—Welty v. Indianapolis & V. R. Co., 4 N. E. 410, 105 Ind. 55.

[b] (Sup. 1886)

Where one is in possession of property, as live stock on pasture, under an agreement making him accountable for it, or for any injury to it, except such as may happen from natural causes, he is an "owner" in such a sense that he may recover, in a proper case, for the killing of such stock by a railroad company.—New York, C. & St. L. Ry. Co. v. Auer, 106 Ind. 219, 6 N. E. 330, 55 Am. Rep. 734.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 1539.

See, also, 33 Cyc. p. 1249.

§ 430. Notice of claim.

[a] (Sup. 1867)

Under Act March 4, 1853, a 30-day notice must be given to a railroad company in an action to recover for cattle killed by such company.—New Albany & S. R. Co. v. Welsh, 9 Ind. 479.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1540-1542.

See, also, 33 Cyc. pp. 1250-1252.

§ 433. Actions for injuries to animals.

Consolidation of actions, see ACTION, § 58.

Newly discovered evidence as ground for new trial, see NEW TRIAL, § 102.

Notice of claim as condition precedent to action, see ante, § 430.

Splitting causes of action, see ACTION, § 53.

Venue of actions in justices' courts, see JUSTICES OF THE PEACE, § 72.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1545-1656.

See, also, 33 Cyc. pp. 1254-1325.

§ 434. — Rights of action and defenses.

[a] (Sup. 1859)

Act March 1, 1853, gives justices of the peace jurisdiction of actions against the railroad company for stock killed by their cars, regardless of the value of such stock. 2 Rev. St. p. 18, c. 8, § 11, gives courts of common pleas concurrent jurisdiction with justices of the peace, in all cases where the sum due or demanded is not less than \$50. *Held*, that the former act gives a special remedy to persons whose stock was so killed exclusively within the jurisdiction of a justice court, and hence, a suit in the common pleas, against a railroad company, for stock exceeding \$50 in value, is based on the company's liability under the common law, and cannot be maintained without proof of the company's negligence.—*Indianapolis, P. & C. R. Co. v. Taffe*, 11 Ind. 458.

[b] (Sup. 1884)

In an action against a railroad company for killing a horse, the complaint charged in one paragraph the company's failure to fence, and in another that the horse was negligently killed by defendant. *Held*, that defendant could not plead by way of counterclaim plaintiff's negligence in suffering the horse to stray on the track, whereby the cars were thrown off and great damage caused; it plainly not being a claim "arising out of" plaintiff's cause of action under Rev. St. 1881, § 350.—*Terre Haute & I. R. Co. v. Pierce*, 95 Ind. 496.

[c] (App. 1895)

The remedy of one whose stock has been killed on a railroad track is purely statutory, and he who seeks to avail himself of such a right should bring himself within the statutory provisions.—*Chicago & S. E. Ry. Co. v. Adams*, 39 N. E. 877, 12 Ind. App. 317.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1545, 1546.

See, also, 33 Cyc. p. 1254.

§ 435. — Jurisdiction and venue.

Jurisdiction as dependent on amount of value in controversy, see COURTS, § 121.

Jurisdiction of justices of the peace as dependent on amount in controversy, see JUSTICES OF THE PEACE, § 43.

Pleading, see post, §§ 439, 440.

Presumptions and burden of proof, see post, § 441.

Sufficiency of evidence, see post, § 443.

Waiver of objections thereto, see VENUE, § 17.

[a] (Sup. 1861)

Actions against railroad companies for injuries to animals must, under the statute, be brought in the county where the injury was done.—*Indianapolis & C. R. Co. v. Renner*, 17 Ind. 135.

[b] (Sup. 1864)

In an action for killing stock under a statute requiring the action to be brought in the county where the killing occurred, failure to object to the jurisdiction of a court of another county is a waiver of the defect of jurisdiction.—*Indianapolis & M. R. Co. v. Solomon*, 23 Ind. 534.

[c] (Sup. 1876)

An action against a railroad company, based on its common-law liability for negligently killing or injuring animals, is a transitory action, and may be brought in any county through which the railroad passes.—*Toledo, W. & W. Ry. Co. v. Milligan*, 52 Ind. 505.

[d] (Sup. 1878)

An action against a railroad for negligently killing stock is not local, but transitory.—*Detroit, E. R. & I. R. Co. v. Barton*, 61 Ind. 293.

[e] (Sup. 1878)

In an action under the statute against a railroad company for killing stock, the evidence should show that the stock was killed within the county where the action was brought.—*Louisville, N. A. & C. Ry. Co. v. Breckenridge*, 64 Ind. 113.

[f] (App. 1900)

A complaint in the circuit court alleging a cause of action for the killing of stock, claiming \$8 damages therefor, is demurrable as to such cause of action for want of jurisdiction of said court, under Burns' Rev. St. 1894, § 5313, which provides that actions for the killing of stock, where the value thereof does not exceed \$50, can only be enforced before a justice of the peace.—*Chicago & S. E. Ry. Co. v. Spencer*, 55 N. E. 882, 23 Ind. App. 605.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 1547.

See, also, 33 Cyc. p. 1255.

§ 436. — Time to sue and limitations.

Application of statute of limitations relating to actions for penalties and forfeitures, see LIMITATION OF ACTIONS, § 35.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 1548.

See, also, 33 Cyc. p. 1256.

§ 438. — Process and appearance.

[a] (Sup. 1859)

In an action against a railroad company for killing stock, the summons commanded the officer to summon the N. A. & S. "Railroad Co., their agent, or attorney," etc., and the return was, "served as commanded, by copy given to

Conductor P., conductor on express train." *Held*, that the service was sufficiently shown under St. 1853, p. 113.—*New Albany & S. R. Co. v. Powell*, 13 Ind. 373.

[b] (Sup. 1860)

Service of process on the conductor of a train of cars, in an action for the killing of stock, under the provisions of the act of March 1, 1853, will not authorize a judgment against individuals, although they may represent themselves to be the lessees of the railroad, and to have charge of its rolling stock.—*Wright v. Gossett*, 15 Ind. 119.

[c] (Sup. 1861)

In a suit against a railroad company, before a justice of the peace, for killing stock, process was served 10 days before the return day on the conductor of a freight train. Judgment by default was taken against defendant, who appealed and moved to dismiss the action on the ground that the process was not served 30 days before the day of trial, though the principal office of the company was not in the state. *Held*, that the plaintiff was entitled to judgment.—*Ohio & M. R. Co. v. Quier*, 16 Ind. 440; *Same v. Clement*, Id. 473.

[d] (Sup. 1868)

In an action against a railroad company for killing live stock, the summons may be served on a conductor, or any agent of the corporation.—*Jeffersonville, M. & I. R. Co. v. Dunlap*, 29 Ind. 426.

[e] (Sup. 1874)

Where a railroad is being operated and controlled by a receiver appointed by the circuit court of the United States, service of process, in an action against the company, under the statute, for killing stock, may be made upon the conductor of a train passing through the county where the stock was killed, although such conductor be employed and controlled by the receiver.—*Louisville, N. A. & C. R. Co. v. Cauble*, 46 Ind. 277.

FOR CASES FROM OTHER STATES,
SEE 41 CENT. DIG. R. R. § 1550.
See, also, 33 Cyc. p. 1257.

§ 439. — Pleading.

Aider by verdict or judgment, see PLEADING, § 433.

Complaint as stating single or separate causes of action, see ACTION, § 38.

Form and requisites of declaration in general, see PLEADING, § 41.

Grounds for demurrer, see PLEADING, § 193.

In justices' courts, see JUSTICES OF THE PEACE, § 91.

Instructions, see post, § 447.

Motion to require separate statement and numbering of causes of action, see PLEADING, § 368.

Negating statutory exceptions, see PLEADING, § 63.

Objections reached by general demurrer, see PLEADING, § 205.

Objections reached by special demurrer, see PLEADING, § 208.

Pleading matters of fact or conclusions, see PLEADING, § 8.

Pleading ownership and operation of road, see ante, § 268.

Separate counts on same cause of action, see PLEADING, § 53.

Surplusage, see PLEADING, § 35.

Waiver of objections, see PLEADING, § 406.

[a] (Sup. 1863)

In the absence of statutory provisions, a party who sues a railroad company for the killing or injuring of live stock on its track must allege negligence, unskillfulness, or willful misconduct of defendant's agents in running the train, and that such negligence was the proximate cause of plaintiff's damage.—*Jeffersonville R. Co. v. Martin*, 10 Ind. 416.

[aa] In actions to recover damages for the killing of stock by the cars of a railroad company, the complaint must show either carelessness, or that the road was not properly fenced.—(Sup. 1860) *Indianapolis, P. & C. R. Co. v. Sparr*, 15 Ind. 440; (1860) *Same v. Williams*, Id. 486; (1877) *Baltimore, P. & C. Ry. Co. v. Anderson*, 58 Ind. 413.

[aaa] (Sup. 1861)

In a suit brought in Shelby county court, against a railroad, for killing cattle, a declaration that "defendants, while running their locomotive and cars on, over, and along the said railroad, on, etc., in the county and state, aforesaid, etc., ran upon and over, and thereby killed and destroyed, certain animals belonging to the plaintiff, to wit," etc., was *held* sufficient, both in its implication that the railroad ran through, or at least in, Shelby county, and that the animals were killed by being run over by the locomotive and cars.—*Indianapolis & C. R. Co. v. Moore*, 16 Ind. 43, 56.

[b] (Sup. 1862)

In a suit against a railroad company to recover for stock killed, an averment that the road was not fenced, without a further averment of negligence, was *held* insufficient.—*Terre Haute & R. R. Co. v. Smith*, 19 Ind. 42.

[bb] In an action under the statute against a railroad company, to recover for the killing or injuring of animals by a passing train, the complaint should aver that the animals were killed or injured in the county where the action is brought.—(Sup. 1863) *Indianapolis & C. R. Co. v. Smither*, 20 Ind. 228; *Same v. Wilsey*, 20 Ind. 229; (1876) *Toledo, W. & W. Ry. Co. v. Milligan*, 52 Ind. 505.

[bbb] (Sup. 1863)

A complaint against a railroad company for stock killed by the machinery of the company will be bad, even after verdict, if it fails to aver negligence, or that the road was not fenced.

ed.—Indianapolis, P. & C. R. Co. v. Brucey, 21 Ind. 215.

[c] (Sup. 1864)

A complaint against a railroad company for stock killed on the road where it was not fenced will sufficiently aver the want of fence if it allege "that said railroad was not, at the time and place aforesaid, fenced in by said defendant in manner and form as in the statute provided."—Toledo & W. R. Co. v. Fowler, 22 Ind. 316.

[cc] A complaint, averring that at the time and place when and where stock was run over and killed by a passing train "the said railroad was not securely fenced as required by law," sufficiently implies that the road was not securely fenced at the point where the animals entered upon it.—(Sup. 1864) Indianapolis & C. R. Co. v. Adkins, 23 Ind. 340, 345; (1868) Jeffersonville, M. & I. R. Co. v. Chenoweth, 30 Ind. 366; (1874) Indianapolis, B. & W. Ry. Co. v. Lyon, 48 Ind. 119.

[ccc] (Sup. 1865)

In a suit against a railroad company for killing cattle upon its road, a complaint, alleging that the fence along the railroad took fire, and, while burning, the servants of the defendant, to extinguish the fire, threw down the fence, making a gap therein, which was negligently left open by said servants, they seeing the plaintiff's cattle in the pasture adjacent, so that they escaped upon the track and were killed by the cars, is sufficient; as the circumstances alleged are equivalent to an averment that the railroad fence was not properly maintained.—Indianapolis, P. & C. R. Co. v. Truitt, 24 Ind. 162.

[d] (Sup. 1865)

An allegation in an action to recover for stock killed on a railroad track, that the railroad was not fenced at the place, sufficiently avers that the road was not securely fenced.—Indianapolis & C. R. Co. v. McKinney, 24 Ind. 283.

A complaint in an action against a railroad company alleged that the defendant was indebted to the plaintiff in a certain sum "for a brown mule killed by the cars and locomotive of the defendant, run," etc., "and passing through the said county of Dearborn, state of Indiana, at said county of Dearborn." *Held*, that this was a sufficient allegation of the place where the killing occurred.—Id.

[dd] (Sup. 1867)

A complaint to recover the value of animals killed by the cars of a railroad company is bad if it only alleges that at the time of the killing the road was not securely fenced in; it should aver that the fence was insufficient at the place where the animals entered.—Bellevue Ry. Co. v. Suman, 29 Ind. 40.

[ddd] (Sup. 1867)

To render a complaint for killing live stock on a railroad good, under the statute, it

must allege that the road was not securely fenced; to say, merely, that it was not fenced "according to law," is not enough.—Indianapolis, P. & C. R. Co. v. Bishop, 29 Ind. 202.

In an action against a railroad for killing a horse, a complaint alleging that the defendant by its agents and servants was engaged in running a locomotive and a train of cars attached thereto on defendant's road in a certain county, and while being engaged in running the locomotive and train ran over, killed, and destroyed plaintiff's horse to the value of \$200, sufficiently shows that the injury was done by the locomotive or cars used on the road.—Id.

[e] (Sup. 1868)

In an action against a railroad company for killing stock, an answer charging that the injury was the result of the "gross negligence of the plaintiff" should aver in what particular act or omission his negligence consisted.—Jeffersonville, M. & I. R. Co. v. Dunlap, 29 Ind. 426.

In an action against a railroad company for killing stock, an answer charging that the injury was the result of the "gross negligence of the plaintiff" should aver in what particular act or omission his negligence consisted.—Id.

[ee] (Sup. 1868)

Where the killing of stock by a railroad company is alleged to have been willfully done, it is not necessary to aver affirmatively that the plaintiff's carelessness did not contribute to it.—Indianapolis, P. & C. R. Co. v. Petty, 30 Ind. 261.

[eee] (Sup. 1868)

The want of reasonable time to repair the fence would excuse the company, but the allegation, in an answer by the company, that the fence was out of repair but a short time, is too indefinite.—Jeffersonville, M. & I. R. Co. v. Nichols, 30 Ind. 321.

[f] (Sup. 1868)

In an action against a railroad company for the killing of plaintiff's stock, based on the failure of defendant to fence its track, the fact that the killing occurred at a place where the track could not legally be fenced need not be negatived in the complaint, but must be set up by the answer.—Jeffersonville, M. & I. R. Co. v. Brevoort, 30 Ind. 324.

[ff] (Sup. 1868)

Suit against a railroad company for the value of stock killed on the track of the defendant by a passing train, the complaint averring "that at the time and place when and where said stock was so run over and killed as aforesaid the said railroad was not securely fenced as required by law." *Held*, that the words, "not securely fenced as required by law," alleged a fact, and not a conclusion of law.—Jeffersonville, M. & I. R. Co. v. Chenoweth, 30 Ind. 366.

[fff] (Sup. 1868)

A complaint before a justice that "a locomotive owned and used by the said defendant, on its railroad in the county of F., etc., on, etc., killed one hog of the plaintiff, and that at the time and place of the killing the road was not fenced," was sufficient to show that the animal was killed in F. county, and that the defendant committed the injury.—*Whitewater Valley R. Co. v. Quick*, 30 Ind. 384.

[g] (Sup. 1870)

A complaint before a justice of the peace against a railroad company for killing stock alleged "that the defendant, on or about," etc., "at and in said county of," etc., "and state of Indiana, by its locomotive and train of cars then running on its railroad, at a point on said road in said county where its railroad track was not securely fenced, ran over and killed two hogs of the plaintiff of the value of fifty dollars: Wherefore," etc. *Held*, that the complaint stated sufficient facts.—*Bellefontaine Ry. Co. v. Reed*, 33 Ind. 476.

[gg] (Sup. 1870)

A complaint against a railroad company for running over stock of plaintiff, to be good at common law, must aver negligence.—*Toledo, W. & W. Ry. Co. v. Weaver*, 34 Ind. 298.

A complaint against a railroad company to recover for killing stock, under the statutes imposing liability for failure to fence, must aver that the road was not fenced.—*Id.*

[ggg] A complaint against a railway company for the negligent killing of animals on its track is not good at common law in the absence of an allegation that the injury was done or suffered without fault or negligence on plaintiff's part.—(Sup. 1871) *Indianapolis, C. & L. R. Co. v. Robinson*, 35 Ind. 380; (1880) *Jeffersonville, M. & I. R. Co. v. Lyon*, 72 Ind. 107.

[h] (Sup. 1871)

The excuse that a reasonable time has not elapsed to repair the fence must be pleaded or proved.—*Jeffersonville, M. & I. R. Co. v. Sullivan*, 38 Ind. 202.

[hh] (Sup. 1872)

Where it is sought to charge a railroad company with the negligent killing of an animal on its road, the ground of liability relied on being the failure to fence the road, an allegation merely that the road "was not fenced according to law" is insufficient; for it alleges matter of law only.—*Jeffersonville, M. & I. R. Co. v. Underhill*, 40 Ind. 229.

To charge a railroad company with liability for negligence in killing an animal on the line of its road, the complaint must allege that the animal was killed without any negligence of the plaintiff.—*Id.*

[hhh] (Sup. 1872)

In an action against a railroad company for negligently killing an animal on its road, the negligence charged being the failure to fence

the road, the complaint need not allege that the road could have been lawfully fenced at the spot where the killing occurred.—*Jeffersonville, M. & I. R. Co. v. Vancant*, 40 Ind. 233.

[i] (Sup. 1873)

In an action against a railroad company to recover for stock killed at a highway crossing, the complaint alleged that the stock was killed through the fault, misconduct, and negligence of the servants and employes of the defendant in running the locomotive and train out of their regular time, and at the rate of 40 miles an hour, without giving any of the proper signals of their approach. *Held* a sufficient statement of the negligence.—*Indianapolis, C. & L. R. Co. v. Hamilton*, 44 Ind. 76.

[ii] A complaint against a railroad company for killing cattle, on the ground of the road's not being fenced, which alleges that the cattle came upon the road at a point where it was not securely fenced, and were there injured by being run over, etc., is sufficient.—(Sup. 1873) *Pittsburgh, C. & St. L. R. Co. v. Brown*, 44 Ind. 409; (1874) *Toledo, W. & W. Ry. Co. v. Harris*, 49 Ind. 119.

[iii] (Sup. 1874)

A complaint before a justice of the peace, against a railroad company, for killing a cow belonging to the plaintiff, charged that the animal was killed by a locomotive of the defendant, at a point where the railroad was by law required to be fenced, and where the same was not fenced. *Held*, that the complaint was sufficient. It was not necessary to aver that the animal went upon the track at a place where the road was not fenced; the reasonable inference from the averments of the complaint being that the road was not securely fenced at the place where it went upon the track and was killed.—*Ohio & M. R. Co. v. Miller*, 46 Ind. 215.

[j] (Sup. 1874)

In a complaint against a railroad company to recover under the statute the value of an animal killed by the cars of such company, it is sufficient to allege that the railroad was not fenced at the place, etc. If the killing was at a point where the company was not required to fence its track, that is a matter of defense, and need not be negated in the complaint.—*Ohio & M. Ry. Co. v. McClure*, 47 Ind. 317.

[jj] (Sup. 1874)

In an action against a railroad company for the killing of a cow by the defendant, the complaint alleged that the track at the point where said cow entered upon the same and was killed was not "securely fenced in, and said fence maintained by said company or any other person at its special instance and request." *Held*, that it was not necessary to allege in such complaint that the defendant was bound to fence the road at the point where the cow came upon the track and was killed.—*Ft. Wayne, M. & C. R. Co. v. Mussetter*, 48 Ind. 286.

A complaint which alleged that the track, at the point where the animal killed entered upon it, was not fenced by the defendant railway company, added the words "or by any other person at its special instance and request," and a motion in arrest of judgment was made, on the ground that these words implied that the track was fenced by some other person, although not at the special instance of the railroad company, and that, if it was actually fenced, the company was not liable. *Held*, that the motion was untenable.—*Id.*

[jjj] (Sup. 1874)

A complaint against a railroad company for negligently killing cattle must negative the existence of contributory negligence on the part of the plaintiff.—*Toledo, W. & W. Ry. Co. v. Harris*, 49 Ind. 119.

[k] (Sup. 1874)

In a complaint, under the statute, against a railroad company, for the value of hogs killed by a passing train, it is not sufficient to allege, in regard to the fence, "that said railroad was not, at the time and place where said animals were killed, fenced in by said defendant in manner and form as in the statute provided."—*Pittsburgh, C. & St. L. R. Co. v. Keller*, 49 Ind. 211, 217.

[kk] (Sup. 1875)

A complaint in an action commenced before a justice of the peace, against a railroad company, to recover the value of an animal killed by a train of cars, which does not allege that the railroad was not fenced, and does not allege negligence on the part of the defendant, is insufficient.—*Toledo, W. & W. Ry. Co. v. Eidson*, 51 Ind. 67.

[kkk] (Sup. 1876)

Where, in an action under the statute against a railroad company to recover for the killing or injury of animals by a train, the complaint fails to aver that the animals were killed or injured in the county where the action was brought, the question of jurisdiction is not waived by failure to demur on the ground of want of jurisdiction, but the objection may be raised by motion in arrest of judgment.—*Toledo, W. & W. Ry. Co. v. Milligan*, 52 Ind. 505.

[l] (Sup. 1876)

A complaint is sufficient against a railroad company, to recover damages for killing stock, alleging that such stock, being the property of the plaintiff, had entered upon the defendant's right of way and track, at a point where the same had been carelessly and negligently left unfenced, and, while there, was, by the defendant's train of cars, driven into a cut through which such track ran, and there killed.—*Jeffersonville, M. & I. R. Co. v. Lyon*, 55 Ind. 477.

[li] (Sup. 1877)

In an action under Act March 4, 1863, § 2 (1 Rev. St. 1876, p. 751), to provide compensation to the owners of animals killed or

injured by the cars, locomotives, or other carriages of a railroad company, providing that the owner of stock injured or killed may bring his action "before some justice of the peace of the county in which such killing * * * occurred," or in the circuit court of such county, a complaint in a justice's court must show, and plaintiff must prove on the trial, that the injury complained of occurred within the county in which the action was commenced.—*Evansville & C. R. Co. v. Epperson*, 59 Ind. 438.

[lii] (Sup. 1878)

In an action against a railroad for killing stock, the complaint alleged that the defendant owned and operated a railroad running through D. county, Ind., that on a certain day defendant's locomotive used and operated on its said railroad ran against and over the cow in said county and state, by reason whereof the cow was killed. *Held* to sufficiently allege that the killing was done in D. county, the venue of the action.—*Detroit, E. R. & I. R. Co. v. Barton*, 61 Ind. 203.

[m] In an action against a railroad company for killing stock, a complaint is sufficient which alleges that the stock was killed at a place where defendant's road was not "securely fenced," without adding the word "in" after the word "fenced," under Rev. St. 1881, § 4031, providing that the statutes making railroad companies liable for stock killed or injured by locomotives, cars, and other carriages, running on roads controlled or operated by them, do not apply to any railroad "securely fenced in."—(Sup. 1878) *Detroit, E. R. & I. R. Co. v. Blodgett*, 61 Ind. 315; (1883) *Terre Haute & I. R. Co. v. Penn*, 90 Ind. 284.

[mm] (Sup. 1878)

In an action in a justice's court in L. county, against a railroad company, for killing stock, a complaint alleged that defendant, on or about a specified day, "in D. county, Ind., did then and there, with a locomotive and train of cars used and operated by it, or used over its road in said county, run over, kill, cripple, damage, and render worthless one cow belonging to the plaintiff," etc., and that at the place where such cow went on defendant's road and was damaged and killed such road "was not securely fenced." *Held*, that the complaint sufficiently laid the venue, and showed that the road was not "securely fenced in."—*Detroit, E. R. & I. R. Co. v. Blodgett*, 61 Ind. 315.

[mmm] (Sup. 1880)

A complaint against a railroad for killing stock, which alleged that defendant railroad is in a certain township or county of the state at a point where the plaintiff's stock was run over, is sufficient even in the absence of an averment that defendant is a railroad company of the state of Indiana.—*Pittsburgh, C. & St. L. Ry. Co. v. Hunt*, 71 Ind. 229.

[n] (Sup. 1880)

A complaint against a railway company for the negligent killing of stock need only

allege that the road was not fenced at the point where the stock entered upon the track; it being matter of defense if it was not the company's duty to fence at that point.—*Jeffersonville, M. & I. R. Co. v. Lyon*, 72 Ind. 107.

[nn] In an action against a railroad company for killing stock, it is not necessary to allege in the complaint that the company was bound to fence the road at the place where the stock was killed.—(Sup. 1881) *Wabash Ry. Co. v. Forshee*, 77 Ind. 158; (1882) *Louisville, N. A. & C. Ry. Co. v. Kious*, 82 Ind. 357; (1883) *Terre Haute & I. R. Co. v. Penn*, 90 Ind. 284.

[nnn] (Sup. 1882)

The right of action given by the statute to one whose animals are killed by railroad cars is local, and it must appear from the complaint that the injury was done in the county where suit is brought. If, however, the locality is discoverable from inferences necessarily drawn from the language of the complaint, it is sufficient.—*Louisville, N. A. & C. Ry. Co. v. Kious*, 82 Ind. 357; *Same v. Davis*, 83 Ind. 89.

[o] (Sup. 1882)

A complaint in a statutory action against a railroad for injury to stock alleged that on a certain date a part of the defendant's roadbed was located on section 14, township 4 north, and range 1 west, in a certain township, in the county in which the action was brought, and that there was a portion of land adjoining the roadbed and road which defendant ought of right to have fenced, and could have fenced and by law should have fenced, but that it was not fenced; that by reason of the road being so unfenced along and adjacent to the lands aforesaid, the plaintiff's stock, a description and the value of which was given under a videlicet, went on the road track of defendant, and were then and there fatally injured by being struck and knocked down and run over by defendant's locomotive and cars, to plaintiff's damage \$500. *Held*, that the complaint sufficiently showed that section 14 was in the county where suit was brought, and that the defendant's roadbed and roadtrack were located on section 14, and that thereon the plaintiff's stock were run over by defendant's locomotive and cars, so that a contention that the complaint was demurrable for want of a sufficient averment that the defendant had or run any railroad in or through the county where suit was brought was untenable.—*Louisville, N. A. & C. Ry. Co. v. Davis*, 83 Ind. 89.

Under Rev. St. 1881, § 4026, providing that the owner of stock injured by the negligence of a railroad by failure to fence its tracks shall file his claim against the road in the circuit court of the county in which the injuries to the stock occurred, it is necessary that the complaint allege as a jurisdictional fact that the injuries to the stock were committed in the county in which the action is brought.—*Id.*

[ool] (Sup. 1882)

In an action against a railroad company for injuries to a mule, a complaint, averring that the road was located upon a certain section in the county in which the action was brought, that a portion of the road on said section adjoining plaintiff's land was not fenced, and that in consequence thereof the mule went on the road and was then and there fatally injured, sufficiently shows that the injury occurred in that county.—*Louisville, N. A. & C. Ry. Co. v. Wilkerson*, 83 Ind. 153.

[ooo] (Sup. 1882)

In an action against a railroad company for killing stock, the averment in the complaint, that the animals entered upon the railroad "at a point where said railway was not securely fenced," sufficiently negatives the fact that the road was securely fenced.—*Louisville, N. A. & C. Ry. Co. v. Overman*, 88 Ind. 115.

[p] (Sup. 1883)

A declaration against a railroad company, for killing live stock, which alleges that the road was not fenced at the place where the injury occurred, but does not aver that it was not fenced where the stock went on the track, is bad on demurrer.—*Louisville, N. A. & C. Ry. Co. v. Quade*, 91 Ind. 293.

[pp] (Sup. 1883)

A complaint in an action under Rev. St. 1881, § 4025, to recover the value of a mare killed by a train, which avers that "where said mare entered upon said defendant's railway and was killed, said railway was not fenced at all," is sufficient.—*Louisville, N. A. & C. Ry. Co. v. Detrick*, 91 Ind. 519.

[ppp] (Sup. 1884)

In an action before a justice, against a railroad company, for the killing of stock on the track, it is not necessary to aver that the track was not fenced at the point where the animal entered thereon.—*Indianapolis & V. R. Co. v. Sims*, 92 Ind. 496; *Louisville, N. A. & C. Ry. Co. v. Argenbright*, 98 Ind. 254.

[pppp] (Sup. 1884)

The complaint in an action against a railroad company for killing stock need not allege that the road could have been fenced at the place where the stock entered.—*Louisville, N. A. & C. Ry. Co. v. Hall*, 93 Ind. 245.

[q] (Sup. 1884)

In an action for injury to stock, an answer that plaintiff was defendant's servant, bound to keep the track near a station clear from animals, and that he turned his mare out at such place near which the track was not fenced, and that plaintiff turned his mare loose in the immediate vicinity of the station, and that she went upon the track at a place where it was not securely fenced, is bad for failure to allege that at the place where the mare entered on the track plaintiff was bound to keep it clear, and that the mare was killed at the station, where

no fence was required.—*Louisville, N. A. & C. Ry. Co. v. Skelton*, 94 Ind. 222.

[qq] (Sup. 1884)

A complaint charging that defendant, on or about November 17, 1881, ran its locomotive upon and killed two horses belonging to plaintiff, and "that the railroad of the defendant was not fenced at the place where said horses got on the track, and where said horses were killed,"—sufficiently alleges the want of fences, when attacked on demurrer.—*Louisville, N. A. & C. Ry. Co. v. Harrigan*, 94 Ind. 245.

[qqq] (Sup. 1884)

In an action against a railway company for killing stock, a complaint alleging that the place where the stock was killed was "not fenced" is sufficient on demurrer; the words of the statute being "not securely fenced."—*Louisville, N. A. & C. Ry. Co. v. Shanklin*, 94 Ind. 297.

[qqqq] (Sup. 1884)

A complaint in an action against a corporation, alleging that defendant's servants, while "acting in the line of their duty, and within the scope of their employment, and under the directions and instructions of the defendant," wrongfully and purposely killed a mule of plaintiff, which had been injured by defendant's train of cars, shows defendant's liability, and is good on demurrer.—*Banister v. Pennsylvania Co.*, 98 Ind. 220.

[r] (Sup. 1884)

In an action for killing a cow by a railroad company, when the complaint alleges that the cow was of a certain value and was killed, it is unnecessary to directly charge that the injury was to plaintiff's damage.—*Louisville, N. A. & C. Ry. Co. v. Argenbright*, 98 Ind. 254.

In an action against a railroad company for killing a cow, the allegation in the complaint that the cow was of a certain value is a sufficient allegation that the injury was to plaintiff's damage.—Id.

[rr] (Sup. 1884)

Under Rev. St. 1881, § 338, providing that a complaint shall contain the title of the cause, the name of the court and county in which the action is brought, the names of the parties, and a concise statement of the facts constituting the cause of action, etc., a complaint against a railroad for killing plaintiff's cattle, containing in a single paragraph all the facts attending the killing, the value of the cattle, and a prayer for judgment in the amount of such value, was sufficient without a formal statement that plaintiff was damaged by the killing.—*Louisville, N. A. & C. Ry. Co. v. Peck*, 99 Ind. 68.

[rrr] (Sup. 1885)

A complaint against a railroad company, in an action to recover for cattle killed at a highway crossing, which negatives plaintiff's negligence, and charges a negligent failure to ring a bell and sound a whistle, as the law re-

quires, sufficiently states a cause of the action.—*Cincinnati, W. & M. Ry. Co. v. Hiltzhauer*, 99 Ind. 486.

In an action against a railroad company for killing cattle at a highway crossing, a complaint alleging that the cattle were killed by the locomotive and cars passing over them, and setting out the specified acts of negligence, and averring that by such negligent acts of the defendant the cattle were killed, sufficiently showed a causal connection between the negligence and the injury.—Id.

[rrrr] (Sup. 1885)

In an action under the statute against a railroad company for killing stock, a complaint alleging that the track was not sufficiently fenced at the place where the animals were injured sufficiently alleges that the track was not "securely fenced," as the statute requires, as the word "sufficiently" is of the same import as the word "securely."—*Evansville & T. H. R. Co. v. Tipton*, 101 Ind. 197.

In a complaint for killing stock, the allegation that the track was not "sufficiently fenced" is equivalent to the statutory phrase "securely fenced."—Id.

[s] (Sup. 1885)

A complaint against a railroad company for the killing of a horse is not insufficient because it does not aver that the railroad was not securely fenced where the horse entered on the track, where it alleged that the right of way of the defendant was not securely fenced.—*Louisville, N. A. & C. Ry. Co. v. Hixon*, 101 Ind. 337.

[ss] (Sup. 1887)

Under Rev. St. 1881, § 4026, a complaint may be brought before any justice of the peace of the county in which the injury occurred; and it is therefore not necessary to show in such a complaint that the injury occurred in the township in which the action was brought.—*Cincinnati, I. St. L. & C. R. Co. v. Parker*, 109 Ind. 235, 9 N. E. 787.

[sss] (Sup. 1889)

A complaint for the alleged intentional killing of plaintiff's cow at a highway crossing, which charges that defendant, "for the purpose and with the intention of running its train of cars over and upon said cow, willfully, recklessly, and carelessly" ran its train at an unlawful rate of speed through the streets of a certain city, and over plaintiff's cow, thereby killing her, sufficiently charges that the animal was purposely and intentionally run upon, and a demurrer is properly overruled.—*Indiana, B. & W. Ry. Co. v. Overton*, 117 Ind. 253, 20 N. E. 147.

[ssss] (Sup. 1890)

In an action against a railroad company for negligently killing the plaintiff's horse, a paragraph of the complaint, which alleges that defendant's servants "willfully and willingly" killed the horse by running upon it with a locomotive,

tive, states a good cause of action, since the word "willfully" implies that the killing was done purposely, and without justifiable excuse.—Chicago, St. L. & P. R. Co. v. Nash, 24 N. E. 884.

A complaint which alleges that defendant, by the carelessness and negligence of its servants, ran its locomotive over plaintiff's horse, and killed it at a highway crossing, and that the plaintiff was without fault, states a good cause of action.—Id.

[t] (App. 1891)

In a suit for an injury to a horse resulting from the negligence of a railroad company in maintaining a highway crossing, contributory negligence is sufficiently negated by an averment that the plaintiff had no knowledge of the dangerous condition of the crossing, and the injury occurred without his fault.—Ohio & M. Ry. Co. v. Hawkins, 1 Ind. App. 213, 27 N. E. 331.

[tt] (App. 1891)

In an action against a railroad company for killing a cow, which entered upon the track at a point where it should have been securely fenced, but was not, an answer which recites a great many evidentiary facts to show why the road was not fenced, but does not aver that the road could not have been fenced at that point without interfering with the rights of the public or the free use of the tracks by the company or jeopardizing the safety of its servants, is demurrable.—Pennsylvania Co. v. Zwick, 1 Ind. App. 280, 27 N. E. 508; Same v. Cook (App.) 27 N. E. 509; Same v. Hayworth, Id.

[ttt] (App. 1891)

In an action against a railroad company for killing stock, an allegation in the complaint that the killing was "willfully and willingly" done is sufficient to show an intentional killing.—Chicago, St. L. & P. R. Co. v. Nash, 1 Ind. App. 298, 27 N. E. 564.

An allegation that the railroad company ran its train against plaintiff's animal at a point on its line of railroad, and then and there killed said animal, sufficiently charges that the animal when killed was on the railroad track.—Id.

An allegation that the animal was killed at a road crossing does not show that the plaintiff was guilty of contributory negligence.—Id.

[tttt] (App. 1891)

In an action against a railroad company for injury to cattle, a complaint which alleges that the road was not fenced at the place where the cattle came on the track need not also allege that the road could properly have been fenced at that place, since inability to fence is a matter of defense.—Louisville, N. A. & C. Ry. Co. v. Hughes, 2 Ind. App. 68, 28 N. E. 158.

[u] (App. 1891)

A complaint which charges an injury to animals by a railroad company by reason of its failure to fence its track at a point where it ought to have been fenced need not negative the

exceptions to the duty of fencing.—Louisville, E. & St. L. R. Co. v. Hart, 2 Ind. App. 130, 28 N. E. 218.

A complaint which charges that the defendant purposely and willfully ran its locomotive against plaintiff's cattle is sufficiently specific.—Id.

[uu] (App. 1891)

In a complaint against a railroad company for negligently allowing its trackyards to become out of repair, whereby plaintiff's horse was injured while being used in loading timber on the cars, an allegation that the place where the horse was injured was the customary place of loading timber, and was on land so used by the railroad company, sufficiently imports an implied invitation from the railroad company to do loading there.—Chicago & I. Coal Ry. Co. v. De Baum, 2 Ind. App. 281, 28 N. E. 447.

[uuu] (App. 1891)

The complaint alleged that defendant's track was constructed over a highway upon which it was defendant's duty to construct a safe crossing; that said crossing was unsafe for horses to pass over; that, plaintiff being ignorant thereof, his horse was driven across the same, by plaintiff's servant, in a careful manner; and that the horse's foot was caught in a space improperly between the iron on one side of the track and the boards of the crossing, and the horse was rendered worthless. Held, upon demurrer, that the complaint was sufficient.—Toledo, St. L. & K. C. R. Co. v. Milligan, 2 Ind. App. 578, 28 N. E. 1019.

[uuuu] (App. 1891)

In an action to recover damages from a railroad company for injuries to stock caused by its removal of a cattle guard and wing fences, erected under a written contract with defendant's predecessor in ownership, it is not necessary that such contract should be set out in the complaint, nor to allege that defendant had notice of the contract in question.—Toledo, St. L. & K. C. R. Co. v. Fenstemaker, 3 Ind. App. 151, 29 N. E. 440.

[v] (App. 1892)

The complaint, in an action for the value of a horse killed on a railroad track, which it was claimed to have reached by reason of the company's failure to fence its road, alleged that it entered on the track immediately north of the city of F. Held, that this was sufficiently specific as to the place of entry.—Louisville, N. A. & C. Ry. Co. v. Consolidated Tank Line Co., 4 Ind. App. 40, 30 N. E. 159.

[vv] (App. 1892)

In an action against a railroad company for killing stock, a complaint alleging the maintenance of a fence and cattle guard at the intersection of the track with a street, and the maintenance of fences on both sides of the track for 400 feet north, so that the stock was permitted to wander on the track at the north end of the inclosure, without being able to escape at the

south end, but not containing any averment showing or alleging plaintiff's freedom from negligence, is bad, even though the case originated before a justice.—*Cincinnati, W. & M. Ry. Co. v. Stanley*, 4 Ind. App. 364, 30 N. E. 1103.

[vvv] (App. 1892)

In an action against a railway company for damages caused by defendant's engine killing plaintiff's stock, where the complaint alleges that the railroad was not fenced at the place where the animals entered upon it, it is not necessary to state that such place was not a public highway, or that the railroad company could have fenced the road at such place, or was bound to do so.—*Terre Haute & I. R. Co. v. Schaeffer*, 5 Ind. App. 86, 31 N. E. 557.

[vvvv] (App. 1892)

A complaint in an action against a railroad company, reciting that at a certain point "said railroad was not securely fenced, but ought to have been; that plaintiff's horse entered on the railroad at said point, and was run down and killed by a train of cars owned and operated by defendant,"—sufficiently alleges that the horse was killed by reason of defendant's failure to properly fence its right of way at said point.—*Ohio, I. & W. Ry. Co. v. Neady*, 5 Ind. App. 328, 32 N. E. 213.

[w] (App. 1892)

An allegation in the complaint in an action for damages that defendant railroad company, without any negligence on plaintiff's part, carelessly and negligently ran its train over plaintiff's mule, is sufficiently specific.—*Ohio & M. Ry. Co. v. Craycraft*, 5 Ind. App. 335, 32 N. E. 297.

[ww] (App. 1892)

In an action against a railroad company under Rev. St. c. 38, art. 4, providing that railroad companies shall fence their roads or be liable for animals killed by their machinery, without regard to the question of negligence, where the complaint alleged that plaintiff's horse strayed upon defendant's track at a point where it was not securely fenced, it was not necessary to allege or show that the railroad track could have been fenced at said point.—*Lake Erie & W. Ry. Co. v. Fishback*, 5 Ind. App. 403, 32 N. E. 346.

[www] (App. 1892)

Under Rev. St. §§ 4029, 4031, which make railroad companies absolutely liable for stock killed or injured by their locomotive unless such railroads are securely fenced, a complaint which alleges that the right of way was not securely fenced at the point where the animal entered on the track and was killed is sufficient, without further alleging that it was the duty of the company to fence the road at such point.—*Chicago & E. R. Co. v. Brannegan*, 5 Ind. App. 540, 32 N. E. 790.

[wwwv] (App. 1892)

In an action against a railroad company for killing horses, an allegation that the horses

went on the railroad "by reason of the failure of defendant to fence and maintain cattle guards" is equivalent to an allegation that they went on the railroad at a point where it was not securely fenced, and is sufficient.—*Wabash R. Co. v. Ferris*, 6 Ind. App. 30, 32 N. E. 112.

[x] (App. 1894)

The controlling theory of the complaint, in an action against a railroad company for the killing of a horse, which alleges that the horse entered on defendant's track at a point where the same was not securely fenced, and that the failure to securely fence the track was negligent and willful, is not one of negligence and willfulness, but of the violation of the statutory duty to fence the track, and such complaint is sufficient; the allegations as to negligence and willfulness being surplusage.—*Cleveland, C., C. & St. L. Ry. Co. v. De Bolt*, 10 Ind. App. 174, 37 N. E. 737.

[xx] (App. 1895)

Under Rev. St. 1894, § 5323, making a railroad company liable for stock killed by its trains on its right of way, which entered thereon by reason of insecure fencing, the fact that the place where the stock entered could not be fenced is matter of defense.—*Lake Erie & W. R. Co. v. Rooker*, 13 Ind. App. 600, 41 N. E. 470.

[xxx] (App. 1895)

In an action against a railroad company for killing a horse a complaint which alleges that plaintiff's farm is situated in H. county, where the action is brought, and that the animal entered upon a neighbor's land, and thence to defendant's unfenced track, where it was killed, is defective, since it does not show that the horse was killed in H. county.—*Chicago & S. E. Ry. Co. v. Wheeler*, 14 Ind. App. 62, 42 N. E. 489.

[xxxx] (App. 1896)

A complaint alleging that defendant operated a railroad in a certain county between two places therein, and that, while plaintiff's animal was on defendant's track, it was struck by its train, and killed, sufficiently avers the killing within the county.—*Lake Erie & W. R. Co. v. Rinker*, 45 N. E. 80, 16 Ind. App. 334.

[y] (App. 1890)

An allegation that defendant used and operated a certain railroad, with tracks, etc., in the county of B., and that plaintiff was the owner of a certain hog, which, "at said time and place," strayed on the track of said railroad, and was killed, sufficiently shows that the hog was killed in B. county.—*Chicago & S. E. Ry. Co. v. Spencer*, 55 N. E. 882, 23 Ind. App. 605.

[yy] (App. 1894)

In an action against a railroad for killing stock, a complaint alleging that the cattle "were run against by a locomotive and cars managed by said defendant's servants" is insufficient, as not alleging that defendant ran its locomotive, or ran against plaintiff's cattle.—*Cleveland, C.,*

C. & St. L. Ry. Co. v. Wasson, 66 N. E. 1020, 70 N. E. 821, 33 Ind. App. 316.

In an action against a railroad for killing stock, a complaint, alleging that the cattle "were run against by a locomotive and cars managed by said defendant's servants," is insufficient, as not alleging that defendant ran its locomotive, or ran against plaintiff's cattle.—*Id.*

[yyy] (App. 1905)

A complaint in an action against a railroad company under the statute alleged that defendant had a defective cattle guard at a crossing, and that plaintiff was the owner of certain mules, which, by reason of the failure of defendant to maintain a proper guard at the crossing in question, "strayed upon the line of said railroad at said crossing, and were run against," etc. *Held*, that the complaint was not insufficient on the ground that it did not show that the animals entered on the railroad by crossing over the alleged defective guard, and showed them struck on the crossing.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Newsom*, 74 N. E. 21, 35 Ind. App. 299.

Acts 1885, p. 224, c. 91 (Burns' Ann. St. 1901, § 5323), provides that railroad companies operating roads or that may subsequently operate them shall within 12 months from the completion of any part of the road maintain suitable cattle guards at all highway crossings. *Held*, that a complaint in an action against a railroad company for the killing of cattle owing to the guards having been defective need not allege that the railroad was in existence when the statute became effective, or that the road had been completed 12 months before the killing.—*Id.*

In an action against a railroad company for the killing of cattle owing to the defendant not having provided a suitable cattle guard as required by Burns' Ann. St. 1901, § 5323, the complaint must show that the stock was killed in the county where the action was commenced.—*Id.*

A complaint alleging a defective cattle guard at a crossing in F. township, B. county, and state of Indiana, and that plaintiff was the owner of certain mules which then and there in B. county and state of Indiana were run over, and showing by an affirmative allegation that the mules "strayed on the line of said railroad at said crossing," sufficiently showed the animals killed in the county of B.—*Id.*

A complaint against a railroad company for damages on account of stock killed need not show by positive and direct allegation in what county the stock was killed.—*Id.*

[yyyy] (App. 1906)

In an action against a railway for the death of plaintiff's cow, plaintiff alleged that the grantor of plaintiff's lessor, contracted to convey a right of way to the railroad company by a written contract containing a condition precedent requiring the railroad company to build

a sufficient fence along the right of way before taking possession of the land, that such grantor subsequently sold the adjoining land to plaintiff's lessor by a deed conveying all rights and covenants running with the remaining unsold portion and that plaintiff had leased the land from such purchaser, that the railroad company failed to fence as required by the covenant in its contract, and negligently left paints and oils on its right of way accessible to plaintiff's cow, from which she drank and died. *Held*, that the cause of action so alleged was not founded on the deed to the railroad company, which was not alleged to contain the covenant to fence, but was founded on the written contract, and was therefore sufficient.—*Indianapolis Northern Traction Co. v. Harbaugh*, 78 N. E. 80, 38 Ind. App. 115; *Same v. Spurgeon*, 78 N. E. 1115, 38 Ind. App. 702.

[z] (App. 1906)

A complaint alleging that the defendant interurban electric railroad failed to inclose its right of way by a fence sufficient to turn horses, that plaintiff's horse strayed on defendant's track, and that the persons operating the defendant's car carelessly and negligently chased the horse along the track upon a bridge which was not suitable for horses to cross, whereby the horse was injured, stated a cause of action.—*Campbell v. Indianapolis & N. W. Traction Co.*, 39 Ind. App. 66, 79 N. E. 223.

A paragraph of a complaint for injuries to a horse on an interurban electric railroad track, based on the railroad's negligence, but failing to aver any excuse for not confining the horse on plaintiff's own land, is insufficient.—*Id.*

To recover under the statute in a suit for injuries to a horse on an interurban electric railroad track where the company failed to properly fence its right of way, the injury must have been caused by an actual striking of the horse by a car.—*Id.*

In an action for injuries to a horse on an interurban electric railroad track, a paragraph of the complaint alleging negligence of the railroad company in neglecting to construct a sufficient fence, and negligence of servants of the company, but not alleging that the wrongful acts of the servants were performed while acting in the line of their employment, or under the company's direction, is insufficient to charge the company with liability.—*Id.*

[zz] (App. 1908)

In pleading the statutory liability of a railroad company under the acts for stock injured or killed in a collision with its locomotive or cars because of its failure to fence, it is only necessary to allege that the place where the animals entered the right of way was not fenced; and if it was not the company's duty to fence at that point, or if the animals entered through a gate to a private crossing, that is matter of defense.—*Central Indiana Ry. Co. v. Smith*, 42 Ind. App. 365, 85 N. E. 26.

The exception to the law, which relieves railroad companies from liability for injury to stock entering the right of way through gates at farm crossings, being a subsequent enactment, it was not necessary to negative it in the complaint, since where an exception is contained in a subsequent clause or statute, it is a matter of defense, and need not be negated.—*Id.*

[xxx] (App. 1908)

A complaint, in an action against a railroad company for killing a horse on its track, averring that plaintiff's horse got out of his field and onto a private crossing, constructed on plaintiff's land by defendant, under a contract made part consideration for plaintiff's conveyance of the right of way, and because the right of way was not fenced, and the crossing equipped with cattle guards, as the contract required, the horse got on the right of way west of the crossing and was killed, did not affirmatively show that the horse got on defendant's road through a gate at a private crossing on plaintiff's farm, and wandered along the right of way to a public highway, where it was killed.—*Indianapolis & C. Traction Co. v. Smith*, 42 Ind. App. 605, 86 N. E. 498.

[xxxx] (App. 1909)

Specific allegations of a complaint for damage to a horse and buggy in a railroad crossing accident held not necessarily inconsistent with the general allegation of freedom from contributory negligence.—*Cleveland, C., C. & St. L. Ry. Co. v. Cyr*, 43 Ind. App. 19, 86 N. E. 868.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1551-1569.

See, also, 33 Cyc. pp. 1257-1267.

§ 440. — Issues, proof, and variance.

[a] (Sup. 1859)

In a suit against a railroad company to recover for stock killed, the allegation that the road was not fenced is a material one, and must be proved.—*Indianapolis & C. R. Co. v. Wharton*, 13 Ind. 509.

[b] (Sup. 1860)

If the plaintiff relies on the statute making the company liable without negligence, he must show that the lands of the company were not fenced as required.—*Indianapolis & C. R. Co. v. Means*, 14 Ind. 30.

[c] (Sup. 1864)

A complaint against a railroad company, for stock killed on the road where it was not fenced, will sufficiently aver the want of fence if it allege "that said railroad was not, at the time and place aforesaid, fenced in by said defendant in manner and form as in the statute provided"; and under such averment proof may be made that the road had not been duly fenced in at all, or, if it had, that the fence had not been properly maintained.—*Toledo & W. R. Co. v. Fowler*, 22 Ind. 316.

[d] (Sup. 1864)

Under a complaint, in an action against a railroad company, before a justice of the peace, for certain animals "killed by your locomotive in Clinton township, Cass county, Ind.," evidence that the road of the company was not fenced is inadmissible.—*Toledo & W. R. Co. v. Reed*, 23 Ind. 101.

[e] (Sup. 1876)

In an action against a railroad company to recover for the killing or injuring of live stock by its cars at a point on its track where the track might have been fenced, but was not, the allegation that the track was not fenced must be proved on the trial.—*Pittsburg, O. & St. L. Ry. Co. v. Hackney*, 53 Ind. 488.

[f] (Sup. 1876)

In a statutory action for killing stock, the defendant need not allege, but, under the general denial, simply, may prove, that the point where such stock entered upon its track was one which could not properly be fenced.—*Jeffersonville, M. & I. R. Co. v. Lyon*, 55 Ind. 477.

[g] (Sup. 1882)

A complaint against a railroad company alleged that the two colts killed were each of the value of \$100. The evidence showed that one was worth \$150 and the other \$50. Held, that the variance was not material.—*Louisville, N. A. & C. Ry. Co. v. Overman*, 88 Ind. 115.

[h] (Sup. 1884)

In an action against a railroad company for stock killed, where the complaint alleges that defendant "with its locomotive and train of cars running on and over its road * * * run over and killed and maimed one * * * steer, * * * one heifer, * * * and one hog," plaintiff cannot prove that the animals were killed at different times.—*Indianapolis & V. R. Co. v. Sims*, 92 Ind. 496.

[i] (Sup. 1884)

In an action against a railroad company for injuries to stock, it was necessary for plaintiff to prove the fact alleged in the complaint and denied in the answer that the stock was injured in the county in which the action was brought.—*Croy v. Louisville, N. A. & C. Ry. Co.*, 97 Ind. 126.

[j] (Sup. 1889)

Plaintiff having sued for an intentional and willful injury, cannot recover on the ground that the engineer was negligent in not discovering the cow, and stopping his train, or frightening the cow off the track.—*Indiana, B. & W. Ry. Co. v. Overton*, 117 Ind. 253, 20 N. E. 147.

[k] (App. 1891)

In an action for the killing of an animal run over by a railroad train, an allegation of the complaint that plaintiff was without fault, like the general averment of negligence on the

part of defendant, has a technical significance, and admits proof of any facts tending to show its truth.—Chicago, St. L. & P. R. Co. v. Nash, 27 N. E. 564, 1 Ind. App. 298.

[l] (App. 1892)

Proof of conditions which would relieve the company from the duty of fencing its track at a particular point may be given under the general denial.—Indianapolis, D. & W. Ry. Co. v. Clay, 28 N. E. 567, 30 N. E. 916, 4 Ind. App. 282.

[m] (App. 1904)

A complaint in an action against a railroad company for the killing of a horse, brought under Burns' Ann. St. 1901, §§ 5312-5318, which make the company liable for stock killed on its right of way at a point "where the same was not securely fenced in," is sustained by proof that the horse entered upon the right of way over a cattle guard which was not sufficient to turn stock.—Chicago, I. & L. Ry. Co. v. Brown, 71 N. E. 908, 33 Ind. App. 603.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1570-1574.

See, also, 33 Cyc. pp. 1268-1272.

§ 441. — Presumptions and burden of proof.

As to ownership and operation of road, see ante, § 270.

[a] (Sup. 1880)

The mere fact of an animal being killed by a train raises no presumption of negligence upon the part of the railroad company or its servants.—Indianapolis & C. R. Co. v. Means, 14 Ind. 30.

[b] (Sup. 1860)

Where, in an action against a railroad company for killing cattle, there was no proof of negligence on the part of the company nor any proof as to whether the road was fenced, a judgment for plaintiff is erroneous.—Indianapolis & C. R. Co. v. Williams, 14 Ind. 521.

[c] (Sup. 1861)

In a suit against a railroad company for killing cattle, the burden of proving that the killing was done within the county is upon the plaintiff.—Indianapolis & C. R. Co. v. Renner, 17 Ind. 135.

[d] In an action under Act March 4, 1803 (1 Rev. St. 1876, p. 751), providing that the owner of stock injured by a railroad company may bring his action "before some justice of the peace of the county in which such killing occurred," or in the circuit court of such county, plaintiff must prove that the injury complained of occurred within the county in which the action was commenced.—(Sup. 1863) Indianapolis & C. R. Co. v. Smither, 20 Ind. 228; Same v. Wilsey, 20 Ind. 229; (1877) Evansville & C. R. Co. v. Epperson, 59 Ind. 438.

[e] A railway company, sued for stock killed on its track, has the burden of proving that

the place where they entered upon the track was one which could not be fenced without interfering with the company's duty to the public and the safety of its employees.—(Sup. 1871) Jeffersonville, M. & I. R. Co. v. O'Connor, 37 Ind. 95; (1879) Louisville, N. A. & C. Ry. Co. v. Whitesell, 68 Ind. 297; (1884) Louisville, N. A. & C. Ry. Co. v. Clark, 94 Ind. 111; (1884) Lake Erie & W. Ry. Co. v. Kneadle, 94 Ind. 454; (1884) Ft. Wayne, C. & L. R. Co. v. Herbold, 99 Ind. 91; (1885) Evansville & T. H. R. Co. v. Mosier, 101 Ind. 597, 1 N. E. 197; (1887) Cincinnati, I., St. L. & C. R. Co. v. Parker, 109 Ind. 235, 9 N. E. 787; (App. 1891) Jeffersonville, M. & I. R. Co. v. Peters, 27 N. E. 299, 1 Ind. App. 69; (1891) Pennsylvania Co. v. Lindley, 2 Ind. App. 111, 28 N. E. 106; (1892) Toledo, St. L. & K. C. R. Co. v. Woody, 30 N. E. 1099, 5 Ind. App. 331; (1892) Toledo, St. L. & K. C. R. Co. v. Jackson, 5 Ind. App. 547, 32 N. E. 793; (1894) Toledo, St. L. & K. C. R. Co. v. Cupp, 36 N. E. 445, 9 Ind. App. 244.

[f] (Sup. 1873)

To entitle the owner of an animal killed on a railroad at a point where the road could not be legally fenced to recover therefor, he must show negligence on the part of the railroad company, and the absence of negligence on his part.—Jeffersonville, M. & I. R. Co. v. Huber, 42 Ind. 173.

[g] In an action against a railway company for the killing of an animal by a train, the burden of proof is on plaintiff to show that the road was not fenced as required by statute and on the company to show that it was not bound to fence its road at that point.—(Sup. 1874) Indianapolis, B. & W. Ry. Co. v. Penry, 48 Ind. 128; (1884) Louisville, N. A. & C. Ry. Co. v. Shanklin, 94 Ind. 297, affirmed Same v. Pixley, Id. 603.

[h] (Sup. 1877)

To entitle one to recover from a railroad company for the alleged negligent killing or injuring of stock, he must prove that he was free from contributory negligence.—Indianapolis, P. & C. Ry. Co. v. Caudle, 60 Ind. 112.

[i] (Sup. 1878)

In an action against a railroad company for killing stock, proof of plaintiff's possession of the stock killed is prima facie evidence of his ownership thereof.—Toledo, W. & W. Ry. Co. v. Stevens, 63 Ind. 337.

[j] (Sup. 1881)

A claim that it was not the duty of a railway company to fence at a point where stock was killed on its track is a matter of defense, but the burden is on the owner of the stock, in an action by him against the company, to show that the road was not fenced where they were killed or entered upon the track.—Indianapolis, P. & C. R. Co. v. Lindley, 75 Ind. 426.

[k] (Sup. 1883)

A railroad company, sued for killing stock at a place on its track where the fence inclosing it was not securely maintained, has the burden of showing reasons for not so maintaining it.—*Cincinnati, H. & I. R. Co. v. Ford*, 89 Ind. 92.

[l] (Sup. 1883)

In an action against a railroad company for killing stock, it will be presumed, in the absence of contrary evidence, that the company had done its legal duty in regard to fencing its road.—*Louisville, N. A. & C. Ry. Co. v. Quade*, 91 Ind. 295.

[m] (Sup. 1884)

Where, in an action against a railroad company for the killing of a horse, it was contended that the grade at a certain place could have been so reduced that a fence could have been put in with safety, there being no proof that a reduction of grade was practicable, it would be presumed that it was as light as the nature of the country would admit of.—*Evansville & T. H. Ry. Co. v. Willis*, 93 Ind. 507.

[n] (Sup. 1884)

In an action against a railroad for injuries caused by its failure to fence, the burden of proof is on plaintiff to show that there was no sufficient fence where the cattle entered.—*Lake Erie & W. Ry. Co. v. Kneadle*, 94 Ind. 454.

[o] (Sup. 1885)

In an action against a railroad company for damages for killing stock, the burden is on the plaintiff to prove that the animals entered at a point where the railroad was bound to fence, and that there was no proper fence at that point.—*Louisville, N. A. & C. Ry. Co. v. Goodbar*, 102 Ind. 596, 2 N. E. 337, 3 N. E. 162.

[p] (Sup. 1887)

While a railroad company is not required to fence nor to maintain cattle pits where to do so would interfere with the safety of its employes or the rights of the public, the burden is upon the company to show, in case of a bridge abutting upon a highway, that it used all reasonable precautions to keep animals from entering upon the bridge from the highway, and it does not alter the case that the bridge may have been partially in the highway, and that the animal may have been struck while on that part of the bridge.—*Cincinnati, H. & I. R. Co. v. Jones*, 111 Ind. 259, 12 N. E. 113.

[q] (Sup. 1888)

In an action against a railroad company to recover for the killing of plaintiff's cattle resulting from a breach of defendant's contract to erect and maintain cattle guards at plaintiff's private crossing, a prima facie case is established for plaintiff, when the evidence shows a valid contract, a breach thereof, and the consequent killing of the cattle and the leaving

open of gates at the crossing by the landowner, or by a wrongdoer other than the railroad company, is a matter of defense.—*Chicago & A. Ry. Co. v. Barnes*, 116 Ind. 126, 18 N. E. 459.

[r] (Sup. 1890)

The burden was upon defendant to show that a guard could not have been maintained at the place where the horses entered without danger to its employes.—*Chicago & E. I. R. Co. v. Modesitt*, 124 Ind. 212, 24 N. E. 986.

[s] (App. 1892)

In an action against a railroad company for killing a colt on the right of way, if the animal entered on the right of way at a place where the company could not fence its track, the burden was on the company to prove the fact.—*Chicago & E. R. Co. v. Brannegan*, 32 N. E. 790, 5 Ind. App. 540.

[t] (App. 1907)

Under Burns' Ann. St. 1894, § 5313, providing that whenever any animal is killed by a railroad the owner of the animal may complain in writing before a justice of the peace, the burden of showing, in an action against a railroad for the killing of the animal, that the road could not be properly fenced, is on the defendant.—*Cleveland, C., C. & St. L. Ry. Co. v. Miller*, 40 Ind. App. 165, 81 N. E. 517.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1575-1595.

See, also, 33 Cyc. pp. 1273-1283.

§ 442. — Admissibility of evidence.

Expert testimony, see EVIDENCE, §§ 513, 514, 527, 553.

Opinion evidence, see EVIDENCE, §§ 474, 474½, 483.

Relevancy of evidence to show value of animals, see EVIDENCE, § 113.

Res gestæ, see EVIDENCE, § 121.

Scope of evidence in rebuttal, see TRIAL, § 62.

[a] (Sup. 1873)

In a suit against a railroad company to recover for stock killed, evidence that after the killing the company repaired and built a fence at the point where the injury occurred is admissible for the purpose of showing that the company regarded the place as one which might be legally fenced.—*Toledo, W. & W. Ry. Co. v. Owen*, 43 Ind. 405.

[b] (Sup. 1890)

Rev. St. 1888, § 4098a, requires all railroad companies, to fence their tracks, and maintain cattle guards at crossings, in default whereof they shall be liable for all damage done to stock upon the track. Held that, in a suit for horses killed by getting upon defendant's track at a crossing where no guard was maintained, the evidence of a witness that, in his opinion, a guard could not be maintained there without endangering defendant's employes, was properly excluded.—*Chicago & E. I. R. Co. v. Modesitt*, 124 Ind. 212, 24 N. E. 986.

[c] (App. 1891)

If, four months before the alleged injury caused to plaintiff's horse by having his foot caught in defendant's railroad crossing, a horse of J. got his foot fast in the space, and, a year before, a horse of M. got his foot fast therein, the jury could consider these facts in determining whether defendant had notice of the condition of the crossing prior to the alleged injury.—*Toledo, St. L. & K. C. R. Co. v. Milligan*, 2 Ind. App. 578, 28 N. E. 1019.

[d] (App. 1892)

In an action against a railroad company for the killing of cattle by defendant's train, where defendant sought to show that the animals were killed at a highway crossing, plaintiff had the right to prove that there were cattle tracks along the railroad near the point where plaintiff claimed his cattle were killed, without proof that the tracks were made by the animals actually killed.—*Ohio & M. Ry. Co. v. Wrape*, 4 Ind. App. 108, 30 N. E. 427.

[e] (App. 1894)

In an action against a railroad company to recover the value of a horse killed, based on the allegations that it had entered on the track at a point where it was not securely fenced, the defense was that the company could not safely maintain fence or cattle guards at that point. Defendant asked a witness if he had noticed any incidents of danger that had threatened the employees of the company in passing where the cattle guard was located, to which the court sustained an objection. Defendant then offered to prove by said witness that, when a cattle guard did exist at that point, the employees of the company in passing there fell into it and were injured. *Held*, that the question asked for the opinion of the witness on two distinct matters—that of danger and that of menace—and the offer was objectionable because it did not appear that the injury occurred while the employees were in the discharge of their duties.—*Cleveland, C., C. & St. L. Ry. Co. v. De Bolt*, 37 N. E. 737, 10 Ind. App. 174.

[f] (App. 1894)

In an action to recover for injuries to stock caused by the maintenance of defective track guards, it appeared that the guard in controversy was a metal surface guard, that all the guards along the track were similar in material and construction, and it was not claimed that they were out of repair. *Held*, that witnesses could testify that they had seen stock walk over a guard some three or four miles distant from the one in controversy.—*New York, C. & St. L. R. Co. v. Zumbaugh*, 11 Ind. App. 107, 38 N. E. 531.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1596-1607.

See, also, 33 Cyc. pp. 1284-1290.

§ 443. — Sufficiency of evidence.

As to ownership and operation of road, see ante, § 272.

[a] (Sup. 1877)

In an action against a railroad company for injury to a horse, it appeared that the horse went on the track at a highway crossing a short distance ahead of the train; that it ran on the track in front of the train, and at greater speed than the train was moving; that it stumbled on a culvert and fell, and immediately got up and ran in front of the train on the track for some distance, then left the track and disappeared; that the ground was such that it could have left the track at any time; and that the speed of the train was slackened, the bell rung, and the whistle blown. *Held*, that the facts failed to show negligence of defendant's employees.—*Cincinnati, H. & L. R. Co. v. Bartlett*, 58 Ind. 572.

[b] (Sup. 1878)

In an action against a railway company for killing live stock, proof that the stock had entered upon the track over a line of fence that was not such as good husbandmen usually keep, and was generally insecure, obviates the necessity of showing that the particular part over which the stock passed was insecure.—*Louisville, N. A. & C. Ry. Co. v. Spain*, 61 Ind. 460.

[c] Direct evidence that the animals were killed by defendant's cars is unnecessary, it being sufficient to show circumstances from which that fact may be fairly and justly inferred, in an action against a railroad company for killing stock.—(Sup. 1882) *Indianapolis, P. & C. Ry. Co. v. Thomas*, 84 Ind. 194; (1884) *White-water R. Co. v. Bridgett*, 94 Ind. 216.

[d] (Sup. 1883)

In an action for the killing of live stock on the line of a railroad at points where the road was not fenced, as required by Rev. St. 1881, § 4025, evidence *held* sufficient to justify a verdict in favor of the plaintiff.—*Louisville, N. A. & C. Ry. Co. v. Hagen*, 87 Ind. 30.

[e] (Sup. 1883)

In an action against a railroad company for killing a mare, there was evidence that she was injured by a moving freight train; that when first seen after the injury she was lying near the track about 20 feet west of a road crossing; that she, with a number of other horses, was running on the highway in the direction of the railroad as the train was approaching and crossing such road; and that she ran against one of the cars as it was crossing the road and was thrown or carried in the direction of the place where she was found. There was also evidence that there was an opening in the fence next to the railroad through which the horses as they approached the passing train entered; that the mare received the injury after leaving such highway; and that the opening in the fence was made some time before such injury by defendant's employees. *Held*, that the evidence supported a verdict for plaintiff.—*Terre Haute & I. R. Co. v. Penn*, 90 Ind. 284.

[f] (Sup. 1884)

In an action against a railroad company for the killing of a horse, evidence considered, and *held* that the railroad could not have been fenced at the place where the horse went on the tracks, without materially interfering with the business of the company and the convenience of the public.—*Evansville & T. H. Ry. Co. v. Willis*, 93 Ind. 507.

[g] (Sup. 1884)

In an action to recover the value of an animal killed by a train, it is not necessary that it should be proved by an eyewitness that the animal was struck by a train, but it is sufficient if facts are shown from which the jury may reasonably infer that the animal was so struck.—*Lake Erie & W. Ry. Co. v. Parker*, 94 Ind. 91.

[h] (Sup. 1884)

Evidence in an action against a railway company for the killing of animals by a train examined, and *held* to show that the animals entered the track and were killed at a point where it was the duty of the company to fence its track, and that it failed to do so.—*Louisville, N. A. & C. Ry. Co. v. Shanklin*, 94 Ind. 297, affirmed *Same v. Pixley*, Id. 603.

[i] (Sup. 1884)

In an action against a railroad company for killing cattle, the evidence showed that the cattle were killed on the main track at a station immediately opposite a grain elevator; that at this point there was a side track used for freight cars for receiving and unloading freight. There was no testimony directly showing at what point the cattle came on the track, but it did clearly show that on one side of the tracks there was a secure fence, and that on the other side there was a steep embankment, down which the cattle would not go. The inference from the evidence was that the cattle entered on the track at a place where it would interfere with the company's business in handling cars, or in receiving freight, or at a place where it would endanger the lives of its employés to have placed cattle guards. *Held* insufficient to show that the cattle passed on the track at a place where it was the duty of the company to fence.—*Lake Erie & W. Ry. Co. v. Kneadle*, 94 Ind. 454.

[j] (Sup. 1884)

In an action against a railroad company for the killing of a cow, it appeared that plaintiff's pasture was on the north side of defendant's track, and that a gate leading to the track had been left or had blown open and that the cow came through it. There was no evidence as to whether the fence along the pasture formed part of defendant's line of fence, but there was evidence that on the other side of the track there was no fence. *Held*, that a verdict for plaintiff would not be disturbed.—*Louisville, N. A. & C. Ry. Co. v. Zink*, 95 Ind. 345.

[k] (Sup. 1884)

In an action for injuries to plaintiff's cattle at a point on defendant's railroad, evidence

considered, and *held* sufficient to support the verdict that the cattle guard where the cattle entered upon the roadway was not so located as to securely fence the track.—*Ft. Wayne, C. & L. R. Co. v. Herbold*, 99 Ind. 91.

[l] (Sup. 1885)

The fact that the day before a horse was killed on a railroad he was seen feeding in a pasture by the side of the railroad near where the next morning he was found dead, with a large scar on one side, and otherwise badly bruised, that his tracks were found on one side of and on the track, and that in attempting to cross he had been knocked off, was sufficient evidence that he was killed by a passing train.—*Louisville, N. A. & C. Ry. Co. v. Hixon*, 101 Ind. 337.

[m] (Sup. 1885)

Testimony of the engineer in charge that he did not see the cow until within about 100 feet of the crossing, and that he had no intention of running upon her, not being contradicted, and it not appearing that the train was being run at a dangerous rate of speed, nor that the crossing was such as made it the engineer's duty to look out for animals, a complaint charging willful negligence is not sustained.—*Indiana, B. & W. Ry. Co. v. Overton*, 117 Ind. 253, 20 N. E. 147.

[n] (App. 1892)

In an action against a railroad company for injuring a colt which strayed upon the track through a defective fence, the theory of defendant was that the colt had crippled itself. The engineer and brakeman testified that the train did not touch it, and that they saw it stumble and fall. Plaintiff testified that he watched the colt running down the railroad near the track until it got behind some corn, and that when last seen by him it was about six feet from the engine. One of the colt's legs was broken, and another cut off, a bone out of his leg was found two or three feet from the track, and the earth around the track bore the impress of the colt's feet. The course taken by the colt was not obstructed except by a telegraph pole and a few rails, and the land was, in the main, level. *Held*, that a verdict for plaintiff would not be disturbed.—*Lake Erie & W. R. Co. v. Mattix*, 4 Ind. App. 176, 30 N. E. 811.

[o] (App. 1894)

In an action to recover for stock killed by reason of defective cattle guards along defendant's railroad track, evidence as to the materials and construction of the fence, together with testimony that at different times various animals had crossed the guards without injury and without being forced over, supported a verdict that the guards were insufficient.—*New York, C. & St. L. R. Co. v. Zumbaugh*, 11 Ind. App. 107, 38 N. E. 531.

[p] (App. 1895)

In an action against a railway company for injury to stock, due to the insufficiency of

the right of way fencing, plaintiff's evidence showed that two of his horses, which had escaped into the highway at night without his fault, were found on defendant's right of way, and another in an adjoining field, cut and bruised as if it had passed through a wire fence; that the wire fencing was in good order, except in one place, near where the latter horse was found, where it looked as if the horse had broken through it; that within the right of way, near the cattle guard, which was a "surface guard," were tracks of horses, but there were no indications that the horses, which were not "breachy," had jumped the guard. *Held*, that the evidence would warrant a finding that the guard was defective.—*Scheerer v. Chicago & E. R. Co.*, 12 Ind. App. 157, 39 N. E. 756.

[q] (App. 1904)

A jury may infer, from evidence giving the locality where a horse was killed upon a railroad track, that such killing was within the county alleged in the complaint, although there is no direct evidence of such fact.—*Chicago, I. & L. Ry. Co. v. Brown*, 71 N. E. 908, 33 Ind. App. 603.

Evidence *held* to sustain a finding by the jury that a horse killed by a train of cars on defendant's railway was, when he was struck and killed, upon the right of way at a point where defendant had the right to fence the same, although his body was found upon a highway crossing.—*Id.*

[r] (App. 1907)

Under Burns' Ann. St. 1894, § 5313, providing that whenever any animal is killed by a railroad the owner may file his complaint before a justice of the peace of the county in which the killing occurred, evidence in an action against a railroad for the killing of an animal, that the animal went on the track at a point where the track was not fenced, and was struck and killed, was sufficient to establish defendant's liability.—*Cleveland, C., C. & St. L. Ry. Co. v. Miller*, 40 Ind. App. 165, 81 N. E. 517.

In an action against a railroad for the killing of plaintiff's mule, evidence *held* sufficient to show that the place where the mule was killed was in a certain county.—*Id.*

[s] (App. 1908)

Evidence *held* sufficient to support a finding that the place where animals injured or killed entered defendant's right of way was not securely fenced, and that they were killed or injured by an actual collision with a locomotive or cars owned or operated by defendant.—*Central Indiana Ry. Co. v. Smith*, 42 Ind. App. 365, 85 N. E. 26.

It is necessary to a recovery under Burns' Ann. St. 1901, §§ 5312, 5318 (Acts 1877, p. 61, c. 30), that the evidence show that the place where the animals entered upon defendant's right of way was not securely fenced, and that the animals were killed or injured by an ac-

tual collision with a locomotive or cars owned or operated by defendant.—*Id.*

[t] (App. 1909)

Evidence in action for damage to horse and buggy sustained in crossing accident *held* to support verdict for plaintiff.—*Cleveland, C., C. & St. L. Ry. Co. v. Cyr*, 43 Ind. App. 19, 86 N. E. 868.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1606-1620.

See, also, 33 Cyc. pp. 1290-1299.

§ 444. — Damages.

[a] (Sup. 1871)

The owner of an animal killed by a locomotive at a point on a railroad where the road is not fenced may abandon the animal, and the railroad company will be liable for the value of the animal when injured.—*Ohio & M. R. Co. v. Hays*, 35 Ind. 173.

[b] (Sup. 1888)

In an action for damages against a railroad for killing the cattle of plaintiff, which got on the track through the failure of defendant to build a cattle guard as agreed, the measure of damages is the value of the cattle, and not the cost of erecting and maintaining the cattle guards.—*Chicago & A. Ry. Co. v. Barnes*, 116 Ind. 126, 18 N. E. 459.

[c] (App. 1895)

Under Rev. St. 1894, § 5312 (Rev. St. 1881, § 4025), providing that a railroad shall be liable for stock killed or injured by its trains, and Rev. St. 1894, § 5316 (Rev. St. 1881, § 4029), providing that the court or jury shall give judgment for the value of animals killed or the injury done, interest on the value of the animals killed or on the amount of the injury from the date of the accident cannot be allowed.—*New York, C. & St. L. R. Co. v. Zumbaugh*, 12 Ind. App. 272, 39 N. E. 1058.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1621-1628.

See, also, 33 Cyc. pp. 1299-1302.

§ 446. — Questions for jury.

Instructions invading province of jury, see TRIAL, § 191.

[a] (Sup. 1872)

In an action against a railroad company for the killing of cattle, the question whether the company has securely fenced the track is a question of fact for the jury.—*Toledo, Wabash & W. Ry. Co. v. Cory*, 39 Ind. 218.

[b] (Sup. 1886)

An interrogatory asking the jury if a railroad could have lawfully fenced its track at a certain point calls on the jury to decide a question of law and not of fact, and is improper.—*Louisville, N. A. & C. Ry. Co. v. Worley*, 7 N. E. 215, 107 Ind. 320.

[c] (Sup. 1888)

Where it is not shown that the engineer of a train saw an animal upon the track, it cannot be said as a matter of law that he was negligent because he did not heed gestures and motions made by men along the track.—*Denniss v. Louisville, N. A. & C. Ry. Co.*, 18 N. E. 179, 116 Ind. 42, 1 L. R. A. 448.

[d] (App. 1891)

Whether a railroad company is or is not obliged to fence its road under the statute at a given point is a question of law, and not fact.—*Jeffersonville, M. & I. R. Co. v. Peters*, 27 N. E. 299, 1 Ind. App. 69.

[e] (App. 1891)

In an action against a railroad company for willfully killing plaintiff's cow, the engineer testified that he did not see the cow on the track until he was too close to stop his engine; that he tried to stop; and that he had no intention of striking her. A witness for plaintiff testified that the train came almost to a stop about 1,000 feet from where the cow was standing; that the track was straight and she could have been seen by the engineer; that the train started up and increased its speed to 30 miles an hour, until it struck the cow, and then slowed up; that the engineer was looking towards the cow all the time; and that no signal was given or attempt made to frighten her from the track. *Held*, that it was for the jury to say whether the injury was willful.—*Overton v. Indiana, B. & W. Ry. Co.*, 1 Ind. App. 436, 27 N. E. 651.

[f] (App. 1891)

Where the evidence is conflicting as to whether a fence could have been maintained without danger to employes, the question of the duty to fence is for the jury.—*Pennsylvania Co. v. Lindley*, 2 Ind. App. 111, 28 N. E. 106.

[g] (App. 1891)

Whether a railroad company is obliged to fence its road at a given point is a question of law.—*Stewart v. Pennsylvania Co.*, 2 Ind. App. 142, 28 N. E. 211, 50 Am. St. Rep. 231.

[h] (App. 1892)

The question as to whether the omission to give the statutory signals at a highway crossing caused the injury to plaintiff's horse, which had escaped from his inclosure without negligence on his part, and wandered upon the crossing, is one of fact for the jury.—*Chicago, St. L. & P. R. Co. v. Fenn*, 3 Ind. App. 250, 29 N. E. 790.

[i] (App. 1892)

Where the evidence is conflicting as to whether or not the tracks could have been fenced at the point where the stock was killed, it is a matter for the jury to determine.—*Terre Haute & I. R. Co. v. Schaeffer*, 5 Ind. App. 86, 31 N. E. 557.

[j] (App. 1892)

In an action against a railroad company for killing a mare and colt, where the evidence

shows that there is great danger of collision with animals at the place where the accident occurred, and that the erection of wing fences and cattle guards would only slightly increase the danger to trainmen, the court cannot say, as a matter of law, that defendant is not required to fence its track.—*Toledo, St. L. & K. C. R. Co. v. Woody*, 5 Ind. App. 331, 30 N. E. 1099.

[k] (App. 1892)

Where, in an action against a railroad company for killing stock, it appeared that the animal was killed without any fault or negligence on plaintiff's part, and that defendant's train was running at the time at a greater rate of speed than allowed by a city ordinance applicable to the place where the animal was killed, that the bell was not rung while passing over a street, it was a question for the jury whether the railroad's failure to ring the bell or the rate of speed was the proximate cause of the injury.—*Ohio & M. Ry. Co. v. Craycraft*, 32 N. E. 297, 5 Ind. App. 335.

[l] (Sup. 1907)

Evidence that an engineer, while running 25 or 30 miles an hour, might have seen cattle on the track for a distance of 800 feet, and did see them 400 feet from the point where they were struck, blew the whistle, gave the usual signal for animals on the track, but failed to check the train until they were struck, did not constitute negligence as a matter of law.—*Chicago, I. & L. Ry. Co. v. Ramsey*, 168 Ind. 390, 81 N. E. 79, 120 Am. St. Rep. 379.

[m] (App. 1909)

Where plaintiff, whose horse and buggy were damaged in a crossing accident, checked his horse as he approached the crossing, and looked and listened, and continued to look and listen until he had driven upon the right of way, when, as soon as he was past an embankment, he saw a train, and his horse became frightened, and he was unable to stop it before it reached the track, and the signals required on approaching a crossing had not been given for the crossing or one above it, whether plaintiff's conduct was that of a reasonably prudent person was for the jury.—*Cleveland, C., C. & St. L. Ry. Co. v. Cyr*, 43 Ind. App. 19, 86 N. E. 868.

A failure to look or listen at any point where the approach of a train could have been seen or heard does not necessarily preclude a recovery for damage to a horse sustained in a collision with it, but it is for the jury whether due care required the driver to look and listen at a particular place.—*Id.*

[n] (App. 1909)

Whether a railroad is exempt from fencing its track is ordinarily a mixed question of fact and law, the question being for the jury if a fence would but slightly increase the danger to trainmen; and where evidence was conflicting as to whether the place where a horse went on the track was within the station grounds,

as well as upon the extent to which a fence there would increase the danger to employes the question was for the jury under proper instructions.—*Baltimore & O. S. W. R. Co. v. Dickey*, 43 Ind. App. 509, 87 N. E. 1047.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1627-1641.

See, also, 33 Cyc. pp. 1303-1311.

§ 447. — Instructions.

Assumption by judge as to facts, see TRIAL, § 191.

[a] (Sup. 1865)

In an action against a railroad company for killing stock, the complaint alleged that the fence took fire, and that the servants of the company, in extinguishing it, threw down a gap in the fence and left it open. *Held*, that an instruction that the fact that hands of the company had notice of the defect would not bind the company was properly refused.—*Indianapolis, P. & C. R. Co. v. Truitt*, 24 Ind. 162.

[b] (Sup. 1870)

In an action against a railroad company to recover damages for the killing of stock by a passing train, the court instructed the jury, first, that, to enable a person to recover under said statute, he must show that the place where the animal went upon the railroad was at a point where the railroad company was bound to fence the road, and that the road was not fenced at said point, or that the company was bound to maintain a cattle guard at said place, and that such guard was not in proper condition to keep stock off the railroad; second, that said statute does not apply to the crossing of a public street or alley in a city, or a place within a city where from the necessary use of the grounds, it would be unlawful or unreasonable to require the railroad company to maintain a fence; third, that a railroad company is not bound under said statute to erect and maintain cattle guards at the crossings of public streets and alleys within the corporate limits of a city, or to fence the lots lying on either side of the railroad track between such crossings, but beyond such crossings the company is bound to maintain fences and guards the same as outside the corporation. *Held*, that the defendant could not complain of these instructions.—*Jeffersonville, M. & I. R. Co. v. Parkhurst*, 34 Ind. 501.

[c] (Sup. 1876)

On the trial of a statutory action for killing stock, instructions to the jury, applicable only to an action therefor at common law, are erroneous.—*Jeffersonville, M. & I. R. Co. v. Lyon*, 55 Ind. 477.

[d] (Sup. 1878)

In an action against a railroad company, under the statute, for negligently killing stock, a charge that to constitute negligence on the part of the plaintiff, and to prevent his recov-

ery, he must have "knowingly suffered his stock to habitually run at large in the immediate vicinity where they were killed," and that if plaintiff was guilty of such negligence he "cannot recover, although he may have been guilty of less negligence than the company's servants," was erroneous.—*Jeffersonville, M. & I. R. Co. v. Foster*, 63 Ind. 342.

[e] (Sup. 1884)

An instruction, in an action against a railroad company for killing stock on its track, that the company was not bound to maintain a fence at the place where the stock entered on the track, unless it could do so without interfering with the rights of the public or with the free use of the property belonging to private individuals or its own property, was as favorable to the company as it had a right to ask.—*Louisville, N. A. & C. Ry. Co. v. White*, 94 Ind. 257.

[f] (Sup. 1884)

In an action against a railroad company under Rev. St. 1881, art. 4, c. 38, relating to the fencing of railroad tracks for the killing of an animal on the track, an instruction that, if the animal was killed at a point where the company should have but did not maintain a fence, the company was liable, was not erroneous, where the uncontradicted testimony showed that the animal was killed at the point where he entered on the track, and that he entered from the grounds from which he should have been excluded by a proper fence.—*Louisville, N. A. & C. Ry. Co. v. Porter*, 97 Ind. 267.

[g] (Sup. 1890)

At the trial of an action against a railroad company for injuries to horses and a wagon by alleged negligence of employes of defendant in running its train, defendant requested an instruction that such train "running 20, 30, or 40 miles an hour constitutes no element of negligence; or, under the other facts proven, shows the defendant or its servants to have been willfully careless of the consequences of such running." *Held*, that this was properly refused as confused and misleading, and because, under the circumstances of the case, there was no question whether defendant's servants were guilty of willful conduct, and the question whether the rate of speed of the train constituted an element of negligence was a question of fact for the jury.—*Louisville, N. A. & C. Ry. Co. v. Stommel*, 126 Ind. 35, 25 N. E. 863.

[h] (App. 1892)

Plaintiff's mule was killed by defendant's train on a street crossing in a city at a point where the street was unimproved, and there was some evidence that plaintiff at times allowed his mule to pasture on the common near the track where it was killed, but at the time in question the proof was clear that the mule was not there with plaintiff's consent, but had escaped from the stable, in which it had been carefully fastened. It also appeared that defendant was guilty of negligence in running its

train faster than the rate prescribed by an ordinance of the city, and that the bell on the engine was not rung, as required by the same ordinance. *Held*, that the court properly refused to instruct the jury that, if plaintiff permitted his mule habitually to run at large in the immediate vicinity of the place where it was killed, he was not free from negligence, and could not recover.—*Ohio & M. Ry. Co. v. Craycraft*, 5 Ind. App. 335, 32 N. E. 297.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1642-1650.

See, also, 33 Cyc. pp. 1312-1320.

§ 448. — Verdict and findings.

Failure to answer interrogatories or make findings, see TRIAL, § 356.

Questions proper to be submitted by special interrogatories, see TRIAL, § 350.

Sufficiency of special findings in general, see TRIAL, § 355.

[a] (Sup. 1888)

In an action against a railroad company for killing stock, a finding that a horse killed went on the track at a point where the track could have been fenced, but was not, cannot be treated as a special finding upon "a particular question of fact" within the meaning of Civil Code, and it was not equivalent to a finding that it was at a place where the road should have been fenced.—*Bechdolt v. Grand Rapids & I. R. Co.*, 15 N. E. 686, 113 Ind. 343.

[b] (Sup. 1888)

A horse, which had escaped from a securely fenced field to a railroad track, was overtaken in a cattle guard by a train, and killed. The engineer, who might have seen the animal at a distance of a quarter of a mile before it was struck, and have stopped the train in time, when about 200 yards from the cattle guard shut off steam and applied the brakes. Signs and motions were made by men in pursuit of the horse, and were seen by the fireman, but not heeded, and the bell was not rung, nor the whistle sounded. There being a special finding of these facts, but no finding that the engineer or fireman saw the horse, nor of the meaning and character of the gestures, *held*, that the company was not liable.—*Dennis v. Louisville, N. A. & C. Ry. Co.*, 116 Ind. 42, 18 N. E. 179, 1 L. R. A. 448.

[c] (Sup. 1889)

A finding of the court that the animals entered on the track at "a cartway or private way known as 'M Crossing'" will be construed to mean at a "driveway," within the meaning of the statute.—*Louisville, N. A. & C. Ry. Co. v. Etzler*, 119 Ind. 39, 21 N. E. 466.

[d] (Sup. 1889)

In an action against a railway company for negligently killing plaintiff's cow at a highway crossing, the jury found specially that the cow escaped, and wandered on the track, on a dark night, and that defendant's employes made no

effort to frighten her off, and did not blow the whistle before reaching the crossing. The special verdict did not find that the employes knew that the cow was on or near the track, and it was also silent as to whether the bell was rung, or whether the rate of speed was unlawful. Rev. St. 1881, §§ 4020, 4021, require locomotive whistles to be blown three times immediately before reaching a crossing, and bells to be rung continuously until after it is passed, and make railroad companies liable for damages resulting to any person by failure to observe these regulations. *Held*, that the facts not found by the special verdict would be presumed in favor of the defendant, and hence that the only fact from which negligence could be inferred was the failure to blow the whistle, and the court could not conclude that the omission caused the accident.—*Louisville, N. A. & C. Ry. Co. v. Green*, 120 Ind. 367, 22 N. E. 327.

[e] (App. 1891)

In an action against a railroad company for killing a mule, the jury found that the mule entered upon the railroad track through a defective gate erected by the company in the fence inclosing its track for the convenience of an adjacent landowner. *Held*, that the verdict was uncertain as to whether there was a farm crossing for the convenience of said landowner at the point where the gate was erected, in which case the company would not be liable under Acts April 8 and 13, 1885.—*Louisville, N. A. & C. Ry. Co. v. Thomas*, 1 Ind. App. 131, 27 N. E. 302.

[f] (App. 1891)

Where the complaint alleges that plaintiff's cow was killed at a crossing where she had a right to be, because of the engineer's negligent failure to whistle when approaching the crossing, a special verdict, which does not state where the cow was when killed, will not support a judgment for the plaintiff.—*Lake Shore & M. S. Ry. Co. v. Van Auken*, 1 Ind. App. 492, 27 N. E. 119.

[g] (App. 1892)

Where, in action against a railroad company for damages for the killing of a horse upon the railroad track, there was a verdict upon a complaint charging a willful injuring, and there were no interrogatories to the jury as to the question of willful killing, but the interrogatories related wholly to the questions of the train's coming in contact with the animal and that of diligence by the trainmen before the horse got on the track, there is no necessary conflict between the general verdict and the answers to the interrogatories, so that a motion for a judgment non obstante veredicto was correctly overruled.—*Ft. Wayne, C. & L. R. Co. v. O'Keefe*, 30 N. E. 916, 4 Ind. App. 249.

[h] (App. 1892)

In an action against a railroad company for the killing of plaintiff's colt, which entered on defendant's right of way at a point east of a water tank, a general verdict in plaintiff's favor is not so inconsistent with a special finding that

the track west of the water tank was used for public purposes, and not required to be fenced, as will authorize the general verdict to be set aside.—*Chicago & E. R. Co. v. Brannegan*, 5 Ind. App. 540, 32 N. E. 790.

[I] (App. 1892)

In an action against a railroad company for the killing of animals on the track, a finding that the cattle guard was so deficient that animals could walk over it was to be construed as having reference to ordinary animals, and showed that the guard was insufficient.—*Wabash R. Co. v. Ferris*, 32 N. E. 112, 6 Ind. App. 30.

[J] (App. 1894)

Under findings that a certain portion of a main track was "but seldom" used for switching purposes, and that it could be fenced without interfering with the transaction of the company's business, it cannot be held, as a matter of law, that the railroad company is relieved from its obligation to fence that part of the road.—*Toledo, St. L. & K. C. R. Co. v. Cupp*, 9 Ind. App. 244, 36 N. E. 445.

A finding that a certain portion of a track was "but seldom" used for switching purposes is not unsupported by the evidence, though the civil engineer and road master of the railroad company, who were familiar with its business at that point, testified that such portion was frequently used for switching purposes, where one who was engaged in hauling freight to and from the company's cars, and was familiar with the manner and place in which cars were handled and the switching and making up trains was done, stated that nothing of the kind was done at the point in question.—*Id.*

[K] (App. 1894)

A special verdict, in an action for killing by a train an unattended horse at a highway crossing, while showing negligence by a finding that the statutory crossing signal was not given, will not support a recovery, it not being found that the negligence was the cause of the horse's death.—*Louisville, N. A. & C. Ry. Co. v. Ousler*, 15 Ind. App. 232, 36 N. E. 290.

[L] (App. 1896)

A special verdict that while plaintiff's horse was hitched to the platform of defendant's depot, at the usual place for unloading freight, a pile driver on a passing car struck and broke a wire stretched across the track, 18 feet above ground, thereby throwing down some telegraph poles, which knocked over a ladder and caused it to fall on plaintiff's horse, does not show that plaintiff was free from contributory negligence, and hence is insufficient to warrant a judgment in his favor for injury to the horse.—*Hartzell v. Louisville, N. A. & C. Ry. Co.*, 15 Ind. App. 417, 44 N. E. 315.

[M] (App. 1897)

Where the theory of the complaint is that defendant railroad company did not maintain a fence along the line of its right of way, and, because of that breach of duty, plaintiff's horse en-

tered on the track of defendant, and was killed by defendant's cars, findings of a special verdict that the fence along the right of way was out of order, and its condition was not discovered until 10 a. m. preceding the night plaintiff's horse got on the track, do not support a judgment in favor of plaintiff.—*Cleveland, C., C. & St. L. Ry. Co. v. Dugan*, 48 N. E. 238, 18 Ind. App. 435.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 1651.

See, also, 33 Cyc. pp. 1321-1323.

§ 449. — Judgment.

Arrest of, see JUDGMENT, § 263.

Judgment in justice's court as bar to subsequent action, see JUSTICES OF THE PEACE, § 130.

FOR CASES FROM OTHER STATES,

See 33 Cyc. p. 1321.

§ 450. — Execution and enforcement of judgment.

[a] (Sup. 1875)

A motion for a writ provided for by Davis Rev. St. Supp. 1870, pp. 415, 416, §§ 5, 6, to be directed to an employé of a railroad company, against which a judgment had been rendered for the value of an animal killed, concluded with a request that the court would "order said agent to pay into the clerk's office of said court one-half of said moneys, or so much thereof as will pay the judgment and costs herein." No objection was made to the motion. *Held* that, on the proceedings under the writ, the introduction of the record of the judgment in evidence could not be objected to on the ground that "the motion did not show that there was such a judgment rendered, or that a transcript of it had been filed and recorded in the clerk's office."—*Logansport, C. & S. W. Ry. Co. v. Byrd*, 51 Ind. 525; *Same v. Bowers*, *Id.* 526.

[b] (Sup. 1877)

Act March 4, 1863, § 5, "to provide compensation to the owners of animals killed or injured by the cars, locomotive, or other carriage of any railroad company" (1 Rev. St. 1876, p. 751), provides that if the action is commenced in the common pleas or circuit court of the county in which such animal or animals are killed, or such injury done, the court may make a rule or order against the company's agent in the county to answer as to his receipts of its money. Section 6 provides for the same rule or order in cases where a judgment has been rendered by a justice of the peace. *Held* that, though the act does not, in express terms, provide for such a rule or order in a case where judgment has been rendered by a justice, and an appeal therefrom results in a judgment by the circuit court against the company, such rule or order is proper in such case.—*Ft. Wayne, M. & C. R. Co. v. Clark*, 59 Ind. 191.

[c] (Sup. 1878)

On a motion to set aside a notice of motion, pursuant to Act March 4, 1863 (1 Rev. St. 1876,

p. 751) § 5, to compel a certain officer of a railway company to pay into court moneys coming into his hands on a judgment against the company for stock killed by it, an objection "that said notice is insufficient" is too vague and uncertain, in not showing in what particular the notice is insufficient.—*Louisville, N. A. & C. Ry. Co. v. Thompson*, 82 Ind. 87.

In a proceeding under 1 Rev. St. p. 751, § 5, against a railroad company for killing live stock, to obtain an order for the payment of moneys coming into the hands of its officers on a judgment recovered against the company, the notice may be served in the manner authorized by 1 Rev. St. 1856, p. 752, § 3, for the service of summons on a railroad company.—*Id.*

[d] (Sup. 1887)

Though Rev. St. 1881, § 4030, relating to the enforcement of payment for animals killed or injured by railroad companies, speak of the pleading as filed by the plaintiff as a "motion," the sufficiency of the facts stated therein to constitute a cause of action may be tested by demurrer.—*Chicago & A. Ry. Co. v. Summers*, 14 N. E. 733, 113 Ind. 10, 3 Am. St. Rep. 616.

[e] (App. 1895)

Under Rev. St. 1894, § 5317 (Rev. St. 1881, § 4030), providing that one obtaining judgment before a justice for an animal killed by the cars of a railway company, on filing a transcript of the judgment in the office of the clerk of the circuit court of the county in which the animal was killed, may, on motion and notice in the circuit court, obtain a writ for any agent, lessee, or assignee of the company to answer on oath as to the amount of money in his hands belonging to such company, the motion must show that the stock was killed in the county in which the transcript was filed, and that the judgment was entered of record.—*Chicago & S. E. Ry. Co. v. Adams*, 12 Ind. App. 317, 39 N. E. 877.

[f] (App. 1897)

Where an action against a railroad company for killing an animal on the track was brought in the county in which the animal was killed, and venue was afterwards changed at the instance of the company, and judgment rendered against it in another county, a motion under Burns' Rev. St. 1894, § 5316 (Horner's Rev. St. 1897, § 4020), which provides that, if the cause be commenced in a county where the animal was killed, the court may, on motion of the plaintiff, after the rendition of judgment, require any agent of the company to appear, and disclose the amount of its money on hand, and make payments therefrom on the judgment, may be made before the court which rendered the judgment.—*Chicago & S. E. Ry. Co. v. Coulter*, 48 N. E. 388, 18 Ind. App. 512.

If the motion is made at the time of the judgment, and the parties to the judgment appear, no notice of the motion is necessary.—*Id.*

[g] (App. 1897)

Rev. St. 1894, § 5317 (Horner's St. 1897, § 4030), provides that, on filing with the clerk of the circuit court the transcript of a justice's judgment against a railroad company for injury to stock, the judgment creditor may obtain the process of the court, on motion made therein, at any time, when notice of such motion has been served on the company at least 10 days before the first day of the term at which the motion is to be heard. *Held*, that failure to serve before said term would not invalidate the service, but would merely entitle the company to a continuance to the next term.—*Chicago & S. E. Ry. Co. v. Harris*, 46 N. E. 1010, 19 Ind. App. 137.

In a proceeding under Rev. St. 1894, § 5317 (Horner's St. 1897, § 4030), providing that, on filing with the clerk of the circuit court the transcript of a justice's judgment in favor of one whose stock has been killed by the cars of a railroad company, the judgment creditor may obtain a writ for any agent of the company to answer as to the amount of money in his hands belonging to said company, etc., a motion averring that the judgment was "for stock killed by said railroad company," instead of alleging that the stock was killed by the company's cars, is sufficient on demurrer.—*Id.*

The motion in such proceeding must either allege facts showing that the justice had jurisdiction to render such judgment, or, as permitted by Rev. St. 1894, § 372 (Horner's St. 1897, § 369), must aver generally that the judgment was duly made.—*Id.*

[h] (App. 1901)

A proceeding in the circuit court under Burns' Rev. St. 1894, § 5317, providing a method for enforcing justices' judgments against railroad companies for injuries to animals on tracks, is not an appeal, but is an original action, and the complaint in the proceeding may be tested by a demurrer.—*Chicago & S. E. Ry. Co. v. Adams*, 59 N. E. 1087, 26 Ind. App. 443.

A complaint in a proceeding in the circuit court under Burns' Rev. St. 1894, § 5317, providing a method for enforcing justices' judgments against railroad companies for injuries to stock, is insufficient on demurrer when it does not aver facts showing jurisdiction of the justice, and fails to allege generally that the judgment was duly given as required by section 372, Burns' Rev. St. 1894 (Horner's Rev. St. 1897, § 369), regulating the pleading of judgments of courts of special jurisdiction.—*Id.*

[i] (App. 1901)

Rev. St. 1881, § 4026 (Burns' Rev. St. 1901, § 5313), fixes the venue of an action against a railroad for injuring or killing animals in the county where the accident occurred; and section 4030 (section 5317) provides that any person obtaining a judgment before a justice for any animal killed or injured by a railroad, on filing a certified transcript of such judgment with the clerk of the circuit court of the county in which such animal was killed or injured,

shall be entitled to the order and proceedings specified in the preceding section. Section 4029 (section 5316) authorizes the issuance of a writ on such a judgment, requiring any agent or employé of the company to make answer on oath as to the amount of money in his hands belonging to the company, and to pay a certain part thereof at certain times into court for the satisfaction of such judgment and costs. *Held*, that a motion for the collection of such a judgment which did not show that the judgment rendered was by a justice of the county in which the animal was killed, or that the transcript was filed with the clerk of the circuit court of such county, and it not appearing from the allegation of facts that the justice had jurisdiction of the defendant, was demurrable as not showing the justice's jurisdiction of the subject-matter of the original action.—*Chicago & S. E. Ry. Co. v. Browers*, 61 N. E. 958, 27 Ind. App. 628.

Under Burns' Rev. St. 1901, §§ 5316, 5317, providing that a person obtaining judgment before a justice of the peace for animals killed or injured by a railway may file a transcript in the office of the clerk of the circuit court of the county and on entry thereof by the clerk may on notice and motion procure enforcement of the judgment, the motion in such proceeding may be tested by demurrer.—*Id.*

FOR CASES FROM OTHER STATES.

SEE 41 CENT. DIG. R. R. § 1652.

See, also, 33 Cyc. p. 1323.

§ 451. — Appeal and error.

Appeal from justice's court, see **JUSTICES OF THE PEACE**, § 139.

Review of decisions of intermediate courts, see **APPEAL AND ERROR**, § 32.

[a] (Sup. 1861)

An animal was killed by a freight train in a place where the railroad company had fenced the road, but since the fencing a small town had begun to grow up, though whether immediately upon the line of the road or at a short distance did not appear. A gap in the fence, through which the animal escaped, had been left open by somebody. *Held*, that this evidence was not sufficient, on appeal, to authorize the supreme court in saying, in opposition to the jury below, that the company was not in fault in failing to close the gap.—*Indianapolis & C. R. Co. v. Snelling*, 16 Ind. 435.

[b] (App. 1892)

Where, in a suit against a railway company for killing stock on the track, the defense is that the company was not bound to maintain a fence at the point where the stock got on the track, but it is shown in the evidence that this point was not within the side track limits, and it does not appear clearly that a fence and cattle guard at that point would have endangered the lives of the employés of the road in switching, a verdict for plaintiff will not be disturbed, as the burden is on defendant to show that it could not safely maintain a fence and cattle guards

at the point in question.—*Indianapolis, D. & W. Ry. Co. v. Clay*, 4 Ind. App. 282, 28 N. E. 567, 30 N. E. 916.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1654-1656.

See, also, 33 Cyc. pp. 1324, 1325.

(I) FIRES.

Danger from fire as element of compensation for property injured by construction and operation of railroad, see **EMINENT DOMAIN**, § 111.

Liability of railroad company for killing stock straying on track after destruction of fence by fire, see *ante*, § 412.

§ 453. Care required and liability as to fires in general.

[a] (Sup. 1869)

A railroad company is not required to keep a watchman stationed to protect adjoining property and extinguish any fire that may be kindled by unavoidable accident.—*Indianapolis & C. R. Co. v. Paramore*, 31 Ind. 143; *Same v. Stark*, *Id.* 149.

[b] (Sup. 1874)

In a suit against a railroad company for negligently setting fire to fences, etc., adjoining the track, by sparks of fire from a locomotive, it is not error to instruct the jury that the railroad company must use their property so as not to injure others, and, if such precaution is used, it will not be liable; and, to use such precaution, the railroad company must provide proper spark arresters, the best of such as are approved by use, and take such reasonable precautions with the track as will tend to prevent such injuries.—*Toledo, W. & W. Ry. Co. v. Wand*, 48 Ind. 476.

[c] (Sup. 1878)

A railroad company, setting a fire on its own premises for a lawful purpose, and guilty of no negligence in permitting it to escape, is not liable for damages resulting therefrom to the property of an adjacent proprietor.—*Pittsburgh, C. & St. L. Ry. Co. v. Culver*, 60 Ind. 469.

[d] (Sup. 1881)

In an action to recover from a railroad company for damages caused by a fire started by one of its locomotives, it was not error to charge that, if the season was unusually dry, the defendant was bound by law to take extra precautions against fire, and that its failure to do so was negligence.—*Pittsburgh, C. & St. L. Ry. Co. v. Noel*, 77 Ind. 110.

[e] (Sup. 1890)

The act of a railroad company in starting a fire on a bed of peat, upon which its track was laid, at a season of great drought, is a positive wrong, which renders it liable for injury to adjacent property.—*Louisville, N. A. & C. Ry. Co. v. Nitsche*, 126 Ind. 229, 26 N. E. 51, 22 Am. St. Rep. 582, 9 L. R. A. 750.

[f] (App. 1896)

Findings that the employees of a railroad company set fire to weeds which they had cut down on its right of way through peat land, during a dry season, in a vicinity where no water could be had, and, with full knowledge of the facts, made no effort to prevent the spreading of the fire, and that the fire did spread to and burn the adjoining peat land, show negligence for which the company is liable.—*Tien v. Louisville, N. A. & C. R. Co.*, 15 Ind. App. 304, 44 N. E. 45.

[g] (App. 1908)

The duty of a railroad company in the matter of communicating fire from its locomotives is to exercise ordinary care corresponding to the risk, in view of the danger to property, and requires prudence and vigilance in selecting and keeping in repair appliances for the prevention of fire which are practical and generally recognized as the most approved.—*Toledo, St. L. & W. R. Co. v. Sullivan*, 83 N. E. 1024, 41 Ind. App. 390.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1657-1660, 1667.

See, also, 33 Cyc. pp. 1325-1332.

§ 454. Defects in construction of engines.

Instructions, see post, § 485.

Pleading, see post, § 478.

Presumptions and burden of proof, see post, § 480.

Questions for jury, see post, § 484.

Sufficiency of evidence, see post, § 482.

[a] (Sup. 1869)

A railroad company is bound to use reasonable precautions to avoid the communication of fire to premises adjoining the road, by providing properly constructed machinery.—*Indianapolis & C. R. Co. v. Paramore*, 31 Ind. 143; *Same v. Stark*, Id. 149.

[b] (Sup. 1875)

It is not a defense to an action for injury caused by fire communicated from a passing locomotive that the company used on its locomotives such machinery as was in common and general use, and approved by experience, to prevent fire from being communicated; for, though the law does not require absolute scientific perfection in the construction of engines, it does require the exercise of a high degree of care and skill to ascertain, as near as may be, the best plan for their construction; and it also requires, not only that skilled and experienced workmen shall be employed in their construction, but that due skill be exercised in the particular instance where injury has resulted from the use of a particular engine.—*Pittsburgh, C. & St. L. R. Co. v. Nelson*, 51 Ind. 150.

[c] (Sup. 1881)

In an action against a railroad company for damages caused by a fire started by its locomotive, a charge authorizing the jury to consider whether the defendant's employees were

negligent in failing to report the imperfect condition of the screens and covering of the smoke-stack of the locomotive was not error.—*Pittsburgh, C. & St. L. R. Co. v. Noel*, 77 Ind. 110.

[d] (App. 1893)

In an action against a railroad company for damages caused by fire set by defendant in weeds which it negligently permitted to accumulate on its right of way, and which fire defendant negligently permitted to escape to plaintiff's land, it is not necessary to allege that the fire was caused by some negligent act or defective machinery of defendant.—*Lake Erie & W. R. Co. v. Clark*, 7 Ind. App. 155, 34 N. E. 587, 52 Am. St. Rep. 442.

[e] (Sup. 1894)

Where a locomotive alleged to have communicated a fire was shown to have been provided with a spark arrester in good repair and properly operated by a skillful engineer, a recovery for the resulting damage was not warranted, in the absence of an affirmative showing of negligence on defendant's part.—*New York, C. & St. L. R. Co. v. Boltz*, 141 Ind. 681, 36 N. E. 414, 38 N. E. 402.

[f] (Sup. 1898)

Evidence showing that a spark arrester, through which fire was communicated from defendant's locomotive to plaintiffs' warehouse, was not properly fitted or secured, leaving spaces in the nettings one to two inches long and one-fourth to three-eighths inches in width; that a number of the wires had become burned or worn off, so that sparks of the size of large grains of corn, and some as large as the end of a man's finger, were emitted—held sufficient to show negligence rendering defendant liable for the loss of the warehouse.—*Cleveland, C., C. & St. L. Ry. Co. v. Scantland*, 51 N. E. 1068, 151 Ind. 488.

[g] (Sup. 1906)

A railroad could not escape liability for failure to make a reasonably careful inspection of its spark arresters, whereby fire was communicated to plaintiff's property, by merely showing that it had employed a competent servant to make such inspection, but must show that a reasonably careful inspection was made.—*Cleveland, C. C. & St. L. Ry. Co. v. Hayes*, 167 Ind. 454, 79 N. E. 448.

It is the duty of railroad companies to not only use on their locomotives the best and most approved spark arresters, but they must keep them in good condition while in use.—Id.

[h] (App. 1908)

A railroad company is not responsible for damages for a fire communicated by a locomotive, unless it was due to the negligent use of a defective and insufficient spark arrester.—*Toledo, St. L. & W. R. Co. v. Sullivan*, 83 N. E. 1024, 41 Ind. App. 390.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1668-1671.

See, also, 33 Cyc. pp. 1332-1335.

§ 455. Management of engines.

Instructions, see post, § 485.

Pleading, see post, § 478.

Questions for jury, see post, § 484.

[a] (Sup. 1888)

It being indisputably proved that the use of wood in a coal-burning engine materially increased the risk of fire, the court did not infringe the province of the jury by charging them that the use of wood in coal-burning engines, except in kindling fire before starting, was negligence, and that if the engineer had timely notice that his engine was to haul a certain train it was his duty to have sufficient fire to make steam without injury to property along the right of way.—*Chicago & E. I. R. Co. v. Ostrander*, 116 Ind. 259, 15 N. E. 227, 19 N. E. 110.

[b] (App. 1895)

A complaint which alleged that defendant negligently ran its train filled with oil over its track, which was defective, and at a rate of speed forbidden by ordinance, and that the train was wrecked thereby, and the oil flowed onto plaintiff's premises and caught fire, and destroyed her property, states a cause of action against defendant.—*Lake Erie & W. R. Co. v. Lowder*, 7 Ind. App. 537, 34 N. E. 447, 747.

Railway companies, so far as the rights of adjacent property owners are concerned, must exercise such care and prudence in the maintenance of their tracks and the running of trains as are usually exercised by prudent and careful persons in similar cases, and great care should be taken in the transportation through towns and cities in the night of heavy trains consisting largely of oil tanks, which, in the event of accident, will probably take fire, and destroy adjoining property and endanger human life.—*Id.*

[c] (Sup. 1905)

Where it was a time of drought, and a locomotive was throwing sparks of larger size and for a greater distance than it would have done if it had had a sufficient spark arrester, which fact the engineer might have discovered from the flying sparks, but nevertheless ran at a high speed with the draft of the locomotive open and its exhaust unusually loud, it was his duty to shut off steam in passing a point in a village at which a barn containing wide cracks through which sparks might enter, and towards which there was a high wind blowing, stood near the right of way.—*Lake Erie & W. R. Co. v. McFall*, 165 Ind. 574, 76 N. E. 400.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 1672.

See, also, 33 Cyc. p. 1336; note, 76 C. C. A. 598.

§ 456. Combustibles on railroad property.

Pleading, see post, § 478.

Sufficiency of evidence, see post, § 482.

[a] (Sup. 1874)

The liability of a railroad company for setting fire by means of the locomotive is not limited to cases where the plaintiff's premises caught fire from sparks emitted from the locomotive in consequence of its defects of construction. If the locomotive was, without due care, driven through combustible rubbish lying along the track, which took fire, and this fire spread to plaintiff's premises, these facts may constitute negligence in the use of the locomotive, on which the company may be liable.—*Toledo, W. & W. Ry. Co. v. Wand*, 48 Ind. 476.

[b] (Sup. 1875)

Negligence on the part of a railroad company may be inferred from the fact that it has permitted such an accumulation of dry grass, weeds, and other combustible materials within its right of way, by which fire from the engines may be communicated to wood belonging to another and within its right of way, as would not be permitted by a prudent and cautious man upon his own premises, exposed to a similar risk.—*Pittsburgh, C. & St. L. R. Co. v. Nelson*, 51 Ind. 150.

[c] (Sup. 1889)

In an action against a railroad company for damages from fire caused by sparks from its locomotive, allegations that defendant carelessly and negligently permitted grass and other combustible matter to accumulate upon its right of way, and that sparks emitted from a passing locomotive set fire to such accumulation, and the fire spread over plaintiffs' adjoining land, and consumed their hay, are sufficient without allegations or proof that the locomotive was kept in an improper condition and carelessly operated.—*Louisville, N. A. & C. Ry. Co. v. Hart*, 119 Ind. 273, 21 N. E. 753, 4 L. R. A. 549.

If a railroad company negligently and carelessly permits grass and other combustible matter to accumulate upon its right of way, and fire is emitted from one of its passing locomotives and falls upon the grass or combustible matter that has been allowed to accumulate from want of proper care on its part, and the fire spreads and passes over upon the lands of the adjoining proprietor and burns and consumes his property, he being guilty of no negligence contributing to the injury, the railroad company is liable for the loss sustained.—*Id.*

[d] A railroad company owes the duty of keeping its right of way clear of combustible materials liable to ignition by sparks from engines.—(Sup. 1890) *Chicago, St. L. & P. R. Co. v. Burger*, 24 N. E. 981, 124 Ind. 275; (App. 1906) *Baltimore & O. S. W. R. Co. v. O'Brien*, 77 N. E. 1131, 38 Ind. App. 143.

[e] (App. 1897)

The fact that a railroad company supplies its engines with the most approved spark arresters, and that its engines are operated with skill, does not relieve it from liability for fires

caused by negligently permitting combustible material to accumulate along its right of way.—*Chicago & E. R. Co. v. Bailey*, 46 N. E. 688, 19 Ind. App. 163.

[c] (Sup. 1900)

When a railroad company knowingly permits dry and combustible material to accumulate on its right of way, it can be held liable for a fire which started thereon and escaped to plaintiff's building, although it had no knowledge of the fire.—*Pittsburg, C., C. & St. L. Ry. Co. v. Indiana Horseshoe Co.*, 56 N. E. 766, 154 Ind. 322.

[g] (App. 1905)

It is not negligence per se for a railroad company to permit combustible material to be on its right of way.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Wise*, 36 Ind. App. 59, 74 N. E. 1107.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1673-1676.

See, also, 33 Cyc. pp. 1338-1340.

§ 457. Preventing spread of fire.

Pleading, see post, § 478.

Proximate cause of injury, see post, § 464.

Questions for jury, see post, § 484.

[a] (App. 1894)

The fact that, after a fire has been started on a railroad company's right of way, through its negligence, its employes use every possible caution to prevent the fire spreading, does not relieve the company from liability for losses caused thereby.—*Chicago & E. R. Co. v. Ludington*, 10 Ind. App. 638, 38 N. E. 342.

[b] (App. 1896)

A complaint alleging that defendant railroad company negligently permitted a fire which originated on its right of way to escape therefrom to contiguous land, and from thence to plaintiff's land, and to damage his property, states a cause of action.—*Chicago & G. T. Ry. Co. v. Burden*, 14 Ind. App. 512, 43 N. E. 155.

[c] (App. 1897)

A railroad company has the right to burn off its right of way, provided it uses due care to prevent the fire from spreading to other lands.—*Lake Erie & W. R. Co. v. Naron*, 47 N. E. 691, 18 Ind. App. 193.

[d] (App. 1901)

The negligence of the defendant in suffering the escape of fire from its right of way may be established by proof of the setting fire by sparks from its locomotive to dry grass and rubbish which had accumulated through negligence on its right of way, so that by the natural progress of the fire it spread itself beyond the right of way, without any proof of negligence of defendant in failing to prevent the escape of the fire from the right of way.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Iddings*, 62 N. E. 112, 28 Ind. App. 504.

[e] (Sup. 1907)

Where grass on land contiguous to a railway right of way is set on fire by sparks from a locomotive the duty of the trainmen to leave the train to extinguish the fire is subject to the greater duty to the public to operate its trains with reasonable speed and on schedule time.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Brough*, 168 Ind. 378, 81 N. E. 57, 12 L. R. A. (N. S.) 401.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 1661.

See, also, 33 Cyc. p. 1329.

§ 458. Contributory negligence of owner of property.

Instructions, see post, § 485.

Pleading, see post, § 478.

Presumptions and burden of proof, see post, § 480.

Sufficiency of evidence, see post, § 482.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1677-1685.

See, also, 33 Cyc. pp. 1341-1346.

§ 459. — In general.

[a] (Sup. 1869)

While every proprietor adjoining a railroad may lawfully deposit his property or goods or erect valuable buildings on his own premises in close proximity to the road he takes upon himself, in so doing, the risk of fire being communicated, except when the railroad company or its servants are chargeable with fault.—*Indianapolis & C. R. Co. v. Paramore*, 31 Ind. 143; *Same v. Stark*, Id. 149.

[b] (Sup. 1876)

If a person places cord wood upon the right of way and near the track of a railroad, under an agreement, express or implied, with the company so to do, he does not thereby contribute to an injury caused by the destruction of the wood by fire communicated from a passing locomotive.—*Pittsburgh, C. & St. L. R. Co. v. Nelson*, 51 Ind. 150.

[c] (Sup. 1881)

Plaintiff drew some wood to defendant's track on the agreement that, after measuring, defendant would pay him a certain sum, and before it was measured an engine of defendant's set it on fire and it was destroyed. *Held*, that the piling of the wood by the track with consent of defendant was not contributory negligence.—*Pittsburgh, C. & St. L. R. Co. v. Noel*, 77 Ind. 110; *Pennsylvania Co. v. Gallentine*, Id. 322.

[d] (Sup. 1893)

In an action to recover damages against a railroad company for fire set by locomotives, the fact that the fire originated in a partition wall of plaintiffs' building by reason of one or more boards of such wall being off is not conclusive evidence that plaintiffs were guilty of contributory negligence, since they had a right

to presume that defendant would manage its engine carefully, and since there was no obligation on them to provide against unusual dangers. *Railway Co. v. Burger*, 24 N. E. 981, 124 Ind. 275, followed.—*Cincinnati, I., St. L. & C. Ry. Co. v. Smock*, 133 Ind. 411, 33 N. E. 108.

[e] (App. 1897)

One owning property contiguous to a railroad only assumes the risk of accidental loss through fires not occasioned through negligence or willfulness on behalf of the company.—*Wabash R. Co. v. Miller*, 48 N. E. 663, 18 Ind. App. 549.

[f] (Sup. 1898)

Where a frame warehouse adjoining a railroad was burned by sparks communicated from an engine supplied with a defective spark arrester, it is immaterial, in an action for the damages so caused, whether the warehouse or the railroad was first constructed, since it is not negligence merely to construct a warehouse on land adjoining a railroad track, and to store inflammable material therein.—*Cleveland, C., C. & St. L. Ry. Co. v. Scantland*, 51 N. E. 1068, 151 Ind. 488.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1677-1680, 1684.

See, also, 33 Cyc. p. 1341.

§ 460. — Combustibles near railroad.

[a] (Sup. 1881)

The mere fact that plaintiff had rubbish on his own land is not such contributory negligence as would defeat his action.—*Pittsburgh, C. & St. L. Ry. Co. v. Hixon*, 79 Ind. 111.

[b] (Sup. 1882)

Although the owner of land through which a railroad runs owns the fee in the right of way, he is under no obligation to keep the grass cut on the right of way, or to move rubbish or combustible material therefrom or from his land adjoining; and if the railroad company negligently permits grass or combustible rubbish to accumulate on the right of way, and a fire is set from engine sparks and communicates itself to the adjoining land, the company is, *prima facie*, guilty of negligence, and the owner of the adjoining land is not guilty of contributory negligence.—*Pittsburgh, C. & St. L. Ry. Co. v. Jones*, 86 Ind. 496, 44 Am. Rep. 334.

[c] The owner of land is not bound to remove dry grass, weeds, stubble, or other combustible material from his land adjoining a railroad right of way, in order to recover for fire caused by the negligence of the railroad company.—(Sup. 1882) *Louisville, N. A. & C. Ry. Co. v. Krimming*, 87 Ind. 351; (1890) *Chicago, St. L. & P. R. Co. v. Burger*, 124 Ind. 275, 24 N. E. 981; (App. 1893) *Chicago & E. R. Co. v. Smith*, 6 Ind. App. 262, 33 N. E. 241; (1894) *Same v. Kern*, 9 Ind. App. 505, 36 N. E. 381.

[d] (Sup. 1887)

Where a railroad company sets fire to dry grass and combustibles, negligently allowed to accumulate on its right of way, and, without fault on the part of an adjoining owner, permits such fire to escape to his lands, and destroy his property, it is liable therefor, whether the fire was negligently started in the first instance or not.—*Indiana, B. & W. Ry. Co. v. Overman*, 110 Ind. 538, 10 N. E. 576.

[e] (Sup. 1900)

Defendant railroad built a siding to plaintiff's factory under a contract by which plaintiff agreed "to exercise the greatest care in the management of the siding herein provided for; to prevent cars or other obstructions from getting out upon, or too close to, the main or other track; to secure the safe closing and locking of the main switch or switches, and to keep the inner safety switch in proper position; also to use such means and care generally as will tend to avoid accidents of any kind." Held, that plaintiff was not liable for accumulations of rubbish beside the track through which fire was communicated to its building.—*Pittsburg, C., C. & St. L. Ry. Co. v. Indiana Horseshoe Co.*, 56 N. E. 766, 154 Ind. 322.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 1681.

See, also, 33 Cyc. p. 1343; note, 1 L. R. A. (N. S.) 533.

§ 461. — Precautions against communication of fire.

[a] (Sup. 1879)

Plaintiff living near a railroad track was not guilty of contributory negligence in leaving open the windows of his house, thereby contributing to his injury by fire, unless such act would have endangered the property from engines properly constructed, or unless plaintiff had notice of the use of such engines as were improperly constructed and dangerous.—*Louisville, N. A. & C. Ry. Co. v. Richardson*, 66 Ind. 43, 32 Am. Rep. 94.

[b] (Sup. 1889)

The owners of hay land adjoining a railroad are not required to keep the grass burned off of the land on which the hay is stacked, or between the stacks and the right of way.—*Louisville, N. A. & C. Ry. Co. v. Hart*, 119 Ind. 273, 21 N. E. 753, 4 L. R. A. 549.

[c] (App. 1897)

A farmer is not bound to use unusual precautionary measures to protect his property from injury by fire set by locomotives on an adjoining right of way.—*New York, C. & St. L. R. Co. v. Grossman*, 46 N. E. 546, 17 Ind. App. 652.

[d] (Sup. 1896)

A warehouse adjoining a railroad track was burned by sparks communicated from defendant's engine, which was fitted with a defective spark arrester. Just before the fire, one of the plaintiffs saw the engine passing,

and emitting showers of sparks, but he did not stop to see whether or not they would communicate fire to the building. The warehouse was located near other wooden buildings in a business district, the conditions of which defendant knew, and on the day the fire occurred the buildings were wet from recent rains. The fire was discovered almost immediately, when plaintiffs used all available means to save the property. *Held*, that plaintiffs were not guilty of contributory negligence in failing to have kept watch on the building after they saw that the engine passing emitted sparks.—*Cleveland, C., C. & St. L. Ry. Co. v. Scantland*, 51 N. E. 1068, 151 Ind. 488.

[e] (Sup. 1900)

The owner of a building near a railroad right of way, which is destroyed by fire communicated therefrom, is not guilty of contributory negligence in leaving the building closed and unguarded, although he was aware of an accumulation of combustible material on the right of way.—*Pittsburg, C., C. & St. L. Ry. Co. v. Indiana Horseshoe Co.*, 56 N. E. 766, 154 Ind. 322.

[f] (App. 1901)

The rule applicable, as between a railroad company and an individual proprietor, whereby the latter is bound to exercise reasonable and ordinary care and diligence to prevent the destruction of his property by fire negligently permitted by the former to escape from its right of way, by taking precautionary or preventive measures, cannot be applied as between the railroad company and a township.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Iddings*, 62 N. E. 112, 28 Ind. App. 504.

[g] (App. 1903)

In an action against a railroad company for firing certain buildings belonging to plaintiff, an instruction that in determining whether plaintiff was guilty of contributory negligence the jury might consider whether or not the smokestack in plaintiff's plant was provided with a spark arrester, together with the character of the roof of the buildings, and its inflammable nature, and whether plaintiff maintained water appliances at its plant at the time of the fire, was error, since plaintiff was not required to keep its property in such a condition as to guard against the negligence of a railroad company in firing the same.—*Indiana Clay Co. v. Baltimore & O. S. W. R. Co.*, 67 N. E. 704, 31 Ind. App. 258.

In an action against a railroad company for firing plaintiff's buildings, an instruction that, while the owner of property in danger of loss is charged with the duty of saving it from destruction if he can do so by the exercise of reasonable care, he is not bound to use unusual care in anticipation that it may be negligently destroyed, and that, if plaintiff's property was negligently fired by sparks from defendant's locomotive, it was not bound to use pre-

caution by providing waterworks for the extinguishment of fire, was erroneously refused.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 1682.

See, also, 33 Cyc. p. 1344.

§ 462. — Extinguishment of fire.

[a] (App. 1900)

Where the owner of property has notice of danger by fire from a railroad, it is negligence on his part if he fails to use all means within his power to extinguish it.—*Lake Erie & W. R. Co. v. Kiser*, 58 N. E. 505, 25 Ind. App. 417.

After fire on defendant's right of way was communicated to sawdust on plaintiff's unoccupied premises, near to his buildings, he and his servants worked therewith until it was apparently wholly extinguished, and, believing it was so in fact, they did not return to examine it. It soon after began to smoke, and, though the smoke was seen by defendant's trackmen, they did not take adequate steps to prevent it from spreading to plaintiff's buildings, which it did several days thereafter, under an ordinary wind, or inform plaintiff of the reappearance of the danger. *Held*, that the efforts made by plaintiff to extinguish the fire were reasonable, under the circumstances, and that the loss was due solely to defendant's negligence.—*Id.*

[b] (App. 1903)

An instruction that if plaintiff or any of its officers, agents, or servants had knowledge of a fire alleged to have been communicated to plaintiff's building by defendant's engine, it was plaintiff's duty to extinguish it as speedily as possible, was erroneous, plaintiff being only required to use reasonable efforts to prevent the loss.—*Indiana Clay Co. v. Baltimore & O. S. W. R. Co.*, 67 N. E. 704, 31 Ind. App. 258.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 1683.

See, also, 33 Cyc. p. 1346.

§ 463. Proximate cause of injury.

Pleading, see post, § 478.

Questions for jury, see post, § 484.

Sufficiency of evidence, see post, § 482.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1687-1693.

See, also, 33 Cyc. pp. 1347-1349.

§ 464. — In general.

[a] (App. 1891)

A fire started by defendant on its own right of way spread to plaintiff's premises, and plaintiff's cattle wandered into the fire. *Held*, that the injury to the cattle was a proximate result of the escape of the fire.—*Chicago, St. L. & P. R. Co. v. Barnes*, 2 Ind. App. 213, 28 N. E. 328.

[b] (App. 1900)

Where fire negligently started on the right of way of one railroad escapes and spreads over intervening grounds to the right of way of another road, where it burns corn stored in cars of the latter, the negligence of the latter in failing to move the cars out of danger will not relieve the former from liability to the owner of the corn.—*Chicago & E. I. Ry. Co. v. Ross*, 56 N. E. 451, 24 Ind. App. 222.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1687–1689.

See, also, 33 Cyc. p. 1347.

§ 465. — Spread of fire.

[a] The fact that a fire set by defendant's locomotive passed through lands of another before reaching plaintiff's property does not render defendant's negligence the less the proximate cause of the destruction of such property by fire.—(Sup. 1882) *Louisville, N. A. & C. Ry. Co. v. Krimming*, 87 Ind. 351; (1890) *Same v. Nitsche*, 126 Ind. 229, 26 N. E. 51, 22 Am. St. Rep. 582, 9 L. R. A. 750.

[b] (Sup. 1884)

Where defendant's servants negligently, but accidentally, set fire to its station house adjacent to plaintiff's hotel building, and while the station house was on fire and being consumed a wind intervened and blew some of the sparks and flames on to plaintiff's hotel which was set on fire and consumed, the defendant's negligence because of which the fire was originally set was not the natural, immediate, and proximate cause of the destruction of plaintiff's hotel.—*Pennsylvania Co. v. Whitlock*, 99 Ind. 16, 50 Am. Rep. 71.

[c] (Sup. 1892)

Where the evidence shows that the fire originated on defendant's right of way, and was carried by the wind to plaintiff's property, though other lands intervened over which the fire burned several days, and was several times partially subdued before reaching his land, defendant is not relieved from liability on the ground that its negligence was not the proximate cause of the injury.—*Chicago, St. L. & P. R. Co. v. Williams*, 131 Ind. 30, 30 N. E. 696.

[d] (App. 1894)

The negligence of a railroad company in setting fire to dry grass on its right of way is the proximate cause of a loss by the fire spreading to plaintiff's farm, though other farms intervened between the place where the fire started and his farm.—*Chicago & E. R. Co. v. Luddington*, 10 Ind. App. 636, 38 N. E. 342.

[e] (App. 1899)

Where there is evidence in an action for a fire set by a locomotive showing that the fire was negligently started in a barn on premises adjacent to plaintiff's barn, and passed directly or indirectly, as a natural consequence to it, without the intervention of any independent

and responsible human cause, and as an ordinarily prudent person would have regarded as reasonably possible under the state of the existing wind and weather, it is sufficient to justify a finding that the escape of fire from the locomotive was the proximate cause of the burning of plaintiff's property.—*Chicago & E. R. Co. v. Kreig*, 53 N. E. 1033, 22 Ind. App. 393.

[f] (App. 1900)

During a drouth, a fire was set out on defendant's right of way, and, escaping, set fire to a building, from which it was communicated to plaintiff's property. The wind was blowing in the same direction from the time the fire was started until it reached plaintiff's property. *Held* to sustain a finding that the negligence in setting out the fire was the proximate cause of plaintiff's loss, and that the building was not an intervening agency.—*Chicago & E. I. Ry. Co. v. Ross*, 56 N. E. 451, 24 Ind. App. 222.

[g] (App. 1900)

In an action against a railway company for setting fire to plaintiff's property, the fact that the fire was started one day and apparently extinguished and afterwards, without any intervening cause, again sprang into life, did not relieve the company from liability.—*Lake Erie & W. R. Co. v. Kiser*, 58 N. E. 505, 25 Ind. App. 417.

[h] (Sup. 1902)

A complaint alleging that fire from defendant's locomotive ignited combustible material which it had negligently allowed to accumulate on its right of way, and that an ordinary wind was blowing, and defendant negligently permitted the fire to spread to plaintiff's buildings on adjoining premises, was not demurrable; an ordinary wind not being a new and independent intervening agency.—*Chicago & E. R. Co. v. Lesh*, 63 N. E. 794, 158 Ind. 423.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1690–1693.

See, also, 33 Cyc. pp. 1348, 1349.

§ 471. Actions for injuries by fire.

Grounds for new trial, see **NEW TRIAL**, §§ 102, 103.

Limitation of cross-examination of witness to subject of direct examination, see **WITNESSES**, § 269.

Service of process, see *ante*, § 24.

Splitting causes of action in general, see **ACTION**, § 53.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1694–1761.

See, also, 33 Cyc. pp. 1350–1404.

§ 474. — Jurisdiction and venue.

Application, general statutes, see **VENUE**, § 5.

[a] (Sup. 1892)

An action against a railway company for injury to land in Cook county, Ill., from fire

escaping from its locomotive, being a local action, cannot be maintained in the circuit court of the adjoining county of Lake, Ind., though defendant's railroad extends through both counties.—*Du Breuil v. Pennsylvania Co.*, 29 N. E. 909, 130 Ind. 137.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 1696.

See, also, 33 Cyc. p. 1351.

§ 478. — Pleading.

Aider by verdict or judgment, see PLEADING, § 433.

Grounds for demurrer, see PLEADING, § 192.

Liberal or strict construction, see PLEADING, § 34.

Motion to make more definite or certain, see PLEADING, § 367.

Pleading ownership and operation of road, see ante, § 268.

[a] (Sup. 1868)

A complaint to recover for goods sold to a railroad company and stored for them adjoining their road, but burned before payment was made, if it alleges that the fire took place through the negligence of the company's servants, need not allege that the plaintiff was free from negligence. Such a case is very dissimilar to a case where the action is brought for a personal injury to a passenger on a train, or to one, not a passenger, who is struck or run over by a passing train, in which the plaintiff is necessarily present and an actor, and where his own negligence may readily contribute to the injury.—*Indianapolis & C. R. Co. v. Paramore*, 31 Ind. 143; Same v. Stark, Id. 149.

[b] (Sup. 1875)

A complaint sufficiently charges an injury to have been caused by the negligence of a railroad company which alleges that the plaintiff placed cordwood on the right of way and line of the railroad under a contract of the company to purchase it; that the agents of the company unreasonably delayed measuring and accepting the wood; that the company negligently permitted an accumulation of grass, weeds, and other combustible material along the railroad track and right of way; that coals of fire were negligently dropped and sparks emitted from the locomotive of the company, which set fire to said accumulation of grass, etc., and the fire was thereby communicated to the wood and destroyed it.—*Pittsburgh, C. & St. L. Ry. Co. v. Nelson*, 51 Ind. 150.

[c] (Sup. 1879)

A complaint for damages for property burned by a railroad company held good where it sufficiently charged the negligence of the defendant, the injury done, and alleged that it happened without the fault of the plaintiff.—*Louisville, N. A. & C. Ry. Co. v. Richardson*, 68 Ind. 43, 32 Am. Rep. 94.

[d] (Sup. 1881)

In an action for negligence, against a railroad company, for setting fire to some wood

piled by the track, the charge that "defendant's locomotive emitted sparks which communicated with said wood and destroyed it, * * * through the carelessness of the defendant and her agents and employes, without the fault of the plaintiff," held to be a sufficient allegation of negligence after verdict.—*Pittsburgh, C. & St. L. R. Co. v. Noel*, 77 Ind. 110.

[e] (Sup. 1881)

A complaint alleging that plaintiff contracted to deliver wood to defendant railroad company, and did deliver the same on its tracks, and that, before such wood was estimated and paid for, the same was set on fire by the passing trains, negligently run and operated on such road by defendant, and burned, was bad on demurrer, since it failed to connect the burning of the wood with the negligence alleged.—*Pennsylvania Co. v. Gallentine*, 77 Ind. 322.

A complaint against a railroad company to recover damages for the burning of wood piled on the right of way must negative contributory negligence.—*Id.*

[f] (Sup. 1881)

A complaint against a railroad, alleging that a locomotive set fire to dry rubbish "negligently suffered to gather on defendant's right of way," "by the medium" of which crops on adjoining land of plaintiff were destroyed, is insufficient unless it alleges that the fire was suffered to escape onto plaintiff's land by the negligence of defendant.—*Pittsburgh, C. & St. L. Ry. Co. v. Hixon*, 79 Ind. 111.

[g] (Sup. 1882)

Though the averments in a complaint in an action against a railroad company for injuries caused by fire set by sparks from a locomotive were not made in the usual form, nor in the connection in which such averments are most appropriate in like cases, the complaint will not be held insufficient where it concludes with a charge that the fire, injury, and damages complained of in the complaint were caused "wholly by the neglect and carelessness of the defendant."—*Pittsburgh, C. & St. L. Ry. Co. v. Jones*, 86 Ind. 496, 44 Am. Rep. 334.

[h] (Sup. 1882)

A complaint against a railroad company, averring negligence in its permitting fire to kindle on its own property, but failing to aver negligence in permitting it to spread onto premises of complainant, is bad on demurrer.—*Louisville, N. A. & C. Ry. Co. v. Spenn*, 87 Ind. 322; Same v. Ehlert, Id. 339.

[hh] (Sup. 1882)

Where, in an action against a railroad company for negligently setting fire to plaintiff's property, the complaint alleges that defendant negligently set fire to the grass on its right of way and on the land adjacent thereto, it need not allege that defendant was negligent in permitting the fire to escape from its right of way.—*Louisville, N. A. & C. Ry. Co. v. Hanmann*, 87 Ind. 422.

[I] (Sup. 1883)

The complaint, in a suit against a railroad company for damages caused by fire negligently set by defendant on its right of way, which fails to aver that the spreading of the fire to plaintiff's land was the result of negligence, is bad.—*Indiana, B. & W. Ry. Co. v. Adamson*, 90 Ind. 60.

[II] (Sup. 1884)

In an action against a railroad company for destruction of property by escaping fire, the complaint must plainly negative contributory negligence; an allegation that it happened without plaintiff's fault is not sufficient.—*Wabash, St. L. & P. Ry. Co. v. Johnson*, 96 Ind. 40, 44, 62.

[J] (Sup. 1884)

A complaint against a railroad company for damages resulting from the escape of fire from its right of way must aver negligence of the company in permitting the fire on its right of way to escape therefrom to the adjoining premises.—*Louisville, N. A. & C. Ry. Co. v. Parks*, 97 Ind. 307.

In an action against a railroad company for damages occasioned by fire, a complaint showing that the fire was caused solely by sparks which were emitted from a locomotive and carried directly to the plaintiff's field, there causing the injury complained of, which, it was averred, occurred through the negligence of the railroad company, and without any fault of the plaintiff, was sufficient as against a demurrer.—*Id.*

A complaint against a railroad company for negligently setting fire to plaintiff's property, alleging that defendant "negligently permitted" dry litter to accumulate along the track, that it employed no spark arrester, that the netting on the smokestack of the locomotive was defective, whereby sparks of fire were emitted and carried into said litter, and "into the adjoining fields of the plaintiff, and by which the same became ignited," held to contain a sufficient allegation of negligence.—*Id.*

[JJ] (Sup. 1887)

A complaint in an action against a railway company for permitting fire to escape to plaintiff's land alleged that the coals negligently dropped and sparks emitted from the company's locomotive engine set on fire dry grass, etc., negligently suffered to gather beside the railroad track and on its right of way, and the fire through the medium of the grass, etc., was by the company negligently allowed to escape from its right of way and communicate to plaintiff's lands. *Held*, that the complaint sufficiently alleged that the fire was permitted to escape on plaintiff's land by the negligence of the company.—*Pittsburgh, C. & St. L. Ry. Co. v. Hixon*, 11 N. E. 285, 110 Ind. 225.

A complaint in an action against a railway company for permitting fire to escape to plaintiff's land, which alleges that the "fire and damage * * * were not caused by any negligence on the part of plaintiff," sufficiently negatives

the idea that the fire and damage complained of were occasioned in any degree by any contributory negligence on the part of plaintiff; *Rev. St. 1881, § 376*, providing that, in the construction of a pleading, its allegations shall be liberally construed.—*Id.*

[k] (Sup. 1887)

An averment that, "without fault or negligence on the part of the plaintiff, said fire, by the negligence of the defendant suffered to escape from its premises to plaintiff's lands, did then and there burn and totally destroy" plaintiff's property, shows freedom from contributory negligence with sufficient certainty to withstand a demurrer.—*Indiana, B. & W. Ry. Co. v. Overman*, 110 Ind. 538, 10 N. E. 575.

[kk] (Sup. 1890)

A complaint which alleges that while a railroad company was running its locomotive over its tracks "sparks and fire escaped from the locomotive and negligently set fire to grass on plaintiff's land; * * * that said fire, injury, and damage were caused wholly by the neglect and carelessness of defendant,"—sufficiently charges negligence.—*Ohio & M. Ry. Co. v. McCartney*, 121 Ind. 385, 23 N. E. 258.

[I] (Sup. 1890)

A complaint which alleges that defendant allowed dry grass and other inflammable material to accumulate on its right of way, which caught fire from sparks negligently allowed by defendant's employes to escape from one of its engines, and that the fire spread to plaintiff's land and destroyed his grass, states a good cause of action.—*Chicago, St. L. & P. Ry. Co. v. Burger*, 124 Ind. 275, 24 N. E. 981.

[II] (App. 1891)

The complaint alleged that defendant negligently permitted the fire to enter on plaintiff's land and burn over two acres of the same, and that the fire "burned the crops, turf, and muck soil off of two acres of said land." *Held*, that it was sufficiently certain that the two acres alleged to have been burned over and rendered valueless were the same two acres on which the fire was alleged to have entered.—*Chicago, St. L. & P. R. Co. v. Barnes*, 2 Ind. App. 213, 28 N. E. 328.

In an action against a railroad company for injuries caused by fire the complaint alleged that defendant negligently permitted dry grass and weeds to accumulate on its right of way through plaintiff's land, and that it set fire to such grass and weeds, and negligently permitted the fire to escape from its right of way, without any fault on the part of plaintiff, and to enter on plaintiff's land; that the fire destroyed plaintiff's crops and grass, and burned and destroyed the muck and peat soil thereon, rendering the land miry and worthless, and depriving plaintiff of access to a stream of water through the burned land; and that the fire burned the feet and legs of plaintiff's cattle which were then on the land,—all of which hap-

pened without any fault or negligence on the part of plaintiff. *Held*, that a motion to require plaintiff to state more specifically the acts of negligence imputed to defendant was properly denied; an allegation that defendant did or omitted to do a certain thing which caused the injury sued for being sufficient without pleading all the facts and circumstances from which negligence could be inferred.—*Id.*

In an action against a railroad company for injuries caused by fire, the words in the complaint, "all of which happened without any fault or negligence on the part of plaintiff," relate to the injuries alleged to have been done by the fire, as well as defendant's negligence in permitting the fire to escape from its right of way.—*Id.*

[m] (Sup. 1892)

In an action against a railroad company for burning plaintiff's property, the complaint described the land on which the property was situated, and alleged that plaintiff was owner thereof, together with "all the improvements thereon and appurtenances thereto;" that defendant, in operating its "railroad in the vicinity of said land, negligently scattered fire on its right of way, which ignited and burned rubbish, grass," etc.; "and said fire was by defendant negligently permitted to spread to and burn and destroy plaintiff's said" property. *Held*, that the averments of ownership of the property destroyed, and that the fire reached and destroyed the property by a continuous burning, were sufficient.—*Chicago, St. L. & P. R. Co. v. Williams*, 131 Ind. 30, 30 N. E. 696.

[mm] (App. 1892)

Where a complaint alleges that defendant railroad company carelessly discharged sparks from a locomotive, igniting combustible material negligently left upon the right of way, and carelessly allowed the fire to spread over plaintiff's land, destroying hay and fences, a motion to make more specific, so as to state whether the negligence in discharging the sparks consisted in improper equipment or careless operation, is properly denied, since the gist of the tort is suffering the fire to escape to plaintiff's land.—*Ohio & M. Ry. Co. v. Trapp*, 4 Ind. App. 69, 30 N. E. 812.

[n] (App. 1892)

In an action against a railroad company for injuries caused by fire, the complaint alleged that defendant negligently permitted combustible rubbish to accumulate on its right of way; that in operating locomotives such rubbish was set afire; and that defendant carelessly permitted such fire to escape from its right of way, without any fault of plaintiff, and to enter on plaintiff's land, where it injured and killed several hundred trees. *Held*, that the motion to require the complaint to state more specifically the acts of negligence was properly denied.—*Ohio & M. Ry. Co. v. Wrape*, 4 Ind. App. 100, 30 N. E. 428.

[nn] (Sup. 1893)

The complaint in an action to recover for hay burned through defendant railroad company's alleged negligence showed that the hay was stacked near defendant's right of way, but contained the general allegation that the hay was destroyed without negligence of the owner. *Held* that, there being no specific allegations tending to destroy such general allegation of fact, such complaint was not demurrable as showing on its face contributory negligence in stacking hay near defendant's railroad.—*Phoenix Ins. Co. v. Pennsylvania Co.*, 134 Ind. 215, 33 N. E. 970, 20 L. R. A. 405.

[o] (App. 1893)

In an action against a railroad company for damages on account of fire escaping from a locomotive, a general allegation that plaintiff was without fault was sufficient, unless it appeared from the facts stated that he was guilty of negligence.—*Chicago & E. R. Co. v. Smith*, 33 N. E. 241, 6 Ind. App. 262.

[oo] (App. 1893)

An allegation "that said fire also, by the carelessness and negligence of defendant, was allowed to and did spread from defendant's right of way to the plaintiff's meadow, and burned" his crops, sufficiently avers that defendant negligently suffered or caused the fire to escape from its right of way to plaintiff's premises.—*Lake Erie & W. R. Co. v. Griffin*, 8 Ind. App. 47, 35 N. E. 396, 52 Am. St. Rep. 465.

[p] (App. 1894)

A complaint which alleged that K.'s premises were fired by sparks from a passing engine, that defendant negligently omitted to equip the engine with a proper spark arrester, and that fire spread from K.'s premises to plaintiff's premises without his negligence, was demurrable for want of an allegation that the sparks were negligently permitted to escape to K.'s premises.—*Lake Erie & W. R. Co. v. Miller*, 36 N. E. 428, 9 Ind. App. 192; *Same v. Pettijohn*, 36 N. E. 429, 9 Ind. App. 695.

The allegations that the spark arrester was defective, and that defendant was negligent in equipping the engine, do not show that the injury to plaintiff's premises was the proximate result of such negligence.—*Id.*

[pp] (App. 1894)

A complaint alleged the negligent accumulation of rubbish on the right of way; that said rubbish took fire from sparks from an engine; "that the fire caused and caught as aforesaid, through the carelessness and negligence of said defendant, was permitted to and did spread over" plaintiff's land. *Held*, on demurrer, that it sufficiently alleged defendant's negligence in permitting the fire to spread over plaintiff's land.—*Chicago & E. R. Co. v. House*, 10 Ind. App. 134, 37 N. E. 731.

A complaint charging that the engine was negligently constructed and managed; that it emitted large sparks and coals of fire, which were carried by the wind, and fell on plaintiff's

land, and caused the fire,—is not demurrable.—*Id.*

[Q] (App. 1894)

Where the complaint states that the defendant railroad company negligently permitted its right of way to become overgrown with grass and weeds; that there had been but little rain, and that said grass and weeds were dry and easily fired; that sparks were negligently permitted to escape from defendant's engine, which ignited said weeds and grass; and that such fire was communicated to plaintiff's land through no fault of his own, but through defendant's negligence, and burned the same, to his damage,—it is sufficient on demurrer.—*Terre Haute & L. R. Co. v. Walsh*, 11 Ind. App. 13, 38 N. E. 534.

[qq] (App. 1895)

In an action for damages for the burning of plaintiff's land by fire started on defendant's right of way, the complaint must allege that defendant negligently permitted the fire to escape.—*Louisville, N. A. & C. R. Co. v. Palmer*, 13 Ind. App. 161, 39 N. E. 881, 41 N. E. 400.

In an action against a railroad company for fire escaping from its right of way, the complaint must aver that defendant permitted the fire to escape; and an allegation that its employees did so is insufficient, without an allegation that they were engaged in the line of their employment.—*Id.*

[r] (App. 1895)

In an action against a railroad company for damages by a fire set by sparks from its engine, a complaint which alleges that defendant's servant's permitted sparks to escape from the engine and set fire to combustibles on defendant's right of way, which, without fault on plaintiff's part, spread over his land, does not charge that defendant negligently allowed the fire to escape from its right of way, and is therefore insufficient.—*Louisville, N. A. & C. Ry. Co. v. Roberts*, 42 N. E. 247, 13 Ind. App. 692.

[rr] (App. 1896)

The general charge, in a complaint, that defendant railroad company negligently permitted its engine to become out of repair, and negligently permitted fire to escape therefrom and to destroy plaintiff's property, is sufficient.—*Lake Erie & W. Ry. Co. v. Gossard*, 14 Ind. App. 244, 42 N. E. 818.

[s] (App. 1896)

In an action for damages caused by fire started on a railroad right of way, a motion to make the complaint more specific by alleging what engine started the fire was properly overruled, upon the averment that plaintiff could not do so.—*Baltimore & O. R. Co. v. Countryman*, 16 Ind. App. 139, 44 N. E. 265.

Where, in an action against a railroad company for damages to real estate caused by fire, the complaint proceeds on the theory that the

claim first accrued to plaintiff's assignor and then passed by assignment to plaintiff, and it is alleged that by his general assignment he transferred to the assignee all claims and demands of every description, the unnecessary statement at the conclusion of the pleading that thereby the "plaintiff has been damaged" cannot be given such force as to cause the complaint to be construed as counting on an injury to the land while its title was in the assignee.—*Id.*

[t] (App. 1896)

A complaint alleging that defendant negligently permitted a fire to originate on its right of way, and negligently permitted it to escape upon plaintiff's land, and to burn the soil and crops thereon, is sufficient.—*Chicago & E. R. Co. v. Long*, 45 N. E. 484, 16 Ind. App. 401.

[tt] (App. 1899)

Where a complaint shows that a fire set on plaintiff's premises, for which he sued, was caused on a certain day by sparks from defendant's engines running by his premises, it is not error to overrule a motion to make it more specific by stating "the engine of what train it was that started the fire complained of."—*Chicago & E. R. Co. v. Kreig*, 53 N. E. 1033, 22 Ind. App. 393.

[u] (Sup. 1900)

In an action against a railroad company for damages from fire caused by sparks from its locomotive, allegations that defendant carelessly and negligently permitted grass and other combustible matter to accumulate on its right of way, and that sparks from a passing locomotive set fire to such matter, and the fire spread to plaintiff's building, are sufficient, without allegations that the locomotive was kept in an improper condition, and carelessly operated.—*Pittsburg, C., C. & St. L. Ry. Co. v. Indiana Horse shoe Co.*, 56 N. E. 766, 154 Ind. 322.

[uu] (App. 1900)

Where a complaint alleged that a railroad so negligently conducted its engine that it fired thick grass on its right of way adjacent to plaintiff's property, and negligently let the same spread to such property, causing damage without fault of plaintiff, it sufficiently stated a cause of action.—*Lake Erie & W. R. Co. v. Miller*, 57 N. E. 596, 24 Ind. App. 692.

[v] (App. 1901)

In an action by a township trustee against a railroad company for the destruction of a peat roadway and culverts and bridges thereon by fire, the complaint showed that defendant negligently permitted dry grass to remain on the right of way; that the peaty soil was dry and combustible through drought; that defendant, by fire from an engine, set a fire on the right of way, which spread to the peaty surface soil, and escaped to the peaty lands adjoining, and ignited the roadway. *Held*, that the complaint sufficiently showed, that the injury was the result of defendant's negligence as its proximate cause.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Iddings*, 62 N. E. 112, 28 Ind. App. 504.

[vv] (App. 1901)

In an action against a railroad company for permitting fire to escape and damage plaintiff's premises, a complaint, charging defendant with negligence in permitting the fire to escape from its premises, and averring that plaintiff was without fault, stated a cause of action.—Pittsburgh, C. & St. L. Ry. Co. v. Greb, 61 N. E. 1139, 64 N. E. 39, 29 Ind. App. 704.

[w] (App. 1902)

The first paragraph of a complaint alleged that defendant railway company negligently permitted combustible material to accumulate on its right of way, negligently permitted its engines to cast out sparks igniting the material, and negligently and carelessly suffered and permitted the fire to escape from its right of way to the plaintiff's lands, igniting the turf, etc., to plaintiff's damage. The second paragraph further alleged that the combustible material which had accumulated on the right of way was ignited by a spark from a locomotive, without averment of negligence in permitting the engine to cast out the sparks. The third paragraph proceeded: "Which said fire, after being ignited by defendant as aforesaid, defendant negligently and carelessly suffered and permitted to escape and spread over the land of plaintiff," etc. *Held*, that under Burns' Rev. St. 1901, § 379, requiring pleadings to be liberally construed the complaint sufficiently indicated that the injuries resulted from negligence in permitting the fire to escape.—Wabash R. Co. v. Schultz, 64 N. E. 481, 30 Ind. App. 495.

[ww] (Sup. 1903)

Where, in an action against a railroad for damage to property by fire alleged to have escaped from defendant's locomotive, the complaint alleges that the injury was caused "wholly by the negligence of defendant," the complaint is good as against a demurrer for want of facts, notwithstanding its failure to state in detail the facts constituting negligence.—Pittsburgh, C. & St. L. Ry. Co. v. Wilson, 66 N. E. 899, 161 Ind. 701.

[x] (App. 1903)

A complaint alleging that defendant railroad company negligently permitted fire on its right of way to escape to the land of S., igniting it, and thence to plaintiff's adjoining land, is sufficient, without alleging negligence in permitting the fire to escape from the land of S. to that of plaintiff.—Wabash R. Co. v. Lackey, 67 N. E. 278, 31 Ind. App. 103.

[xx] (Sup. 1905)

In an action against a railroad company for the burning of property caused by sparks carried by the wind from a passing locomotive, an allegation that defendant negligently permitted the coals and sparks to be carried by the wind to plaintiff's property is insufficient, since plaintiff's cause of action was based on negligence in the operation of defendant's locomotive, and the complaint contained no allegation as to such negli-

gence.—Lake Erie & W. R. Co. v. McFall, 165 Ind. 574, 76 N. E. 400.

A complaint alleging that defendant was operating a railroad through a village in which there were a large number of wooden buildings in close proximity to the track, and on a day when a strong wind was blowing, and it had been unusually dry for a long time, carelessly, negligently, and wrongfully failed to use sufficient spark arresters or other proper appliances to prevent the emission of sparks from its locomotives, and negligently ran the trains at such a high speed that the engines threw out unusually large and dangerous sparks, which set fire to plaintiff's barn, when considered on appeal after a trial in which the issue of negligence was correctly submitted to the jury, sufficiently alleged negligence in respect to the operation of the locomotive, and in permitting fire to escape and destroy plaintiff's barn.—*Id.*

In an action for the destruction of plaintiff's barn by fire emitted from defendant's engine, a paragraph of the complaint alleged that defendant negligently and carelessly omitted to exercise care proportionate to the increased risk and hazard caused by the prevailing high wind and drought then prevailing, but negligently ran its locomotive on the day in question at an unusual and excessive rate of speed under an excessive pressure of steam, causing great and unusual quantities of dangerous sparks to be emitted, which sparks defendant carelessly and negligently permitted and suffered to be so emitted, thrown, carried, and spread by the wind off of defendant's right of way and onto and against plaintiff's barn, igniting and setting fire to the same. *Held* that, the only charge of negligence in such paragraph being the running of the train at an unusual and excessive rate of speed, which was not an invasion of plaintiff's rights, the paragraph was demurrable.—*Id.*

A complaint, alleging that, notwithstanding defendant ran its trains through a village in close proximity to certain wooden buildings on a day when it was unusually dry and when a strong wind was blowing, defendant's servants negligently and carelessly failed and omitted to exercise care and caution in running the locomotive proportionate to the increased danger and risk of setting fire to plaintiff's building, but so negligently and carelessly operated the train at such a high rate of speed and excessive head of steam that unusually large and dangerous sparks were emitted, which were carried by the wind against plaintiff's barn, which was set on fire and burned, sufficiently charged negligence in the operation of the locomotive.—*Id.*

A complaint alleging that defendant operated a railroad through a village between wooden buildings in close proximity to the track, and, on a day when a strong wind was blowing and when it was unusually dry, carelessly and negligently failed to use safe and sufficient spark arresters or other proper appliances on its engine to prevent the emission

of sparks, and negligently ran a locomotive under such a high and unnecessary head of steam that it threw out unusually large and dangerous sparks and coals of fire, which set fire to and burned plaintiff's barn, sufficiently alleged negligence in the operation of the locomotive and in permitting fire to escape, etc.—*Id.*

Where a paragraph of a complaint alleged that sparks and coals of fire were emitted from defendant's engine and carried by the wind from the engine to and against plaintiff's barn, which was set on fire and destroyed, it could not be supported as charging negligence of the defendant in permitting the fire to escape from its right of way.—*Id.*

[v] (App. 1905)

Where, in an action against a railroad company for a fire alleged to have been negligently set out, the complaint stated that there was a large accumulation of combustible matter on defendant's right of way where the fire was set, and that, for a long time prior to the fire, defendant had negligently suffered such matter so to remain during the hot season, until it was ignited by sparks from a passing locomotive, which fire, through defendant's negligence, escaped and communicated to plaintiff's property, such allegation was sufficiently certain and definite, both as to the extent of the accumulation of combustible matter, etc., and also as to the time during which it had been permitted to remain on the right of way.—*Pittsburg, C., C. & St. L. Ry. Co. v. Wise*, 74 N. E. 1107, 36 Ind. App. 59.

An allegation that defendant railroad company negligently failed to have its locomotive alleged to have set out fire provided with a safe and sufficient spark arrester, in that the meshes of the arrester in use were too large, and insufficient to prevent the escaping of sparks and live coals therefrom, and that when the fire was set out the locomotive was so negligently equipped, by such meshes being too large, and by reason of the old, worn, broken, and burned condition of the arrester and meshes and that the engine was then so negligently managed by defendant, in that too much fuel was supplied, and too much steam put on, etc., it threw out coals of fire of unusual size, character, and quantity, etc., charged negligence on the part of defendant in the construction, equipment, and management of the locomotive with sufficient certainty and definiteness.—*Id.*

An averment that defendant railroad company negligently permitted fire to escape from its right of way was not objectionable as pleading negligence in general terms.—*Id.*

[vv] (Sup. 1906)

In an action for loss by fire alleged to have been set by defendant railroad company, the first paragraph of the complaint charged negligence, in that defendant omitted to use a safe and sufficient spark arrester, in operating its locomotive with the trapdoor down, thereby increasing the draft, and in operating the locomotive with an unusual pressure of steam;

each and all of such acts having caused great quantities of dangerous coals to have been emitted from the smokestack, which set fire to the right of way. Then followed an allegation that plaintiff had no opportunity to examine the locomotive or spark arrester in question which was in the exclusive control of defendant railroad company, and therefore plaintiff could not allege what mechanism should have been used, or in what respect the spark arrester was insufficient, etc. *Held*, that such latter averment was immaterial, and did not negative the prior allegations that the defects alleged were the proximate cause of the setting of the initial fire.—*Lake Erie & W. Ry. Co. v. Ford*, 167 Ind. 205, 78 N. E. 969.

In an action against a railroad company for fire alleged to have been negligently set out, it was not necessary that the complaint should allege facts showing that the railroad company had notice or knowledge of the existence of holes in the spark arrester of its engine caused by the bending or springing of wires; such facts being covered by the averment of negligence in the maintenance of the arrester.—*Id.*

A complaint, alleging that defendant railroad company negligently omitted to use a safe spark arrester, that it used a spark arrester with unusually large holes therein, operated its locomotive with the trapdoor open, thereby increasing the draught, and operated its locomotive with a high and unusual pressure of steam, thereby setting fire and causing plaintiff's injury, is sufficient, without alleging that the defects could not be more explicitly described because the locomotive was in defendant's exclusive possession.—*Id.*

[x] (Sup. 1907)

The complaint, in an action against a railway company for damages caused by fire, charging the company with negligence in the construction of the engine; that the company negligently failed to keep the same in repair, and negligently operated it; that, on account of such negligence, the engine threw sparks and coals upon land outside its right of way, and set fire to dry grass, etc.; and that the company negligently permitted such fire to escape to plaintiff's land and destroy his property thereon, such damage being caused solely by the carelessness of the company and without negligence of the plaintiff—was sufficient against a demurrer for want of facts.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Brough*, 168 Ind. 378, 81 N. E. 57, 12 L. R. A. (N. S.) 401.

[xx] (App. 1909)

The first paragraph of a complaint charged negligence in running and operating a locomotive in such a way as to emit large and unusual sparks and coals of fire which fell on a barn of W., and started a fire which injured plaintiff. The second charged negligence in using a locomotive old and out of repair, and in a defective condition, and not equipped with a properly constructed and adjusted spark arrester, by reason of which large coals and sparks

were discharged on the barn and caused the injury. *Held*, that motions to make each more specific as to negligence were properly overruled.—Pittsburgh, C., C. & St. L. Ry. Co. v. German Ins. Co., 87 N. E. 995.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1698-1705.

See, also, 33 Cyc. pp. 1351-1355.

§ 479. — Issues, proof, and variance.

[a] (App. 1893)

Where the complaint against a railroad company alleges that defendant negligently suffered fire to escape from its right of way and burn plaintiff's "fences, grass, corn, and the soil of his lands," without his negligence, plaintiff is entitled to recover if the evidence shows that any of the articles mentioned were so burned; and the complaint is good on demurrer.—Chicago & E. R. Co. v. Smith, 6 Ind. App. 262, 33 N. E. 241.

[b] (App. 1894)

Where the complaint in an action for the burning of a meadow alleges that defendant railway company negligently permitted grass to accumulate on its right of way, evidence of the presence of such materials, and that, shortly after the passage of a train, fire was discovered there, will support a verdict for plaintiff.—Terre Haute & L. R. Co. v. Walsh, 11 Ind. App. 13, 38 N. E. 534.

[c] (App. 1896)

Where the complaint, in an action against a railway company for negligently starting a fire on its right of way, also charges negligence in allowing the fire to escape to plaintiff's premises, evidence showing the negligent escape of the fire is sufficient to support a verdict for plaintiff, even though there is conflict as to where the fire originated.—Baltimore & O. R. Co. v. Countryman, 16 Ind. App. 139, 44 N. E. 265.

[d] (Sup. 1900)

In an action for damages from a fire communicated from defendant's right of way to plaintiff's building, claims as to plaintiff's violation of a contract in regard to the erection of buildings will not be considered when no breach of the contract is alleged in the answer.—Pittsburgh, C., C. & St. L. Ry. Co. v. Indiana Horse-shoe Co., 56 N. E. 766, 154 Ind. 322.

[e] (App. 1903)

An instruction that in order for plaintiff to recover for a loss of its buildings fired by defendant's locomotive it must prove that the property was destroyed by fire negligently emitted from one of defendant's engines, that the spark arrester in the engine was defective and had been negligently allowed to be in that condition, that the engineer at the time of the fire was operating the engine and spark arrester negligently, and that plaintiff was not guilty of contributory negligence, was error, since plaintiff was only required to prove either act of

negligence charged, provided such negligence was the proximate cause of the loss.—Indiana Clay Co. v. Baltimore & O. S. W. R. Co., 67 N. E. 704, 31 Ind. App. 258.

[f] (App. 1905)

Under an allegation that defendant railroad company negligently permitted fire to escape from its right of way on plaintiff's premises, it was not necessary for plaintiff to show that defendant omitted to adopt prudent means to prevent the escape of fire after it had started, but it was sufficient, under such averment, to show the accumulation of combustible material on the right of way, extending up to plaintiff's property, so that the communication of fire to plaintiff's property would be the natural and probable consequence of its burning on the right of way.—Pittsburg, C., C. & St. L. Ry. Co. v. Wise, 74 N. E. 1107, 36 Ind. App. 59.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1706-1708.

See, also, 33 Cyc. pp. 1356-1358.

§ 480. — Presumptions and burden of proof.

As to ownership and operation of road, see ante, § 270.

[a] (Sup. 1869)

There is no presumption that a fire which appears to have been communicated from railroad locomotives to adjoining premises was the result of negligence on the part of the company's servants.—Indianapolis & C. R. Co. v. Paramore, 31 Ind. 143; Same v. Stark, Id. 149.

[b] (Sup. 1881)

The plaintiff in an action against a railroad company for damages caused by a fire started by one of its locomotives need not show by what particular locomotive the fire was started.—Pittsburgh, C. & St. L. R. Co. v. Noel, 77 Ind. 110.

[c] (Sup. 1881)

Sparks from a locomotive engine are prima facie evidence of negligence in the company and their servants having the management thereof, rendering it incumbent on them to show that proper precaution had been taken to prevent the escape of sparks, and hence it was error in an action for a fire alleged to have been caused by a locomotive to exclude the testimony of a witness for defendant tending to rebut such prima facie evidence by showing that the defendant's engines were provided with the best methods known for preventing fire, etc.—Pittsburgh, C. & St. Louis Ry. Co. v. Hixon, 79 Ind. 111.

[d] No presumption of negligence on the part of a railroad company arises from the fact of fire being communicated from an engine in use on its railroad.—(Sup. 1887) Pittsburgh, C. & St. L. Ry. Co. v. Hixon, 11 N. E. 285, 110 Ind. 225; (1894) New York, C. & St. L. R. Co. v. Baltz, 36 N. E. 414, 38 N. E. 402, 141 Ind.

661; (App. 1896) *Lake Erie & W. R. Co. v. Gosard*, 42 N. E. 818, 14 Ind. App. 244; (1900) *Baltimore & O. S. W. R. Co. v. O'Brien*, 77 N. E. 1131, 38 Ind. App. 143.

[e] Where a negligent communication of fire to plaintiff's property by the engine of a railroad company is charged, the burden of proof is on plaintiff.—(Sup. 1888) *Chicago & E. I. R. Co. v. Ostrander*, 116 Ind. 259, 15 N. E. 227, 19 N. E. 110; (App. 1906) *Baltimore & O. S. W. R. Co. v. O'Brien*, 38 Ind. App. 143, 77 N. E. 1131.

[f] (App. 1895)

That the spark arrester on an engine contained holes, through which coals of fire escaped and ignited combustible matter on the right of way, is prima facie evidence of negligence by the company.—*Louisville, N. A. & C. Ry. Co. v. McCorkle*, 12 Ind. App. 691, 40 N. E. 26.

[g] (App. 1897)

In an action for damages from a fire set by a railroad company, the burden is upon plaintiff to show his want of contributory negligence.—*Wabash R. Co. v. Miller*, 48 N. E. 663, 18 Ind. App. 549.

Where, in an action for damages for loss occasioned by fire set by a railroad company, the burden of proof rests upon plaintiff to show his want of contributory negligence, it is necessary for him to show whether he had knowledge of the fire during its progress; and, where lack of knowledge is not shown, plaintiff must show reasonable efforts were made by him to prevent damage.—*Id.*

[h] (App. 1898)

The burden is on the plaintiff to show that his own negligence, either active or passive, did not contribute to the injury.—*Louisville, N. A. & C. Ry. Co. v. Carmon*, 20 Ind. App. 471, 48 N. E. 1047, 50 N. E. 893.

[i] (App. 1900)

Where plaintiff owning property near a railroad company sued to recover for damages from fire, and it was shown that he had knowledge of the fire shortly after it began, it was then incumbent on him to prove the use of reasonable efforts to extinguish it.—*Lake Erie & W. R. Co. v. Kiser*, 58 N. E. 505, 25 Ind. App. 417.

[j] (Sup. 1904)

In an action against a railroad company for damages from fire, where the negligence alleged was in using insufficient or defective spark arresters, plaintiff has the burden of proving such negligence.—*Toledo, St. L. & W. R. Co. v. Fenstermaker*, 72 N. E. 561, 163 Ind. 534.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1709-1716.

See, also, 33 Cyc. pp. 1359-1368; note, 41 C. C. A. 370.

§ 481. — Admissibility of evidence.

Admissions as evidence, see EVIDENCE, § 248.

Expert testimony, see EVIDENCE, § 543½.

Opinion evidence, see EVIDENCE, §§ 474, 493, 497, 501.

[a] (Sup. 1881)

Evidence that after plaintiff's property was burned by fire set out by defendant's locomotives other property was burned by sparks emitted by such locomotives was admissible to show the general defective condition of defendant's engines.—*Pittsburgh, C. & St. L. R. Co. v. Noel*, 77 Ind. 110.

[b] (App. 1893)

In an action against a railroad company for the destruction of property delivered to it for shipment, it was not error to admit evidence of the condition of engines other than those which set the fires which caused the loss, and of other fires along defendant's right of way occurring about the time of such loss; especially when the particular engines which set the former fires had not been identified.—*Evansville & T. H. R. Co. v. Keith*, 8 Ind. App. 57, 35 N. E. 296.

In an action against a railroad company for the destruction of property delivered to it for shipment, it was not error to admit evidence of an expert in the employ of another railroad company, that at the time of the fires in question a certain device to prevent the emission of sparks was in use on his road, and that, with proper use and handling, he had never known of a fire caused by an engine so equipped.—*Id.*

Nor was it error to refuse to permit defendant to show that fires occurred along the line of such witness' road while such device was in use thereon.—*Id.*

[c] (App. 1895)

In an action for the destruction of hay by fire from defendant's engines, evidence that other fires were started along the line of the road by such engines about the time of the burning of the hay in question is admissible.—*Louisville, N. A. & C. Ry. Co. v. Lange*, 13 Ind. App. 337, 41 N. E. 609.

[d] (App. 1896)

In an action against a railroad company for damages from a fire set by sparks from its engine, it is error to admit evidence that defendant paid others for losses from the same fire.—*Louisville, N. A. & C. Ry. Co. v. Roberts*, 13 Ind. App. 692, 42 N. E. 247.

[e] (App. 1897)

In an action for damages caused by fire set by a locomotive, where the complaint alleged that the locomotive was carelessly constructed and operated, it was not error to admit evidence of other fires on the same day set by the same engine.—*Lake Erie & W. R. Co. v. Gould*, 47 N. E. 941, 18 Ind. App. 275.

[f] (App. 1899)

In an action for a fire set by a locomotive, evidence of other fires on the same day which sprang up adjacent to the track after the same locomotive passed is admissible.—*Chicago & E. R. Co. v. Kreig*, 53 N. E. 1033, 22 Ind. App. 393.

[g] (App. 1899)

That a certain engine, in charge of a particular engineer, was defective, and was so negligently managed as to unnecessarily throw out fire, cannot be shown by testimony of the condition of another engine, or of the careless conduct of other engineers.—*Chicago, I. & L. Ry. Co. v. Gilmore*, 53 N. E. 1078, 22 Ind. App. 466.

[h] (Sup. 1900)

In an action for damages from fire started by defendant's engine, when the negligence complained of is in allowing combustible material to accumulate on the right of way, evidence of other fires started by defendant's engines about the same time is admissible.—*Pittsburg, C., C. & St. L. Ry. Co. v. Indiana Horseshoe Co.*, 56 N. E. 766, 154 Ind. 322.

[i] (App. 1900)

Where there was no evidence that a fire near a right of way was started by a particular engine, evidence of other fires started by such engine is inadmissible.—*Chicago & E. I. Ry. Co. v. Ross*, 56 N. E. 451, 24 Ind. App. 222.

[j] (App. 1900)

Where damages were claimed for negligence of a railroad in permitting a fire caused by it to escape from its right of way, evidence as to other fires along such right of way, and the condition of the grass at the time thereof, was immaterial.—*Lake Erie & W. R. Co. v. Miller*, 57 N. E. 596, 24 Ind. App. 662.

[k] (Sup. 1901)

In an action against a railroad for injuries to land caused by the negligent accumulation and ignition of combustible materials on the right of way and the escape of the fire, evidence of the presence of dry grass and weeds on the right of way at other places than that at which the fire complained of occurred, and of fires occurring at other times and places, was admissible.—*Wabash R. Co. v. Miller*, 61 N. E. 1005, 158 Ind. 174.

[l] (Sup. 1906)

In an action against a railroad company for damages for destruction of a house and barn by a fire in which it was claimed that the barn was set on fire by sparks from the engine and the fire communicated from the barn to the house, evidence as to how far the sparks were carried from the burning barn was admissible as part of the occurrence tending to show the extent of the fire.—*Cleveland, C., C. & St. L. Ry. Co. v. Hayes*, 167 Ind. 454, 79 N. E. 448.

[m] (App. 1906)

Where, in an action against a railway company for loss by fire caused by sparks emit-

ted by an engine, it was shown that a particular engine emitted the sparks, it was error to admit evidence that other engines at other times set fires.—*Cleveland, C., C. & St. L. Ry. Co. v. Loos*, 77 N. E. 948, 38 Ind. App. 1.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1717-1729.

See, also, 33 Cyc. pp. 1368-1380.

§ 482. — Sufficiency of evidence.

As to ownership and operation of road, see ante, § 272.

[a] (Sup. 1879)

In an action against a railroad company for damages for burning property, evidence held sufficient to sustain a finding that the smokestack of defendant's locomotive was defective.—*Louisville, N. A. & C. Ry. Co. v. Richardson*, 66 Ind. 43, 32 Am. Rep. 94.

[b] (Sup. 1892)

There was evidence that, at a point where the fire started on defendant's right of way, there were dry grass and weeds extending up to the track; that passing locomotives frequently dropped coals of fire, which set fire to the ties; that the weather was dry, and the wind was blowing in a direction which would carry fire towards plaintiff's property; and that there was a line of "burnt district" extending from defendant's right of way to plaintiff's land. *Held*, that the evidence was sufficient to sustain a verdict for plaintiff.—*Chicago, St. L. & P. R. Co. v. Williams*, 131 Ind. 30, 30 N. E. 696.

[c] (Sup. 1893)

Where there was evidence that at the time the accident occurred the engine threw an unusual quantity of sparks and coals of fire, and that such coals were of an unusual size, the jury could rightfully infer that the fire was caused by defendant's negligence.—*Cincinnati, I., St. L. & C. Ry. Co. v. Smock*, 133 Ind. 411, 33 N. E. 108.

In an action for the burning of an ice house ignited by sparks from a locomotive, findings that the fire originated in a partition wall where one or more boards were off, though they may have tended to show contributory negligence on the part of the plaintiffs, are not conclusive on that subject.—*Id.*

[d] (App. 1895)

It appeared that, about the time of the fire complained of, fires frequently occurred which were due to sparks or coals from defendant's engines; that defendant had one engine, about this time, the spark arrester of which was not in good condition; and that the fire complained of broke out shortly after an engine of defendant's had passed on the right of way adjoining plaintiff's land. *Held*, that a verdict for plaintiff was warranted.—*Chicago & E. R. Co. v. Zimmerman*, 12 Ind. App. 504, 40 N. E. 708.

[e] (App. 1896)

That the spark arrester on an engine was defective is sufficiently shown by evidence that

It had emitted fire for a considerable time, and that fires were started on and adjacent to the right of way just after its passage.—*Louisville, N. A. & C. Ry. Co. v. McCorkle*, 12 Ind. App. 691, 40 N. E. 26.

That a fire which spread from the right of way of a railroad to adjacent land was set by a particular engine is sufficiently shown by evidence that it was discovered immediately after the train passed, and that the same engine had set fires on other days at about the same time.—*Id.*

[f] (*App.* 1896)

Judgment against a railroad for a fire which started 68 feet from its track cannot be sustained, the only evidence that it was set by an engine being that it was discovered 10 minutes after one passed that point, that a person passing that point a few minutes before the engine saw no fire, and that, a little distance beyond there, sparks were escaping from the engine; there being positive and uncontradicted testimony that the spark arrester was the most approved in general use, and was in good condition and repair.—*Lake Erie & W. Ry. Co. v. Gossart*, 14 Ind. App. 244, 42 N. E. 818.

[g] (*App.* 1897)

In an action against a railroad company for the destruction of a house by fire, alleged to have escaped from defendant's right of way through defendant's negligence in permitting combustible materials to accumulate thereon, plaintiff's witnesses testified that they went to the house soon after it was discovered that it was on fire; that the wind was blowing from the southwest towards the railroad; that the fire in the house had started in the southwest corner; and that the grass about the house, and between it and the railroad, was burned. Defendant's section foreman testified that on the day of the fire he burned off the right of way for about 500 feet each way from plaintiff's house, between 1 and 3 o'clock, starting the fire at the fence, and burning towards the track; that they afterwards sprinkled water wherever any fire could be seen; that a train passed at 3:15; that the locomotive emitted no sparks, and that, if any had been emitted, they would have gone with the wind to the east side of the track. *Held* insufficient to support a special verdict, finding that the fire that burned the house was set by the locomotive on the west side of the track on the right of way, and was communicated to the building by running in the dry grass.—*Lake Erie & W. R. Co. v. Naron*, 47 N. E. 691, 18 Ind. App. 193.

[h] (*App.* 1899)

A verdict holding defendant railroad company liable for a fire caused by its engine is supported by evidence that the train had stopped at a crossing about 700 feet from the burned building; that by the time it reached the building the train was going at the rate of 25 miles per hour, the engine emitting sparks and live cinders; that the wind was blowing to-

wards the building, the roof of which was seen to be on fire on the side towards the track, about 30 minutes later, and that the building was not on fire when seen shortly before the train passed.—*McDoel v. Gill*, 53 N. E. 956, 23 Ind. App. 95.

[i] (*Sup.* 1900)

Evidence that there was an accumulation of combustible material on defendant's right of way opposite plaintiff's building; that there was a steep grade at such point, so that defendant's engines in passing put on steam and emitted sparks and coals, which frequently ignited the rubbish on the right of way; that on the day of the fire the wind was blowing over the right of way towards plaintiff's building,—is sufficient to sustain a finding that defendant was negligent.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Indiana Horseshoe Co.*, 56 N. E. 768, 154 Ind. 322.

In an action against a railroad company for fire set out, plaintiff was not bound to prove that the fire started on defendant's right of way from sparks emitted from defendant's passing engines, and that defendant was negligent in permitting the fire to escape from its right of way, by direct evidence, but it was sufficient if such facts were established by either direct or circumstantial evidence or by both.—*Id.*

[j] (*Sup.* 1903)

In an action against a railroad for damages from fire alleged to have escaped from its locomotive, the fact that the fire was caused by negligent operation of the locomotive may be proved by either direct or circumstantial evidence, or both.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Wilson*, 66 N. E. 899, 161 Ind. 701.

[k] (*Sup.* 1904)

In an action against a railway company for damages caused by fires set by its passing locomotives, evidence examined, and *held* sufficient to sustain the finding of the jury that the spark arresters on the locomotives were not in good condition at the time of the fires.—*Toledo, St. L. & W. R. Co. v. Fenstermaker*, 163 Ind. 534, 72 N. E. 561.

In an action against a railroad company for damages from fire alleged to have been caused by sparks from defendant's locomotives, where it is shown that there was no fire on the premises before, and no probable cause for the fire except the locomotive; that the wind was blowing from the railroad to the place where the fire started; and that the fire started soon after the locomotive passed—a conclusion that the fire was communicated by the locomotive is justified.—*Id.*

[l] (*Sup.* 1904)

Evidence that within a few minutes after a freight train passed over defendant's railroad a fire broke out in plaintiff's woods at a point about 10 feet from the right of way, and that prior to the passage of the train there was no fire in the woods, and, aside from the loco-

tive, there was no known actual or probable source of the fire, was sufficient to justify a finding that the fire was caused by the engine.—*Toledo, St. L. & W. R. Co. v. Parks*, 72 N. E. 636, 163 Ind. 592.

In an action against a railroad company for damages from fire set by defendant's engine, there was no evidence that the fire originated from coals or sparks from the fire box or ash pan, and the jury found that the fire was started by a spark emitted from the smokestack of the engine. The engine was shown to have been equipped with one of the best and most approved spark arresters, and was being operated in a careful manner, by competent employes; and there was uncontradicted testimony of a witness who personally inspected the spark arrester of the engine after the fire that it was in good condition. *Held*, that there was no evidence of negligence sufficient to sustain a recovery.—*Id.*

[m] (*Sup.* 1906)

In an action against a railroad for destroying plaintiff's property by fire, evidence examined and *held* to sustain a judgment for plaintiff.—*Cleveland, C., C. & St. L. Ry. Co. v. Hayes*, 167 Ind. 454, 79 N. E. 448.

[n] (*App.* 1906)

Where no fire had been on plaintiff's premises for an indefinite period before the date in question, and it was shown that fire was seen thereon shortly after the passage of defendant's locomotive, and that the wind was blowing from the railroad track towards plaintiff's premises, such facts were sufficient to justify a finding that the fire was occasioned by defendant's negligence in permitting combustible materials to remain on its right of way which were ignited and that the fire was negligently permitted to spread to plaintiff's land.—*Baltimore & O. S. W. R. Co. v. O'Brien*, 77 N. E. 1131, 38 Ind. App. 143.

In an action against a railroad company for fire permitted to escape from its right of way, defendant's negligence may be established by circumstantial evidence.—*Id.*

[o] (*App.* 1907)

Where plaintiff, in an action for the burning of a building by sparks from a locomotive, relies on negligent operation of the locomotive consisting of the use of too much steam, he must show the connection between the use of too much steam and the escape of the sparks; and he does not do this by mere evidence of other fires set by the locomotive.—*Louisville & N. R. Co. v. Vinyard*, 39 Ind. App. 628, 79 N. E. 384; *Same v. Howard*, 39 Ind. App. 703, 79 N. E. 1119.

[p] (*App.* 1906)

Evidence in an action against a railroad company to recover damages for the burning of property considered and *held* sufficient to sustain a finding that the fire originated from one of defendant's locomotives, and was caused

by its negligence.—*Toledo, St. L. & W. R. Co. v. Sullivan*, 83 N. E. 1024, 41 Ind. App. 390.

Circumstantial evidence of negligence is sufficient to support a verdict in an action against a railroad company for damages for a fire communicated by a locomotive, if from all the circumstances proved the jury might reasonably find that defendant's negligence was the proximate cause of the injury.—*Id.*

[q] (*App.* 1909)

Where, in a suit for negligently causing a fire destroying property, evidence merely showed that L, in whose right plaintiff sued, heard of the fire shortly after it broke out in W's barn, and hurried to the scene and found a corner of his barn, which stood near, on fire, but there was entire absence of evidence as to whether L did anything, or whether it was possible for him to do anything, to avert the injury, plaintiff failed to sustain the burden of showing by a fair preponderance of the evidence that his own negligence did not contribute to the injury.—*Pittsburgh, C., C. & St. L. Ry. Co. v. German Ins. Co.*, 87 N. E. 995.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1730-1736.

See, also, 33 Cyc. pp. 1381-1389.

§ 483. — Damages.

Opinion evidence as to, see EVIDENCE, § 497.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1737-1739.

See, also, 33 Cyc. pp. 1389-1393.

§ 484. — Questions for jury.

Instructions as to duties of jury as to invading province of jury, see TRIAL, § 201.

[a] (*App.* 1897)

Whether a railroad company used proper care to remove combustible materials from its right of way is a question of fact for the jury, regardless of the care used in the operation of its locomotives.—*Chicago & E. R. Co. v. Bailey*, 46 N. E. 688, 19 Ind. App. 163.

[b] (*App.* 1899)

In an action for damages from fire started by a locomotive, where the issue is as to whether the fire originated on the right of way, it was error to refuse to submit a special interrogatory as to whether at that time and place there was a short green growth of grass upon the right of way.—*Pennsylvania Co. v. Hunsley*, 54 N. E. 1071, 23 Ind. App. 37.

[c] (*App.* 1907)

Whether a fire was set by defendant's engine because of the use of too much steam in making an upgrade is a question for the jury.—*Louisville & N. R. Co. v. Vinyard*, 39 Ind. App. 628, 79 N. E. 384.

[d] (*App.* 1907)

Whether a railroad company was negligent in operating an engine which emitted coals of

fire was a question for the jury under evidence as to the conditions under which it was operated.—*Lake Erie & W. R. Co. v. Hobbs*, 40 Ind. App. 511, 81 N. E. 90.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1740-1746.

See, also, 33 Cyc. pp. 1394-1398; note, 5 L. R. A. (N. S.) 99.

§ 485. — Instructions.

Applicability of instructions to pleadings and evidence, see TRIAL, § 252.

Error in instructions cured by withdrawal or giving other instructions, see TRIAL, § 296.

Instructions as to credibility of witnesses, see TRIAL, § 236.

Instructions as to duties of jury as invading province of jury, see TRIAL, § 201.

[a] (Sup. 1881)

In an action against a railroad company to recover damages for the destruction of wood piled near the track by fire communicated from defendant's locomotives, where the evidence showed that the wood had been cut by one not a party to the action under a contract with plaintiff, by which such person was to receive an interest in the wood or in the proceeds thereof, the nature or amount of which was not shown, and that plaintiff had settled with such person for his interest whatever it was, an instruction that "if B. was to share in the proceeds of this wood, or if he had settled with the plaintiff for his interest therein, and so has nothing to do with this litigation, the plaintiff is the real party in interest, and such relation of B. with plaintiff is no bar to this suit," was not objectionable where other instructions informed the jury that plaintiff must prove title to the wood before he could recover, and the jury actually found by answer to an interrogatory that the title was in plaintiff.—*Pittsburgh, C. & St. L. R. Co. v. Noel*, 77 Ind. 110.

[b] (Sup. 1898)

In an action for the burning of a building by sparks communicated from defendant's locomotive, containing a defective spark arrester, defendant showed the screen to the jury, though it was not introduced in evidence, and evidence was offered relating to it on the assumption that it was the same screen that was in the engine from which the fire was communicated. *Held*, that an instruction that it was the jury's duty not to consider any fact which they might have observed while examining the screen as evidence was properly refused, as misleading; since they might properly consider the facts so disclosed in applying other testimony.—*Cleveland, C., C. & St. L. Ry. Co. v. Scantland*, 51 N. E. 1068, 151 Ind. 488.

[c] (App. 1903)

Where the court charged, in an action for the loss of buildings alleged to have been fired by defendant's locomotive, that plaintiff was not absolutely bound to remove old shingles or other combustible material, and was not guilty of

negligence if its buildings were covered with dry shingles, or in not covering the buildings with noncombustible material, and in another instruction authorized the jury to consider the age of the shingles, the kind of wood of which they were made, and their inflammable character, in determining whether plaintiff was guilty of contributory negligence, such instructions were misleading.—*Indiana Clay Co. v. Baltimore & O. S. W. R. Co.*, 67 N. E. 704, 31 Ind. App. 258.

An instruction that the origin of a fire alleged to have been communicated to plaintiff's building by defendant's engine might be proved by circumstances, and, if they were such as to justify the inference that the fire was emitted from defendant's locomotive, the jury might find that the locomotive was the origin of the fire, which the court modified by inserting the word "negligently" before the word "emitted," was error, since it made proof of the origin of the fire depend on the question of negligence in its emission from the locomotive.—*Id.*

[d] (Sup. 1904)

In an action for damage resulting from fires alleged to have been set by defendant's locomotive, where it appeared that, after the passing of the locomotive, fire was discovered on plaintiff's premises near the track on the side to which the wind was blowing, where there had been no fire for a considerable time before, the charge of the court that, if the jury found that sparks escaped from the engine and blew 70 or 80 feet, they might consider that fact in determining whether the spark arresters on the locomotive were in proper condition, even if improper, did not constitute reversible error.—*Toledo, St. L. & W. R. Co. v. Fenslemaker*, 163 Ind. 534, 72 N. E. 561.

[e] (Sup. 1905)

In an action against a railroad for the destruction of property by fire, a charge that if plaintiff's barn was set on fire by sparks carried by the wind against the same, and such sparks were thrown from defendant's engine on account of a defective spark arrester, it would make no difference how the engine was being run as to speed or amount of steam, did not mislead the jury, where in other instructions the court charged with great explicitness that plaintiff must show negligence to authorize a finding in her favor, and the jury, in answer to special interrogatories, found the existence of negligence.—*Lake Erie & W. R. Co. v. McFall*, 165 Ind. 374, 76 N. E. 400.

[f] (App. 1906)

Where the second paragraph of a complaint in an action against a railroad for setting out fire charged negligence, in that defendant permitted combustible material to remain on its right of way, which material was set on fire by a locomotive, and the fire permitted to escape to plaintiff's premises, whether sparks of unusual size and number escaped from the engine, and, being carried an unusual

distance, started a number of fires in different places on defendant's premises, was not within the issue tendered by such paragraph, and hence an instruction making such conditions applicable to that paragraph was erroneous.—*Pittsburg, C., C. & St. L. Ry. Co. v. Wise*, 74 N. E. 1107, 36 Ind. App. 59.

[g] (Sup. 1906)

In an action against a railroad for fire alleged to have been negligently set out, the court charged that it was the railroad's duty to use all "reasonable precaution" in operating its trains, and providing its engines with proper spark arresters, so as to prevent injuries to the property of others by fire emitted therefrom, and in the instruction immediately succeeding, after stating the circumstances hypothetically, charged that "a greater degree of care" was required than under ordinary conditions. *Held*, that the latter instruction was objectionable, as misleading the jury to believe that under the circumstances hypothesized the railroad company was bound to exercise more than ordinary care.—*Lake Erie & W. Ry. Co. v. Ford*, 167 Ind. 205, 78 N. E. 969.

[h] (Sup. 1906)

In an action against a railroad company for setting fire to plaintiff's property, instructions on the theory that the company might acquit itself of negligence by showing the employment of a competent inspector, coupled with the fact that the spark arrester appeared to him to be in good condition, was sufficient to absolve the company from dereliction in failure to inspect were insufficient for not including the element of a reasonably careful inspection.—*Cleveland, C., C. & St. L. Ry. Co. v. Hayes*, 167 Ind. 454, 79 N. E. 448.

[i] (App. 1908)

In an action against a railroad company to recover damages from a fire communicated by its locomotive, an instruction that defendant was required to use a high degree of care and skill to prevent the escape of fire from its engines is not objectionable, as the jury must have understood that the "high degree of care" had reference to the degree of care and skill required in equipping defendant's locomotives and in keeping them in repair.—*Toledo, St. L. & W. R. Co. v. Sullivan*, 83 N. E. 1024, 41 Ind. App. 390.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1747-1756.

See, also, 33 Cyc. pp. 1398-1402.

§ 486. — Verdict and findings.

Failure to answer interrogatories or make findings, see TRIAL, § 356.

Questions proper to be submitted by special interrogatories, see TRIAL, § 350.

Responsiveness of findings, see TRIAL, § 357.

Sufficiency of special findings in general, see TRIAL, § 355.

[a] (Sup. 1879)

In an action to recover of a railroad company for the burning of the plaintiff's house, caused by sparks from a locomotive having a defective spark arrester, the jury, with their general verdict, found that the burning could not have occurred if the locomotive had had a proper spark arrester; that the sparks entered an unoccupied upper room of the house through a window fronting on the track, left open by the plaintiff, but not by negligence on her part, she not knowing of the use of the defective locomotive. *Held*, that the defendant was not entitled to judgment non obstante.—*Louisville, N. A. & C. Ry. Co. v. Richardson*, 66 Ind. 43, 32 Am. Rep. 94.

[b] (Sup. 1889)

In an action against a railroad company for burning property, failure of a special verdict to find as to whether defendant's engines were in proper condition and properly operated could not be complained of by defendant as such omitted facts would be deemed as found against plaintiff.—*Louisville, N. A. & C. Ry. Co. v. Hart*, 21 N. E. 753, 119 Ind. 273, 4 L. R. A. 549.

[c] (Sup. 1893)

In an action to recover damages against a railroad company for injuries by fire, special interrogatories, and answers thereto, as to whether defendant had at specified times examined the spark arrester, and whether it was in perfect condition at the time of the casualty, cannot control a general verdict in favor of plaintiffs, in that the question of the negligence of defendant's employes in operating the engine is left out of consideration.—*Cincinnati, I., St. L. & C. Ry. Co. v. Smock*, 133 Ind. 411, 33 N. E. 108.

[d] (App. 1895)

Where the complaint alleged negligence on the part of defendant railroad company merely in allowing its locomotives to be without proper spark arresters, special findings by the jury that there was evidence that all the engines passing plaintiff's land on each day had proper spark arresters, and that there was no reliable evidence that such spark arresters were in good condition, are not inconsistent with a general verdict for plaintiff.—*Chicago & E. R. Co. v. Zimmerman*, 12 Ind. App. 504, 40 N. E. 703.

[e] (App. 1896)

In an action against a railroad company for damages from fire negligently set out on its right of way by its employes, and allowed to spread to plaintiff's land, a finding that plaintiff, who was a resident of another state, was not present at the time of the fire, shows freedom from contributory negligence.—*Tien v. Louisville, N. A. & C. R. Co.*, 15 Ind. App. 304, 44 N. E. 45.

In an action against a railroad for damages from fire negligently set out on its right of way, a special verdict which shows that the land burned was plaintiff's, and describes the land as

described in the complaint, sufficiently shows that the land burned was the land described in the complaint.—Id.

[f] (App. 1896)

A judgment for damages for an injury to plaintiff's premises by fire caused by the negligence of defendant railroad company is not sustained by a special verdict which fails to find that the damage resulted without contributory negligence on the part of plaintiff.—Louisville, N. A. & C. Ry. Co. v. Porter, 16 Ind. App. 266, 44 N. E. 1112.

[g] (App. 1897)

A finding that plaintiff expended labor in suppressing the fire shows sufficient effort to save his property.—New York, C. & St. L. R. Co. v. Grossman, 46 N. E. 546, 17 Ind. App. 652.

That a railroad company was negligent, and that such negligence was the proximate cause of the injury, is shown by findings that combustible material was allowed to accumulate on its right of way; that it was an exceedingly dry time; that there was a "brisk" wind blowing towards plaintiff's land from the right of way; that sparks from a passing engine set fire to said material; and that defendant negligently permitted it to escape to plaintiff's land, and destroy his property.—Id.

[h] (App. 1897)

In an action for damages from fire caused by a railroad company, a special verdict was returned on the question as follows: "Did not plaintiff and members of his family make all reasonable efforts to subdue and extinguish said fire? Answer. Yes. Did not the injuries * * * occur without any fault or negligence on his part? Answer. Yes." Held, that the findings are conclusions of law, and not findings of fact, and not sufficient, as a special verdict, to show want of negligence by plaintiff.—Wabash R. Co. v. Miller, 48 N. E. 663, 18 Ind. App. 549.

[i] (App. 1897)

In an action against a railroad company for damages caused by fire, a special verdict finding that plaintiff had taken certain precautions to prevent the destruction of his property prior to the date at which the fire occurred is insufficient to show his freedom from contributory negligence; the verdict being silent as to whether he was present when the fire started or at any time during its continuance.—Chicago & E. R. Co. v. Bailey, 46 N. E. 688, 19 Ind. App. 163.

[j] (App. 1898)

In an action for damages from a fire set by a railroad company, a special verdict, which fails to show whether or not plaintiff or his agents were present at the fire, and, if present, or with knowledge of it, what, if anything, they did to prevent the injury, is defective, and will not support a judgment.—Louisville, N. A. & C. Ry. Co. v. Carmon, 20 Ind. App. 471, 48 N. E. 1047, 50 N. E. 893.

In an action against a railroad company for damages from fire alleged to have escaped from defendant's locomotive, an interrogatory to the jury was, "Did plaintiff do anything which in any way aided the spread of the fire or contribute to the spread of the fire?" and the answer was, "No." Held, that standing alone it did not sufficiently show that plaintiff was free from fault.—Id.

In an action against a railroad company for damages from fire alleged to have escaped from defendant's locomotive, the special verdict must show the negligence charged against the defendant, that the injury was without plaintiff's fault, and it must also show what, if anything, defendant did to prevent the injury.—Id.

[k] (App. 1898)

A judgment for damages caused by a fire originating on a railroad right of way is not proper where the verdict consists of interrogatories and answers, and the facts found do not show affirmatively that plaintiff was without contributing fault.—Baltimore & O. S. W. Ry. Co. v. Does, 51 N. E. 368, 20 Ind. App. 680.

One suing for damages caused by a fire originating on a railroad right of way is not entitled to a judgment where the special verdict states that he was free from contributory negligence, but does not find any facts supporting such a conclusion.—Id.

[l] (App. 1899)

In an action for injury caused by a locomotive setting out a fire, a special answer that the spark arrester was of the most approved kind was not inconsistent with a general verdict for plaintiff, other answers showing the verdict was based on its defectiveness for want of repair.—Chicago, I. & L. Ry. Co. v. Gilmore, 53 N. E. 1073, 22 Ind. App. 466.

[m] (App. 1899)

In an action against a railroad company for damages occasioned by fire, a special verdict was returned answering affirmatively interrogatories as follows: "Did plaintiff become aware that his property was in danger of being burned * * * before it reached his land?" "If you answer * * * in the affirmative, then did plaintiff * * * endeavor to prevent said fire from reaching his property?" "Did plaintiff do all in his power to prevent his property from being injured by said fire? * * * " And negatively: "If you find that plaintiff's property was injured by the fire, * * * then did said injury occur through any fault of his?" Held, that there was not such a showing of due care and diligence as was necessary in a special verdict.—Pennsylvania Co. v. Manderville, 53 N. E. 489, 22 Ind. App. 697.

[n] (App. 1899)

Special findings that defendant's engine which started the fire was provided with a proper spark arrester, but that it was improperly operated by running at too great a speed in so short a distance from the starting point,

are not in conflict with a general verdict finding defendant negligent.—*McDoel v. Gill*, 53 N. E. 956, 23 Ind. App. 95.

[o] (Sup. 1900)

In an action for damages from a fire communicated from defendant's right of way, a finding that defendant's right of way was covered with dry, combustible material, consisting in part of weeds and grass cut two weeks before the fire, and that fire was started by defendant's engine, and spread continuously through such combustible material till it reached plaintiff's building, is sufficient without a finding as to the amount of combustible material, or that permitting the grass and weeds to remain for two weeks after being cut was unnecessary, or increased the danger.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Indiana Horseshoe Co.*, 56 N. E. 766, 154 Ind. 322.

[p] (App. 1900)

Where, in an action for damages caused by a fire started by a locomotive, both a general verdict for the plaintiffs and answers to special interrogatories were returned, the fact that such answers did not affirmatively show that plaintiffs were free from contributory negligence is insufficient to show that the jury was not justified in returning the general verdict.—*Chicago, I. & L. Ry. Co. v. McCoy*, 55 N. E. 869, 24 Ind. App. 651.

[q] (App. 1900)

Where damages were claimed against a railroad for causing a fire on its right of way, and negligently permitting it to escape, and the evidence supported special findings that the fire originated on such right of way from sparks from an engine, and escaped from the right of way, a general finding for the plaintiff was in harmony with such special findings.—*Lake Erie & W. R. Co. v. Miller*, 57 N. E. 596, 24 Ind. App. 662.

[r] (App. 1902)

In an action for damages from fire alleged to have been caused by defendant railway company, there were special interrogatories and answers, to wit: "(5) Does the preponderance of the evidence show that such fire might not have started in some other way than by the fire from a locomotive? Answer. No. (6) Is it established by the preponderance of the evidence that there was reasonable cause for the origin of the fire, except from fire from the locomotive * * * ? Answer. No." The jury, in answer to preceding interrogatories, had found that the fire had started about five minutes after the passing of the train; but the complaint did not refer to any particular locomotive, and there was no interrogation as to any particular locomotive. *Held*, that such special findings were not in irreconcilable conflict with the general verdict for plaintiff.—*Wabash R. Co. v. Schultz*, 64 N. E. 481, 30 Ind. App. 495.

[s] (Sup. 1903)

Where, in an action against a railroad company for damages from fire alleged to have escaped from defendant's locomotive, the jury found for plaintiff, and, in answer to interrogatories, found that there was a sufficient spark arrester, but that there was negligence in the operation of the locomotive, the answers to the interrogatories were not in conflict with the general verdict.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Wilson*, 66 N. E. 899, 161 Ind. 701.

[t] (Sup. 1906)

In an action against a railroad for the destruction of property by fire, where the jury answered in the affirmative a special interrogatory as to whether there was any defect in the construction of the engine or spark arrester, a further answer, in response to a question as to what that defect was, that it was a defect in the spark arrester, was sufficiently specific.—*Lake Erie & W. R. Co. v. McFall*, 76 N. E. 400, 165 Ind. 574.

[u] (Sup. 1906)

In an action for fire alleged to have been negligently set out by defendant railroad company, an alleged variance consisting of a finding that the fire started in a manure pile, instead of in the adjoining barn as alleged, could not be raised on answers to interrogatories.—*Lake Erie & W. Ry. Co. v. Ford*, 167 Ind. 205, 78 N. E. 969.

[v] (Sup. 1906)

In an action against a railroad company for negligently setting fires by using a defective spark arrester and in overtaxing its locomotive, where the special issues submitted failed to show a thorough inspection of the spark arrester, and also failed to negative negligence in the management of the locomotive, and there is no finding as to the condition of the spark arrester, the general verdict for plaintiff must prevail.—*Cleveland, C., C. & St. L. R. Co. v. Hayes*, 167 Ind. 454, 79 N. E. 448.

[w] (Sup. 1907)

Though, in an action against a railway company for loss caused by a fire started by sparks from an engine, the answers of the jury to interrogatories were clearly against the allegations of the complaint as to the negligent construction of the engine and the company's negligent failure to keep the same in repair, where there was nothing in such answers in irrevocable conflict with the general verdict as to the negligent operation of the engine, the court did not err in overruling the company's motion for a judgment in its favor on the answers to the interrogatories notwithstanding the general verdict.—*Pittsburgh, C., C. & St. L. Ry. Co. v. Brough*, 168 Ind. 378, 81 N. E. 57, 12 L. R. A. (N. S.) 401.

[x] (App. 1907)

In an action for injuries from fire set by locomotive, answers to interrogatories showing

that the engine was equipped with a sufficient spark arrester, but that the engine was not operated by a skilled engineer, and that the engineer used more steam than was required to get up the grade, are not inconsistent with a general verdict for plaintiff.—*Louisville & N. R. Co. v. Vinyard*, 39 Ind. App. 628, 79 N. E. 384.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 1757.

See, also, 33 Cyc. p. 1403.

§ 487. — Judgment.

[a] (App. 1897)

A complaint alleging that defendant negligently permitted fire and sparks to escape from its engine and set fire to rubbish which defendant had negligently allowed to accumulate on its right of way, and that the fire so kindled was negligently suffered to escape to plaintiff's adjoining premises, and burn up his property without negligence on his part, is sufficient to sustain a judgment against defendant on default.—*Chicago & S. E. Ry. Co. v. Daily*, 47 N. E. 1078, 18 Ind. App. 308.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. § 1758.

See, also, 33 Cyc. p. 1403.

§ 488. — Appeal and error.

[a] (Sup. 1881)

In an action against a railroad company to recover damages for the destruction of wood, piled near the track, by fire set out by defendant's locomotives, an instruction that "if the season at which the fire occurred was unusually dry, the railroad company, defendant, was bound by law to take extra precautions against fire, and, if she did not do so, this fact may be considered in determining the question of negligence," was not open to objection on appeal where appellant failed to ask for more specific instructions.—*Pittsburgh, C. C. & St. L. R. Co. v. Noel*, 77 Ind. 110.

[b] (Sup. 1882)

In an action against a railroad company, charging that defendant negligently permitted

grass to grow on its track, so negligently conducted the running of one of its engines that sparks of fire escaped, that the engine was not in proper condition to prevent the escape of sparks, and that defendant permitted the fire to spread from its right of way, a general verdict for plaintiff would not be disturbed because there was not evidence to show that the engine was not in proper condition.—*Louisville, N. A. & C. Ry. Co. v. Stevens*, 87 Ind. 198.

[c] (App. 1899)

In an action for a fire set by a locomotive, it appeared from the evidence that the size of the standard meshes in a spark arrester was about three-sixteenths of an inch, being three or four to an inch; that diagonally the mesh was one-fourth or five-sixteenths of an inch; that it would take a good gale to blow a spark from an engine so equipped 30 feet from the center of the track, and in doing that there ought not to be any vitality left, and, if there was, it would have to be as large as a walnut. *Held* that, in view of this evidence, defendant was not harmed by the admission, conceding it improper, of an expert's opinion that in a case of a real live spark, if it was the size of a grain of wheat or rye, it might, before it died away, be seen readily in the daytime from 10 to 20 rods, passing from a smokestack.—*Chicago & E. R. Co. v. Kreig*, 53 N. E. 1033, 22 Ind. App. 393.

FOR CASES FROM OTHER STATES,

SEE 41 CENT. DIG. R. R. §§ 1759-1761.

See, also, 33 Cyc. pp. 1403, 1404.

RAILWAY MAIL CLERKS.

Passengers, see CARRIERS, § 241.

RAINFALL.

Best evidence to show, see EVIDENCE, § 168.

RAIN WATER.

See WATERS AND WATER COURSES, § 121.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

RAPE.

Scope-Note.

[INCLUDES sexual intercourse with a female without her consent, or where her consent is extorted by fear or obtained by fraud, or with a female who either is in fact or is deemed in law incapable of such consent, and attempts and assaults with intent to commit such offenses, and aiding therein, and compulsion of a woman to marry or to be defiled; and carnal knowledge or abuse of female child; nature and extent of criminal responsibility therefor and grounds of defense; and prosecution and punishment of such acts as public offenses.

[EXCLUDES indecent assaults without intent to commit rape (see *Assault and Battery*); and abduction or detention of a female for purpose of sexual intercourse (see *Abduction*). For complete list of matters excluded, see cross-references, post.]

Analysis.

I. Offenses and Responsibility Therefor.

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- § 8. Want of consent of female.
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II. Prosecution and Punishment.

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- § 20. Requisites and sufficiency in general.
- § 21. Intent.
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- § 26. Description of acts constituting offense.
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(C) TRIAL AND REVIEW.

- § 56. Reception of evidence.
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II. Prosecution and Punishment—Continued.

(D) SENTENCE AND PUNISHMENT.

§ 64. Nature and extent of punishment.

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Cross-References.

Abduction of female for purpose of sexual intercourse, see ABDUCTION.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

§ 2. Statutory provisions.

Repeal of penal act by change in definition of offense or in punishment thereof, see STATUTES, § 165.

Saving clause in statutes, see STATUTES, § 277. Setting forth provisions of statute as altered or amended, see STATUTES, § 141.

FOR CASES FROM OTHER STATES,
SEE 42 CENT. DIG. Rape, § 2.
See, also, 33 Cyc. p. 1416.

§ 4. Persons on whom offense may be committed.

[a] (Sup. 1907)

All human females 14 years of age and over are deemed women within the statute defining rape.—*Rahke v. State*, 168 Ind. 615, 81 N. E. 584.

FOR CASES FROM OTHER STATES,
SEE 42 CENT. DIG. Rape, § 4.
See, also, 33 Cyc. p. 1420.

§ 6. Force.

[a] (Sup. 1884)

Where, on a trial for rape, the evidence failed to show that the prosecutrix consented to, or had knowledge of, the act of sexual intercourse until after it was fully accomplished, the force required to constitute the offense is in the wrongful act.—*Pomeroy v. State*, 94 Ind. 96, 48 Am. Rep. 146.

[b] (Sup. 1907)

The force necessary to constitute rape need not be actual, but may be constructive, or implied.—*Rahke v. State*, 168 Ind. 615, 81 N. E. 584.

FOR CASES FROM OTHER STATES,
SEE 42 CENT. DIG. Rape, § 6.
See, also, 33 Cyc. p. 1427.

§ 7. Carnal knowledge.

[a] (Sup. 1887)

Under Criminal Code, § 1806, it is sufficient to prove penetration either by direct or circumstantial evidence, and evidence of penetration to the slightest depth is sufficient to establish the crime of rape, if the other elements

of the offense are present.—*Taylor v. State*, 111 Ind. 279, 12 N. E. 400.

FOR CASES FROM OTHER STATES,
SEE 42 CENT. DIG. Rape, § 7.
See, also, 33 Cyc. pp. 1421, 1422.

§ 8. Want of consent of female.

FOR CASES FROM OTHER STATES,
SEE 42 CENT. DIG. Rape, §§ 8-12.
See, also, 33 Cyc. pp. 1423-1428.

§ 9. — In general.

[a] (Sup. 1907)

In order to constitute rape, it is only necessary that the woman should not consent, provided her resistance is in good faith, and not mere pretense.—*Rahke v. State*, 168 Ind. 615, 81 N. E. 584.

FOR CASES FROM OTHER STATES,
SEE 42 CENT. DIG. Rape, § 8.
See, also, 33 Cyc. p. 1423.

§ 10. — Fraud or other deception.

[a] (Sup. 1883)

A physician made an examination of a girl 19 years of age, in her mother's presence, and said that she was suffering from a womb disease, and afterwards, under pretense of making further examination, took her into a private room, where, under the same pretense, he succeeded in having connection with her without her making any outcry. *Held*, that he was guilty of rape.—*Pomeroy v. State*, 94 Ind. 96, 48 Am. Rep. 146.

FOR CASES FROM OTHER STATES,
SEE 42 CENT. DIG. Rape, § 9.
See, also, 33 Cyc. p. 1428; notes, 12 Am. Rep. § 390, 38 Am. Rep. 860.

§ 11. — Intimidation and fear.

[a] (Sup. 1907)

Consent to sexual intercourse by a woman with a man other than her husband, induced by duress, fear, or fraud, is no defense to a prosecution for rape.—*Rahke v. State*, 168 Ind. 615, 81 N. E. 584.

FOR CASES FROM OTHER STATES,
SEE 42 CENT. DIG. Rape, § 10.
See, also, 33 Cyc. p. 1428.

§ 14. Resistance by female.

[a] (Sup. 1875)

The term "rape" imports, not only force and violence on the part of the man, but resistance on the part of the woman.—*Mills v. State*, 52 Ind. 187.

[b] (Sup. 1886)

In a prosecution for rape, it is necessary for the state to show that the woman resisted with all the means within her power; but the nature of the means, and the extent of the resistance, must depend upon the peculiar circumstances of each particular case.—*Anderson v. State*, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711.

[c] (Sup. 1890)

To establish the crime of rape on a woman not of unsound mind, and who has reached the age of consent, it must be proved, beyond a reasonable doubt, that there was actual resistance on her part, or that resistance was prevented by violence, or restrained by fear; opposition by mere words is not enough.—*Huber v. State*, 126 Ind. 185, 25 N. E. 904.

[d] (Sup. 1892)

The nature and extent of resistance which ought reasonably to be expected in each particular case must necessarily depend very much upon the peculiar circumstances attending it, and no general rule can be laid down on the subject as applicable to all cases involving the necessity of showing a reasonable resistance.—*Cross v. State*, 31 N. E. 473, 132 Ind. 65.

[e] (Sup. 1894)

The kind and degree of resistance on the part of a female that must be exerted in order to constitute a rape on her must depend upon the circumstances surrounding the act.—*Hawkins v. State*, 36 N. E. 419, 136 Ind. 630.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rape, § 13.

See, also, 33 Cyc. p. 1427.

§ 16. Assaults with intent to rape.

Indictment or information, see post, § 34.

Loss of jurisdiction, see CRIMINAL LAW, § 102.

Sufficiency of evidence, see post, § 53.

[a] (Sup. 1886)

Under an indictment for an assault with intent to commit a rape upon a female child under 12 years of age, based upon section 1909, Rev. St. 1881, the prosecution must prove both the intention and an assault in pursuance of such intention; and where, after certain familiarities consented to by the girl, the attempt is abandoned on her refusal to allow the intercourse, there can be no conviction.—*Stephens v. State*, 107 Ind. 185, 8 N. E. 94.

[b] Under the statute making the act of sexual intercourse with any female under the age of 12 years a crime, any touching of the person of a female under that age, with intent to have sexual intercourse with her, is an assault and battery with intent to commit rape, wheth-

er it be done against her will or not.—(Sup. 1889) *Murphy v. State*, 120 Ind. 115, 22 N. E. 106, overruled *Stephens v. State* (1886) 107 Ind. 185, 8 N. E. 94.

[c] (Sup. 1894)

A conviction of assault with intent to rape cannot be had, in the absence of evidence showing defendant's intent to enforce carnal knowledge of prosecutrix against her will.—*White v. State*, 136 Ind. 308, 36 N. E. 274.

[d] (Sup. 1900)

One who, by lascivious conduct towards a female under the age of consent, attempts to induce her to submit to sexual intercourse with him, is guilty of an assault and battery with intent to commit rape.—*Hanes v. State*, 57 N. E. 704, 155 Ind. 112.

Any touching of the person of a female under the age of consent (14 years) with intent to have sexual intercourse is, though with her consent, an assault and battery with intent to commit a rape, since such female has no power to consent thereto.—*Id.*

[e] (Sup. 1907)

Burns' Ann. St. Supp. 1905, § 1995, declares that whoever perpetrates an assault or an assault and battery on any human being, with intent to commit a felony, shall, on conviction, be imprisoned, etc., and section 2004 declares that whoever unlawfully has carnal knowledge of a woman forcibly against her will or of a female child under 14 years of age is guilty of rape. *Held*, that force is an essential element of assault to rape committed on a female over 14 years of age.—*Rahke v. State*, 168 Ind. 615, 81 N. E. 584.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rape, §§ 15-19.

See, also, 33 Cyc. pp. 1429-1436.

§ 17. Defenses.

[a] (Sup. 1910)

Accused was guilty of rape under the statute if he had sexual intercourse with a girl under 14 years old, she being incapable of consenting thereto, and it was immaterial whether she had been previously chaste.—*Heath v. State*, 90 N. E. 310.

An erroneous belief as to the age of the girl, however well founded, is not a defense to a prosecution for rape upon a female child under 14 years old, if she was in fact within the prohibited age.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rape, § 20.

See, also, 33 Cyc. pp. 1430, 1438; note, 86 L. R. A. 479.

II. PROSECUTION AND PUNISHMENT.**(A) INDICTMENT AND INFORMATION.**

Conviction of offense included in charge, see INDICTMENT AND INFORMATION, § 191.

Duplicity, see INDICTMENT AND INFORMATION, § 125.

Election between counts, see INDICTMENT AND INFORMATION, § 132.

Language and form of allegations, see INDICTMENT AND INFORMATION, § 74.

Necessity of prosecution by indictment, see INDICTMENT AND INFORMATION, § 3.

Variance between indictment or information and preliminary affidavit, see INDICTMENT AND INFORMATION, § 122.

§ 20. Requisites and sufficiency in general.

[a] (Sup. 1871)

An indictment for rape, charging that defendant "did" make an assault upon the prosecuting witness, and her "ravish and carnally know," is not bad because the word "did" is not repeated before the words "ravish and carnally know"; all being in the same sentence.—*Whitney v. State*, 35 Ind. 503.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rape, §§ 23, 25.

See, also, 33 Cyc. p. 1439.

§ 21. Intent.

[a] (Sup. 1844)

If the description of rape in an indictment leave out the word "unlawfully," but be in accordance with the common-law definition of the offense, it is sufficient.—*Weinzorpfen v. State*, 7 Blackf. 186.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rape, § 24.

§ 23. Age of female.

[a] (Sup. 1908)

Under Burns' Ann. St. 1908, § 2250, punishing one who has carnal knowledge of a female child under 16 years of age, and punishing one being over 17 years of age who has carnal knowledge of an insane woman, etc., an indictment for rape on a female child under 16 years is not bad for failing to allege that accused was over the age of 17.—*Cheek v. State*, 171 Ind. 98, 85 N. E. 779.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rape, § 27.

See, also, 33 Cyc. p. 1441.

§ 26. Description of acts constituting offense.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rape, §§ 30, 31.

See, also, 33 Cyc. pp. 1441-1446.

§ 27. — Female under age of consent.

[a] (Sup. 1888)

An indictment charging that defendant, at a certain time and place, "did then and there unlawfully and feloniously make an assault in and upon one C., a female child, then and there being under the age of 12 years, to wit, of the

age of 11 years, and did then and there unlawfully and feloniously ravish and carnally know her, the said C., contrary to the form of the statute," etc., is sufficient on motion in arrest of judgment.—*McClure v. State*, 116 Ind. 160, 18 N. E. 615.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rape, § 31.

See, also, 33 Cyc. p. 1442.

§ 34. Assault with intent to rape.

[a] (Sup. 1867)

An indictment for an assault and battery with intent to commit a felony which charges the intent as follows: "With the intent then and thereby willfully, forcibly and feloniously, and against her will, to have carnal knowledge of said woman"—is sufficient.—*Dooley v. State*, 28 Ind. 239.

[b] (Sup. 1875)

An indictment for an assault and battery with intent to ravish must use, in describing the crime intended, the word "unlawfully," or some equivalent word.—*Greer v. State*, 50 Ind. 267, 19 Am. Rep. 709.

[c] (Sup. 1894)

An information charging that accused did unlawfully, in a rude and insolent manner, feloniously touch, strike, and wound L., a female child under 12, with intent thereby to feloniously and unlawfully ravish and carnally know her, sufficiently charges an assault and battery with intent to commit a felony, under Rev. St. § 1909, without the word "feloniously" preceding the words charging assault, since section 1911 defines assault and battery as unlawfully touching another in a rude, insolent, or angry manner, and section 1917 defines as rape the unlawfully having carnal knowledge of a female child under 12.—*Polson v. State*, 137 Ind. 519, 35 N. E. 907.

[d] (Sup. 1896)

An affidavit and information charging that defendant did then and there unlawfully, feloniously, and in a rude, insolent, and angry manner, touch, strike, push, pull, grasp, and wound one A., a woman, then and there being with intent then and there and thereby unlawfully, feloniously, and forcibly and against her will to ravish and carnally know her, contained the essential elements of assault and battery with intent to rape.—*State v. Duggins*, 45 N. E. 603, 146 Ind. 427.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rape, §§ 37-41.

See, also, 33 Cyc. pp. 1446-1450.

§ 35. Issues, proof, and variance.

[a] (Sup. 1876)

The statute defining and prescribing punishment for rape enumerates two classes of facts, each of which constitutes a rape. First, it is a rape to unlawfully have carnal knowledge of a woman against her will; second, it is a

rape to unlawfully have carnal knowledge of a female child under 12 years of age. All females of the human species over 12 years of age are to be deemed "women" within the meaning of the first clause of the statute. A charge of a rape of one class cannot be sustained by proof of a rape of the other class; nor can a charge of assault and battery with intent to commit a rape of one class be sustained by evidence of an assault and battery with intent to commit a rape of the other class.—*Greer v. State*, 50 Ind. 267, 19 Am. Rep. 700.

[b] (Sup. 1879)

Where an indictment for rape alleged that the name of the prosecuting witness was Dellia, while the evidence showed that her name was Della, there was a fatal variance.—*Vance v. State*, 65 Ind. 460.

[c] (Sup. 1900)

Where, on a prosecution for rape, the affidavit and information named Laura V. as the alleged victim, and on trial the only name proven was Lillie, the judgment on conviction should be reversed for failure of proof, since the name was an essential element in the legal description of the offense.—*McFarland v. State*, 56 N. E. 910, 154 Ind. 442.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rape, §§ 42-45.

See, also, 33 Cyc. pp. 1451-1453.

(B) EVIDENCE

Effect of statutory protection of witness from use of evidence against herself, see WITNESSES, § 304.

Leading questions, see WITNESSES, § 243.

§ 37. Admissibility.

Evidence of other offenses, see CRIMINAL LAW, § 369.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rape, §§ 48-70.

See, also, 33 Cyc. pp. 1454-1498.

§ 40. — Character and habits of female.

[a] (Sup. 1877)

Evidence that the prosecuting witness was a prostitute, or had on previous occasions had sexual intercourse with other persons for pay, is not competent for any purpose, in defense of an indictment for rape.—*Richie v. State*, 58 Ind. 355.

[b] (Sup. 1886)

Evidence as to the moral character of the woman for chastity and virtue is admissible to affect her credit as a witness, and as to whether the act of intercourse was voluntary or against her will.—*Anderson v. State*, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711.

[c] (Sup. 1888)

On a trial for rape, evidence that the prosecuting witness, a short time before the alleged

rape, submitted to sexual intercourse with one of defendants, who, according to her testimony, participated in the crime, is relevant as a circumstance rendering it probable that force was not used.—*Bedgood v. State*, 115 Ind. 275, 17 N. E. 621.

[d] (Sup. 1889)

On a trial for rape, where there was evidence of the unchastity of the prosecuting witness, and the defense was consent, it was error to instruct that the evidence of unchastity was introduced only to affect the credibility of the prosecuting witness, as such evidence was proper to render the consent more probable.—*Carney v. State*, 118 Ind. 525, 21 N. E. 48.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rape, §§ 55-59.

See, also, 12 Cyc. p. 418; 33 Cyc. p. 1478.

§ 43. — Physical and mental condition of parties.

[a] (Sup. 1894)

The mother of the victim may testify that she examined her, and may state her condition, and the complaints of suffering made by her, at the time of the examination.—*Polson v. State*, 137 Ind. 519, 35 N. E. 907.

The physician who examined the victim after the outrage may testify to her condition when he examined her, and give his expert opinion thereon.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rape, §§ 62, 65.

See, also, 33 Cyc. pp. 1470, 1474.

§ 47. — Conduct and acts of female.

[a] (Sup. 1890)

In a prosecution for rape, evidence that after its alleged commission, prosecutrix cheerfully came hand in hand with accused from the place where it was alleged to have been committed was competent as tending to rebut the inference arising from her testimony that she had been ravished against her will.—*Huber v. State*, 25 N. E. 904, 126 Ind. 185.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rape, § 66.

See, also, 33 Cyc. p. 1469.

§ 48. — Complaints and declarations of female.

[a] (Sup. 1869)

On the trial of a prosecution for assault and battery with intent to commit a rape, statements made in the absence of the defendant by the female alleged to have been so injured, not allowed to testify on account of her immature age, elicited soon after the transaction by questions to her by her parents, are not admissible in evidence to prove the crime charged.—*Weldon v. State*, 32 Ind. 81.

[b] (Sup. 1871)

In a prosecution for rape, the fact that the prosecutrix made complaint of the injury

soon after the occurrence is admissible; but the particulars of such complaint, and what she said in respect thereto, are not.—*Thompson v. State*, 38 Ind. 39.

On a trial for rape, a witness, in describing the complaint made by the woman immediately afterwards, may not give the name of defendant as the man charged by the woman with having committed the rape.—*Id.*

On trial for rape, the prosecution may show, by the testimony of the prosecuting witness, or that of other witnesses, that she made complaint of the outrage recently after its commission, and when, where, and to whom it was made.—*Id.*

On the direct examination, the practice has been merely to ask whether she made complaint that such an outrage had been perpetrated upon her, and to receive in answer only a simple "Yes" or "No." Her complaint is only corroborative of her testimony, and is not evidence of the fact upon which the jury can find the defendant guilty, and, when she is not a witness in the case, it is wholly inadmissible.—*Id.*

[c] (Sup. 1892)

On a prosecution for rape, evidence that the prosecuting witness made complaint soon after the occurrence is admissible as corroborative of her testimony, but it was not proper to permit the witnesses to give a detailed statement of what she said.—*Cross v. State*, 31 N. E. 473, 132 Ind. 65.

[d] (Sup. 1894)

The victim may testify to the fact that she complained of the outrage to others.—*Polson v. State*, 137 Ind. 519, 35 N. E. 907.

FOR CASES FROM OTHER STATES.

SEE 42 CENT. DIG. Rape, §§ 67-69.

See, also, 33 Cyc. pp. 1462-1468; note, 38 Am. Rep. 369.

§ 49. — Failure of female to complain, or delay in complaining, and explanation thereof.

[a] (Sup. 1894)

The complaining witness may state why she did not make complaint to her mother immediately after the commission of the crime.—*Polson v. State*, 137 Ind. 519, 35 N. E. 907.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rape, § 70.

See, also, 33 Cyc. p. 1468.

§ 50. Weight and sufficiency.

Proof of venue, see CRIMINAL LAW, § 564.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rape, §§ 71-84.

See, also, 33 Cyc. pp. 1485-1498.

§ 51. — In general.

[a] (Sup. 1871)

Where, on the trial of an indictment for rape, the evidence showed that the prosecutrix

was of a doubtful character, that she did not presently discover the offense, nor indeed at all until interrogated about it, and she remained with the defendant afterwards, and the party accused did not flee, and the prosecutrix was uncorroborated by any material evidence, the place of the crime being such that it was possible she might have been heard, and she made no outcry, and there were other circumstances of doubt, *held*, that the evidence was insufficient.—*Whitney v. State*, 35 Ind. 503.

[b] In a prosecution for rape, evidence *held* sufficient to sustain a conviction.—(Sup. 1878) *Batterson v. State*, 63 Ind. 531; (1910) *Heath v. State*, 90 N. E. 310.

[c] (Sup. 1887)

In rape, penetration, like any other element of crime, may be established by circumstantial evidence.—*Taylor v. State*, 12 N. E. 400, 111 Ind. 279.

[d] (Sup. 1904)

Under Burns' Ann. St. 1901, § 1875, providing that in prosecutions for rape proof of penetration is sufficient evidence of the offense, a conviction may be upheld though the answer of the prosecuting witness to a question as to penetration did not declare in unambiguous terms that there was penetration, but the inference that there was was the only one comfortable with the evidence.—*Bradburn v. State*, 71 N. E. 133, 162 Ind. 689.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rape, §§ 71-77.

See, also, 33 Cyc. pp. 1485-1492.

§ 52. — Female under age of consent.

[a] (Sup. 1880)

On indictment for rape, the evidence was that the prosecutrix, at the time when the act was committed, did not cry out, nor did she complain within a reasonable time. It appeared, also, that, before instituting criminal proceedings, she had brought suit for seduction under promise of marriage, in which there was no claim that force had been used, and that afterwards she had repeatedly had sexual intercourse with defendant. *Held*, that a verdict of guilty could not be sustained.—*Eyler v. State*, 71 Ind. 49.

[b] (Sup. 1893)

Defendant, a quack, pretending to cure by charms, after several times visiting a girl 13 years old, who had for 2 years had epileptic fits, was placed in a room with her, at his instance, by her ignorant and credulous parents, where, on the fifth night, he called her to his bed, telling her that he had something to tell her which would cure her. Her testimony that she tried to make him quit, but he would not, was uncontradicted. *Held*, that there was not a failure to show sufficient resistance because she made no outcry, and concealed the crime committed on her.—*Eberhart v. State*, 34 N. E. 637, 134 Ind. 651.

[c] (Sup. 1894)

Prosecutrix was 13 years old, and defendant was her mother's family physician. She having gone with her brother and sister to clean his offices, he sent the brother and sister on errands, locked the doors, and took her on his lap. She did not know what he was going to do, but she told him to quit, and he, saying that he would not hurt her, accomplished his purpose. Her brother returned, and could not get into the offices till defendant let him in, and the brother found her crying, and she told him what defendant had done. *Held*, that these facts warranted an inference of moral restraint amounting to coercion, and of a reasonable resistance.—*Hawkins v. State*, 136 Ind. 630, 36 N. E. 419.

[d] (Sup. 1894)

Evidence that prosecutrix was a small woman, and not a person of ordinary intelligence; that she was in fear of violence from defendant and his two companions, who were strangers to her; that she saw no one to whom she could appeal for help (the offense having been committed at a distance from any habitation); and that defendant afterwards left her in a lumber yard,—is sufficient proof that the act was done against her will, though there is no evidence of an outcry.—*Felton v. State*, 139 Ind. 531, 39 N. E. 228.

[e] (Sup. 1894)

A statement by one since deceased, made the day before her death, when, the physician testified, he could get no intelligent answer from her, that defendant had, two days before, committed rape on her, while sick in bed, was insufficient to sustain a conviction, deceased having, after the time of the alleged rape, spoken highly to several persons of defendant, and requested him to assist others in attending to her wants.—*Hutchins v. State*, 140 Ind. 78, 39 N. E. 243.

[f] (Sup. 1895)

Testimony of the prosecutrix that the plaintiff was engaged to her; that he had induced her to walk with him, at night, out of the settled portion of the town; and that when she insisted on going back he forcibly dragged and carried her to a secluded spot, where he had sexual intercourse with her against her will, threatening to kill her if she ever told it,—was sufficient, although contradicted in some particulars, to sustain a conviction.—*Dickerson v. State*, 141 Ind. 703, 40 N. E. 687.

[g] (Sup. 1896)

In a prosecution for rape there was evidence tending to show that prosecutrix, who was but little over 14 years of age, was induced by means of false representations to herself and her mother to go with defendant to the house where the crime was perpetrated; that the house was unoccupied, except by defendant, two apparent accomplices, and prosecutrix; and that defendant accomplished his purpose by means of threats, and against the will of prosecutrix. *Held*, that

the verdict was not unsupported by such evidence.—*Ransbottom v. State*, 144 Ind. 250, 43 N. E. 218.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rape, §§ 71-74, 76.

See, also, 33 Cyc. p. 1491.

§ 53. — Attempt or assault with intent to rape.

[a] (Sup. 1889)

Where there is an entire failure of proof tending to show that defendant on the occasion in question touched the person of the child, or that he did any act from which such touching could be inferred, the evidence was insufficient to support a conviction of assault and battery with intent to commit rape.—*Murphy v. State*, 22 N. E. 106, 120 Ind. 115.

[b] (Sup. 1900)

Defendant, a man of mature years and lustful habits, followed a girl, who had not yet attained to the age of consent, into a barn, where he put his arms about her, and tried to throw her down, at the same time telling her he would not hurt her. It was also shown that he had on previous occasions followed the girl, and attempted to make arrangements with her to see her privately. *Held* sufficient to warrant a verdict finding defendant guilty of an assault and battery with intent to commit rape.—*Hanes v. State*, 57 N. E. 704, 155 Ind. 112.

[c] Evidence held sufficient to sustain a conviction of assault with intent to ravish.—(Sup. 1901) *Hollister v. State*, 59 N. E. 847, 156 Ind. 255; (1903) *Shular v. Same*, 160 Ind. 800, 66 N. E. 746.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rape, §§ 78-82.

See, also, 33 Cyc. pp. 1493-1495.

§ 54. — Corroboration of female.

[a] (Sup. 1898)

In a trial for rape, the evidence showed that prosecutrix was 17 years of age, and, on her way home from a visit, was attacked in a lonely place on the road. When released, she sought protection at the nearest house, and complained to her mother as soon as she reached home. She went at once to the county seat, was examined by physicians, and made affidavit for the arrest of her assailants. Her evidence was further corroborated by admissions made in court as to her parents' testimony, by the evidence of physicians and officers, and by one of the defendants, who at the time of the arrest said to the other: "You take the blame in the matter. You are young, and have money and a guardian, and can stand it better than I can." *Held* sufficient to support a conviction.—*Sutherland v. State*, 49 N. E. 947, 150 Ind. 154.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rape, §§ 83, 84.

See, also, 33 Cyc. pp. 1495-1498.

(C) TRIAL AND REVIEW.

Questions to witness, see WITNESSES, § 236.

§ 56. Reception of evidence.

Proving place after close of evidence, see CRIMINAL LAW, § 687.

[a] (Sup. 1896)

It was not error, in a prosecution for rape, to submit to the inspection of the jury the drawers worn by prosecutrix at the time the alleged crime was committed, after defendant had closed his case, it not appearing that defendant was without opportunity to meet such evidence.—*Ransbottom v. State*, 144 Ind. 250, 43 N. E. 218.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rape, § 86.

See, also, 33 Cyc. p. 1490.

§ 59. Instructions.

Assumption as to facts, see CRIMINAL LAW, § 761.

As to reasonable doubt, see CRIMINAL LAW, § 789.

Error in instruction cured by other instructions, see CRIMINAL LAW, § 823.

Instructions on weight and sufficiency of evidence as invading province of jury, see CRIMINAL LAW, §§ 763, 764.

[a] (Sup. 1877)

Under an indictment for rape, the defendant may be found guilty of assault and battery only; and an instruction to acquit if the jury have a reasonable doubt as to whether the prosecutrix used all reasonable efforts to resist intercourse is therefore erroneous.—*Richie v. State*, 58 Ind. 355.

[b] (Sup. 1887)

It is not error for the court to refuse to instruct the jury that the failure of the prosecutrix, in a prosecution for assault with intent to commit rape, to appear at the trial, and the failure of the state to account for her absence, are circumstances proper to be considered as tending to show that no crime had been committed, where it does not appear that she was not equally accessible to the defendant.—*Coleman v. State*, 111 Ind. 563, 13 N. E. 100.

[c] (Sup. 1894)

Where prosecutrix was but 13 years old, and in the service of defendant, who was her mother's family physician, the court properly charged the jury that, "on reaching a conclusion on the question of consent, you may consider the condition, age, and relation of the parties. If you find that she was ignorant of the sexual act, you may consider this fact also."—*Hawkins v. State*, 136 Ind. 630, 36 N. E. 419.

[d] (Sup. 1894)

In a prosecution for rape, an instruction that consent of prosecutrix, induced by fear of personal violence, was no consent, though defendant laid no hands on her, yet, if by an array of physical force he so overpowered her

mind that she did not resist, he was guilty, etc., was not error.—*Felton v. State*, 39 N. E. 228, 139 Ind. 531.

[e] (Sup. 1900)

The defendant specifically denied that he had sexual intercourse with the prosecuting witness. The prosecutrix gave testimony to the same effect. The evidence disclosed that defendant, a man of mature years, was of lustful habits; that he had sought a meeting with prosecutrix; that she had met him, and that they had remained together in a barn for 15 or 20 minutes, during which time the evidence shows he took indecent liberties with her person. *Held*, that there was sufficient evidence of sexual intercourse to warrant an instruction that, if the jury found that defendant had sexual intercourse with prosecutrix, then they would be authorized to find him guilty.—*Hanes v. State*, 57 N. E. 704, 155 Ind. 112.

In a prosecution for assault and battery with intent to commit rape on a girl under the age of consent, an instruction authorizing the jury to find defendant guilty if they find that he had sexual intercourse with the girl is not erroneous, since the crime of rape includes the crime with which defendant was charged.—*Id.*

When the evidence disclosed that defendant and fondled the girl, and took hold of her person, an instruction that, "if the jury are satisfied from the evidence, beyond a reasonable doubt, that defendant did take hold of the prosecutrix, it was for them to say whether or not, under all the circumstances, the intention to have intercourse with the girl was then in his mind, and that it was with that purpose that he laid his hands on her," is not erroneous as authorizing the jury to infer any particular intent from any particular facts.—*Id.*

[f] (Sup. 1903)

In a prosecution for assault on a female at night, it was shown that immediately after the assault she had made a mistaken identification of her assailant, but that at the time she was nervous, excited, and in a hysterical condition. The court charged that in weighing her testimony the jury might consider that before she identified defendant she had identified another person as the guilty one, but that, if she did so identify such other person, the jury could consider her condition, surroundings, and all the facts shown to exist at the time she made such identification. *Held*, that the charge was not erroneous, as attempting to excuse prosecutrix's mistake, or as making too prominent, as an excuse for the mistaken identity, her alleged hysterical condition.—*Shular v. State*, 66 N. E. 746, 160 Ind. 300.

[g] (Sup. 1907)

In a prosecution for assault to rape, the court charged that a woman assaulted with intent to rape was not required to resist with all violent means in her power, and was not required to do more than her age, strength, and all attendant circumstances made it reasonable for her to do, in order to manifest her opposition,

provided the resistance was in good faith. *Held*, that such instruction was not objectionable, as misleading the jury to infer that, if defendant attempted to have intercourse with prosecutrix, and she did not consent expressly in words, that alone would warrant a conviction.—*Rahke v. State*, 168 Ind. 615, 81 N. E. 584.

In a prosecution for assault to rape, instructions requiring the state to establish beyond a reasonable doubt that defendant did lay or put his hands on prosecutrix's person, with the intent to induce her thereby to submit against her will to sexual intercourse with him, and that he intended to have sexual intercourse with her at the time he laid or put his hands on her person, etc., were fatally defective; the acts hypothecated being consistent with an intent on the defendant's part merely to coax prosecutrix to submit to sexual intercourse.—*Id.*

In a prosecution for assault to rape, the court charged that the state must establish beyond a reasonable doubt that defendant put his hands on prosecutrix's person with an intent to induce her thereby to submit against her will to sexual intercourse with him, and that he intended to have intercourse with her at the time he so laid or put his hands on her person. *Held* that, the instruction being objectionable as eliminating the element of force, the phrase "against her will" did not cure the defect, but rendered the instruction misleading, ambiguous, and uncertain.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rape, §§ 88-100.

See, also, 33 Cyc. pp. 1501-1515.

§ 61. New trial.

[a] (Sup. 1875)

Where, under an indictment substantially charging the accused with assault and battery and rape committed upon a female as one and the same transaction, thereby charging only one substantive offense, that of rape, the charge of assault and battery being necessarily included in the substantive offense, the court improperly requires the prosecuting attorney to elect whether to put defendant on trial for rape or for an assault and battery, and such attorney elects to put him on trial for rape, which trial results in a verdict of guilty of an assault and battery, the accused, by moving for and obtaining a new trial, takes such new trial as to the whole case, and it is error to sustain his objection to being tried thereon for a rape, and to put him on trial for an assault and battery.—*Mills v. State*, 52 Ind. 187.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rape, § 102.

See, also, 33 Cyc. p. 1516.

§ 62. Appeal and error.

Harmless error in admission of evidence, see CRIMINAL LAW, § 1169.

Questions presented for review by record, see CRIMINAL LAW, § 1120.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rape, §§ 103, 104.

See, also, 33 Cyc. p. 1516.

(D) SENTENCE AND PUNISHMENT.

Repeal of penal act by change in definition of offense or in punishment thereof, see STATUTES, § 165.

§ 64. Nature and extent of punishment.

Requisites and sufficiency of sentence, see CRIMINAL LAW, § 991.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rape, § 105.

See, also, 33 Cyc. p. 1518.

III. CIVIL LIABILITY.

Liability of infant, see INFANTS, § 60.

§ 66. Proceedings in actions.

[a] (Sup. 1882)

In an action for assault with intent to rape, evidence that plaintiff had made similar charges against other men, and obtained money by compromise, or that defendant had made similar attempts against other women, is inadmissible.—*Ogle v. Brooks*, 87 Ind. 600, 44 Am. Rep. 778.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rape, §§ 107-111.

See, also, 33 Cyc. pp. 1521-1524.

RATE.

See—

Charges for supply of gas. GAS, § 14.

For telegraph or telephone service. TELEGRAPHS AND TELEPHONES, §§ 33, 34.

Commissions of executor or administrator. EXECUTORS AND ADMINISTRATORS, § 496.

Compensation for performance of contract. CONTRACTS, § 229.

Interest. INTEREST, §§ 27-38.

Chargeable against trustee for use of trust funds. TRUSTS, § 219.

On amount required to redeem from foreclosure sale. MORTGAGES, § 600.

On funds of estate of ward. GUARDIAN AND WARD, § 54.

School taxes, certificates, estimates, and determination. SCHOOLS AND SCHOOL DISTRICTS, § 103.

Speed of automobiles on highways. HIGHWAYS, § 177.

Of horses and vehicles, highways. HIGHWAYS, § 177.

Of horses and vehicles on streets. MUNICIPAL CORPORATIONS, § 705.

Of street cars. STREET RAILROADS, §§ 74, 80, 81, 89, 90, 92-96.

Of trains. RAILROADS, §§ 234-236, 285, 315-317, 371-373, 417.

Of trains, injuries to passengers from excessive speed. CARRIERS, § 297.

Of trains, opinion evidence. EVIDENCE, § 539½.

Toll. TURNPIKES AND TOLL ROADS, § 41.

Transportation rates—

CARRIERS, §§ 12, 13, 32, 188–196½, 199–202, 248½–259.

SHIPPING, §§ 144, 145.

RATIFICATION.

See—

Acts of others as ground of estoppel in pais.

ESTOPPEL, §§ 89–94.

Contract on Sunday. **SUNDAY, § 15.**

Pleading matters of fact or conclusion as to ratification of agreement. **PLEADING, § 8.**

Written instrument as defense to action for cancellation. **CANCELLATION OF INSTRUMENTS, § 17.**

Of acts of particular classes of persons.

See—

Agents of city for negotiation of bonds. **MUNICIPAL CORPORATIONS, § 217.**

Of railroad company. **RAILROADS, § 17.**

Attorneys. **ATTORNEY AND CLIENT, § 103.**

BROKERS, § 103.

County officers affecting liability on bonds. **COUNTIES, § 98.**

Guardians. **GUARDIAN AND WARD, § 70.**

Husband as agent of wife. **HUSBAND AND WIFE, §§ 25, 138.**

INFANTS, §§ 30, 57.

Insurance agents. **INSURANCE, § 94.**

Married women. **HUSBAND AND WIFE, §§ 23½, 25, 73, 89.**

MUNICIPAL CORPORATIONS, §§ 76, 932, 933.

Municipal officers. **MUNICIPAL CORPORATIONS, §§ 248, 351.**

Officers and agents of corporations. **CORPORATIONS, §§ 426, 497.**

Partners. **PARTNERSHIP, § 157.**

PRINCIPAL AND AGENT, §§ 75, 163–176.

Promoters of corporations. **CORPORATIONS, § 448.**

School officers. **SCHOOLS AND SCHOOL DISTRICTS, § 82.**

Servants. **MASTER AND SERVANT, § 308.**

State officers. **STATES, § 102.**

Town officers. **TOWNS, § 39.**

Wife, as agent of husband. **HUSBAND AND WIFE, § 23½.**

Of particular acts, contracts, or transactions.

See—

Agreement by railroad company made in consideration of grant of right of way. **RAILROADS, § 194.**

ALTERATION OF INSTRUMENTS, § 13.

Appointment of administrator by clerk. **EXECUTORS AND ADMINISTRATORS, § 22.**

Assignment of contract for construction of public improvements. **MUNICIPAL CORPORATIONS, § 560.**

ASSIGNMENTS FOR BENEFIT OF CREDITORS, § 48.

Award of arbitrators. **ARBITRATION AND AWARD, § 67.**

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Compromise between legatees. **WILLS, § 740.**

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Of attorneys. **ATTORNEY AND CLIENT, § 103.**

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Of reinsurance. **INSURANCE, § 684.**

Of state officers. **STATES, § 102.**

Of suretyship. **PRINCIPAL AND SURETY, § 47.**

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RECEIVERS.

Scope-Note.

[INCLUDES care, management, and disposition of property, the subject of or involved in civil actions, by persons specially appointed by the court, for the purpose either of preservation of the property pending the litigation or of execution of the judgment therein; nature and scope of the remedy in general; in what cases and for what purposes and as to what property it is allowed; grounds of appointment, and jurisdiction over and proceedings to obtain appointment of receivers; appointment and qualification of receivers, extension of receiverships, and effect thereof; rights, duties, powers, and liabilities of receivers, control, management, and disposition of property by them, their relation to the court and actions by and against them; dissolution of receiverships, removal, resignation, or discharge of receivers, and accounting by them; liabilities on and enforcement of securities given to obtain, dissolve, etc., receiverships; and liabilities for wrongful procuring of appointment of receivers.

[EXCLUDES sequestration of property subject to conflicting claims, or to liens or other special rights to preserve it during litigation, or to enforce orders or judgments (see *Sequestration*); receiverships in actions or proceedings for particular forms of relief, or affecting particular kinds of property (see *Partnership*; *Corporations*; *Banks and Banking*; *Railroads*; *Patents*; *Mortgages*; and other specific heads), or merely incident to other remedies (see *Execution*; and other specific heads); jurisdiction, in regard to receiverships, of particular courts (see *Courts*); and review of decisions relating to receiverships (see *Appeal and Error*). For complete list of matters excluded, see cross-references, post.]

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I. NATURE AND GROUNDS OF RECEIVERSHIP.

(A) NATURE AND SUBJECTS OF REMEDY.

§ 1. Nature and purpose of remedy.

[a] (Sup. 1882)

The exercise of the power of the court to appoint receivers is the same under the Code as under the general rule of equity.—*Bitting v. Ten Eyck*, 85 Ind. 357.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, § 1.

See, also, 34 Cyc. p. 17.

§ 3. Remedy provisional or incidental to other relief.

[a] (Sup. 1882)

Under the chancery practice, the appointment of a receiver was an interlocutory proceeding in a pending suit, and by Civ. Code, § 199, as amended by Act March 12, 1875 (Acts 1875, p. 117), no substantial change was made in the powers of the court or in the office of the receiver, and an application for a receiver under such statute is an interlocutory proceeding in a pending suit.—*Brinkman v. Ritzinger*, 82 Ind. 358.

[b] (Sup. 1885)

The appointment of a receiver may be part of the relief asked in the complaint in actions of the class in which receivers may be appointed, but it is questionable whether this can be the sole purpose of the action.—*Bufkin v. Boyce*, 3 N. E. 615, 104 Ind. 53.

[c] (Sup. 1896)

The appointment of a receiver being a provisional remedy and ancillary to other relief sought, the court cannot appoint a receiver on a complaint filed for that sole purpose; there being no other action pending between the parties, and plaintiff having no lien to be enforced and no debt due from defendant.—*State v. Union Nat. Bank*, 145 Ind. 537, 44 N. E. 585, 57 Am. St. Rep. 209.

[d] (Sup. 1904)

The court has no jurisdiction to appoint a receiver on mere petition demanding no money judgment, or any other legal or equitable remedy beyond the appointment of a receiver, and presented without the filing of a complaint or the issuance of a summons or any other process.—*Winona, W. E. & S. B. Traction Co. v. Collins*, 69 N. E. 998, 162 Ind. 693.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, § 3.

See, also, 34 Cyc. pp. 19-21.

§ 5. Pendency and condition of cause.

[a] (Sup. 1877)

After the dismissal by the plaintiff of an action to procure the appointment of a receiver to settle a certain partnership, and to enjoin the issue of executions against its property, the

defendant cannot, in such action, procure the appointment of a receiver.—*Dale v. Kent*, 58 Ind. 584.

[b] (Sup. 1881)

A receiver may be appointed after final decree, though the original bill contained no prayer therefor.—*Connelly v. Dickson*, 76 Ind. 440.

[c] (Sup. 1882)

Where a foreclosure decree was rendered on a petition containing no prayer for a receiver, but, if the complaint had contained such a prayer, a receiver would have been appointed before the hearing, the suit, having been appealed to the Supreme Court, may be regarded as pending for the purpose of an application for a receiver of the rents and profits, and the court that rendered the decree appealed from was the proper court to hear and determine such an application.—*Brinkman v. Ritzinger*, 82 Ind. 358.

[d] (Sup. 1882)

An application for the appointment of a receiver in an action is properly disposed of before the perfecting of a change of venue from the county.—*Bitting v. Ten Eyck*, 85 Ind. 357.

[e] (Sup. 1885)

There must be a pending suit to authorize the appointment of a receiver.—*Pressly v. Harrison*, 102 Ind. 14, 1 N. E. 188.

Under 2 Rev. St. 1876, p. 115, providing that receivers shall not be appointed by any court in any case until the adverse party shall have appeared and answered in a pending action, and shall have had reasonable notice of the pendency of the action and the application for such appointment, no appointment can be made until the court has acquired jurisdiction of defendant's person either by service or appearance.—*Id.*

Under Code, § 1221, providing that a receiver may be appointed "in actions between partners," where a partner files a complaint against his fellow, upon whom no service is had, and by whom no appearance is made in person or by attorney, alleging the insolvency of the firm and praying dissolution, a petition at chambers, in vacation, for the appointment of a receiver, should be denied, although plaintiff files with his complaint and petition writings whereby defendant "admits the allegations of the complaint," and "consents to the surrender of all his individual property," since the signing, delivery, and presentation of such writings constitute no appearance, so as to cause the pendency of an action.—*Id.*

[f] (Sup. 1886)

Rev. St. 1881, § 1222, provides that a receiver may be appointed by the court or the judge thereof in vacation. *Held*, that the appointment of a receiver by a judge at chambers on a voluntary appearance entered by the corporation was not invalid on the ground that there was no suit pending before the judge, who therefore had no jurisdiction of the subject-matter or the person of the defendant.—

First Nat. Bank v. United States Encaustic Tile Co., 105 Ind. 227, 4 N. E. 846.

[a] (Sup. 1889)

Where notice in an action has been served, defendant has appeared, and the parties are before the court, an action is pending so as to authorize the court to appoint a receiver, though defendant's appearance may have been special or the notice of service may have been defective.—Hellebush v. Blake, 119 Ind. 349, 21 N. E. 976.

[b] (Sup. 1895)

A receiver may be appointed, not only after final decree in the action, but even after an appeal has been perfected, though such relief was not demanded in the original bill. Brinkman v. Ritzinger (1882) 82 Ind. 358, followed.—Chicago & S. E. Ry. Co. v. St. Clair, 144 Ind. 371, 42 N. E. 225.

[i] (Sup. 1896)

Receivers are appointed under the provisions of Rev. St. 1894, § 1236, prescribing when a receiver may be appointed, in the cases therein named and in all the cases named, except, perhaps, the fifth and seventh, relating to the appointment of a receiver of a corporation which has been dissolved or is insolvent and in such other cases as may be provided by law, or where, in the discretion of the court, it may be necessary to secure ample justice to the parties, it is plainly provided that there shall be an action pending between the parties, in which action the receiver may be appointed as auxiliary to or in aid of the principal action.—State v. Union Nat. Bank, 44 N. E. 585, 145 Ind. 537, 57 Am. St. Rep. 209.

[j] (Sup. 1899)

In an action to set aside a fraudulent conveyance, the court has no jurisdiction to appoint a receiver of the property involved, after the filing of the complaint, but before the issuance of a summons thereon, since the action is not pending until issuance of a summons, under Burns' Rev. St. 1894, § 316 (Horner's Rev. St. 1897, § 314).—Alexandria Gas Co. v. Irish, 53 N. E. 762, 152 Ind. 535.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 5–11.

See, also, 34 Cyc. pp. 28–29.

§ 6. Existence of and resort to other remedy.

[a] (Sup. 1886)

The fact that a firm might have made a voluntary assignment in trust for their creditors does not preclude either member of the firm from resorting to a court of equity for the appointment of a receiver.—Pressley v. Lamb, 105 Ind. 171, 4 N. E. 682.

[b] (Sup. 1895)

Rev. St. 1894, § 1076 (Rev. St. 1881, § 1064), provides for a new trial in ejectment on the applicant giving an undertaking that he will pay all costs and damages which shall be

recovered against him in the action. *Held*, that if plaintiff in ejectment is entitled to the crops sown by defendant after the first trial, which terminated in plaintiff's favor, plaintiff has his remedy on the bond for defendant's conversion thereof, and therefore a receiver to take charge of said crops should not be appointed.—Stephens v. Kaga, 142 Ind. 523, 41 N. E. 930.

[c] (Sup. 1907)

It is not required that a party applying for a receiver under the statute should have exhausted his remedies at law.—Sallee v. Soules, 168 Ind. 624, 81 N. E. 587.

[d] (Sup. 1910)

Relief by a receiver is an extraordinary equitable remedy, and is never exercised if the petitioner has a full and adequate remedy at law. But a receiver will not be denied for this reason alone, unless it is made to appear that the legal remedy is equally as complete, efficient, and effective as that in equity.—Robbins v. Reed, 91 N. E. 921.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, § 12.

See, also, 34 Cyc. pp. 23–26.

§ 8. Discretion of court.

[a] (Sup. 1882)

In the absence of any statute, the appointment of a receiver is dependent on the sound discretion of the court.—Brinkman v. Ritzinger, 82 Ind. 358.

[b] (Sup. 1886)

The appointment of a receiver is a matter resting in the sound discretion of the court.—Naylor v. Sidener, 103 Ind. 179, 6 N. E. 345.

[c] (Sup. 1889)

On motion for the appointment of a receiver pending an action for partition, a defendant cannot defeat the appointment by showing the present collector of the rents to be amply responsible, or by offering to indemnify and secure plaintiff against loss, the appointment being a matter solely within the discretion of the court or judge.—Rapp v. Reehling, 122 Ind. 255, 23 N. E. 68.

[d] (Sup. 1893)

By the express provisions of Rev. St. 1881, § 1222, a receiver may be appointed where, in the discretion of the court or judge thereof in vacation, it may be necessary to secure ample justice to the parties.—McElwaine v. Hosey, 35 N. E. 272, 135 Ind. 481.

[e] (Sup. 1895)

The power of a court to appoint a receiver is one of the highest character vested in the courts, and it is only exercised where justice would probably be defeated by withholding it.—Corbin v. Thompson, 40 N. E. 533, 141 Ind. 128.

[f] (Sup. 1896)

The reappointment of a person as receiver after the first appointment has been set aside

is not an abuse of discretion.—*Robinson v. Dickey*, 42 N. E. 638, 143 Ind. 214.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, § 14.

See, also, 34 Cyc. pp. 19-21.

(B) GROUNDS OF APPOINTMENT OF RECEIVER.

For corporations, see CORPORATIONS, § 553.
Precedents as controlling cause for appointment, see COURTS, § 89.

§ 12. Right or interest in property requiring protection.

[a] (Sup. 1891)

An agreement for the sale of a stock of goods provided that the purchaser should not remove the same from the town, but should be allowed to sell the goods, and should turn over all money taken in therefrom until they were paid for. *Held* that, in the absence of an express stipulation that the sale was conditional, and title should not pass until the goods were paid for, the seller had no such interest in the property as would authorize the appointment of a receiver, though the purchaser was insolvent, and was appropriating to his own use the proceeds of the sales of the goods.—*Steele v. Aspy*, 128 Ind. 367, 27 N. E. 739.

[b] (Sup. 1893)

The right to have a receiver appointed for a corporation exists as well in a policy holder therein, though his debt be not due, as in a creditor of such corporation.—*Supreme Sitting of the Order of Iron Hall v. Baker*, 134 Ind. 293, 33 N. E. 1128.

[c] (Sup. 1896)

A complaint for dissolution of a partnership and for a receiver alleged a prior mortgage of all the firm property, and that the mortgagee purchased at foreclosure sale, under an agreement that any surplus at such sale should be held for the mortgagors' benefit, and alleged a sale by the mortgagee to defendant, and that defendant sold the property for a sum in excess of the mortgage debt, but failed to allege that the sum realized by the mortgagee at his sale exceeded the mortgage debt. *Held*, that the complaint failed to show ground for the appointment of a receiver, since it failed to show that plaintiff had any interest in the property.—*Davis v. Niswonger*, 145 Ind. 426, 44 N. E. 542.

[d] (Sup. 1898)

A receiver will not be appointed on petition of one who shows no right of ultimate recovery in the action.—*Goshen Woolen-Mills Co. v. City Nat. Bank*, 49 N. E. 154, 150 Ind. 279.

Where a trust deed for certain creditors provides that any surplus shall be paid back to the grantor, and there is a possibility that the proceeds may bring more than the amount of the trust deed, an unpreferred creditor has

such a real interest as to have a right to apply for the appointment of a receiver.—*Id.*

[e] (Sup. 1901)

To entitle a creditor to ask for the appointment of a receiver, it is not necessary that his claim should be first reduced to judgment.—*Chicago & S. E. Ry. Co. v. Kenney*, 62 N. E. 26, 159 Ind. 72.

[f] (App. 1908)

A receiver should be appointed in cases of actual wrong, injustice, and injury in the management of any business.—*Green v. Felton*, 42 Ind. App. 675, 84 N. E. 166.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 18, 19.

See, also, 34 Cyc. pp. 44-46.

§ 13. Fraud in obtaining possession of property.

[a] (Sup. 1907)

Burns' Ann. St. 1901, § 1236, provides that a receiver may be appointed where it is shown that the property in controversy is in danger of being lost or materially injured, or where, in the discretion of the court, it may be necessary to secure ample justice to the parties. A complaint in an action by administrators for the appointment of a receiver alleged that during the lifetime of decedent defendant, by fraud and undue influence, had obtained possession of certain notes belonging to decedent and purporting to be indorsed by the latter; that the indorsements were forged; that no consideration was received for the notes; and that defendant was wholly insolvent, and, if not restrained, would collect and dispose of the notes and convert the same to her own use. *Held*, that the appointment of a receiver was authorized.—*Sallee v. Soules*, 168 Ind. 624, 81 N. E. 587.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, § 20.

See, also, 34 Cyc. p. 59.

§ 14. Preservation and protection of property in general.

[a] (App. 1901)

A complaint averred that plaintiff and another owned certain realty in equal shares as tenants in common, subject to a life estate in defendant; that the property was improved, having a brick business building and a dwelling house on it; and that defendant had rented the property for some time, receiving the rental, but had failed to pay certain taxes and street and sewer improvement assessments, and had allowed the property to become out of repair, to the injury of the interest of plaintiff. *Held*, that the complaint did not state facts authorizing the appointment of a receiver to take charge of the property, to collect the rents, and apply the same to the payment of the taxes and liens, and to repair the property.—*Hay v. McDaniel*, 60 N. E. 729, 26 Ind. App. 683.

Evidence that the taxes were paid before trial, and that in 2½ years of defendant's tenancy she had expended \$400 for repairs on the buildings, rendered the showing insufficient to justify the appointment of a receiver, had the pleadings and issues made otherwise permitted it.—Id.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 21-23.

See, also, 34 Cyc. p. 46.

§ 15. Preservation of property pending litigation.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 24-28.

See, also, 34 Cyc. pp. 46-68; note, 57 C. C. A. 80.

§ 16. — In general.

[a] (Sup. 1886)

Where property has been conveyed by a firm to a person to be held by him as trustee for the payment of certain debts of the firm and there arises a controversy as to the application of the proceeds of the property, the appointment of a receiver is a proper precautionary measure for the preservation of the fund.—Naylor v. Sidener, 6 N. E. 345, 106 Ind. 179.

[b] (Sup. 1893)

Plaintiffs brought suit against defendants for wages and to enforce a laborer's lien, and for the appointment of a receiver, and other creditors of defendants filed cross complaints alleging defendants' indebtedness to them,—to some for wages, and to others on notes secured by mortgage on the property on which plaintiffs sought to foreclose their liens. *Held* that, as there were so many conflicting interests, the court properly appointed a receiver; Rev. St. 1881, § 1222, providing for such appointment "where in the discretion of the court * * * it may be necessary to secure ample justice to the parties."—McElwaine v. Hosey, 135 Ind. 481, 35 N. E. 272.

[c] (Sup. 1901)

Insolvency of a person in possession of property in litigation is not essential to the appointment of a receiver thereof pending such litigation.—Mead v. Burk, 60 N. E. 338, 156 Ind. 577.

Burns' Rev. St. 1894, § 1236, provides that a receiver may be appointed in all actions where it is shown that the property in controversy is in danger of being lost, removed, or injured, or where, in the discretion of the court, it may be necessary to secure ample justice to the parties. Appellants contracted to sell appellees an electric lighting plant, appellees to deposit a certain amount in a certain bank within a stated period in payment thereof, which the latter did. Appellants refused to convey, but held possession and operated the plant, refusing to pay over the income thereof, which was being wasted. It appeared that appellants

refused to carry any insurance, that the risk was hazardous, that they were making extensions to the plant, and that the property was liable to damage if permitted to remain in their possession. *Held*, that the court was justified in appointing a receiver to manage the property pending an action to enforce specific performance of such contract.—Id.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 24, 28.

See, also, 34 Cyc. p. 46.

§ 19. — Insolvency or misconduct of party in possession as against claimant.

[a] (Sup. 1908)

Under Burns' Rev. St. 1901, § 1236, providing that a receiver may be appointed in all actions where the property in controversy is in danger of being materially injured, and in such other cases in which it may be necessary to secure ample justice, the court did not abuse its discretion in appointing a receiver to take charge of the property in dispute until the determination of the action, where there was evidence of a probable right in plaintiffs in the property; that defendants, who had purchased the property, were nonresidents, and were making sales thereof, and were about to remove the same from the jurisdiction of the court; that numerous persons had instituted suits to enforce liens; and that the sellers, against whom plaintiffs held claims, were totally insolvent.—Levin v. Florsheim & Co., 68 N. E. 1025, 161 Ind. 457.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, § 27.

See, also, 34 Cyc. pp. 57-59.

§ 20. Security for payment of demand.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 29-31.

§ 21. — In general.

[a] (Sup. 1873)

Where an insolvent debtor, contemplating an assignment, has entered an appearance to a complaint by one creditor, and allowed judgment to go, on proof, for a just debt, other creditors, without judgments, were not entitled to a receiver to take charge of the debtor's property, in the absence of a showing of danger of fraudulent disposition thereof.—McGoldrick v. Slevin, 43 Ind. 522.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, § 29.

§ 23. — Pendency of appeal or other proceeding for review.

[a] (Sup. 1895)

Where the question is one of disputed title to property, a receiver for the rents and profits will not be appointed on motion of appellant

pending an appeal.—*Corbin v. Thompson*, 141 Ind. 128, 40 N. E. 533.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, § 31.

§ 25. Defenses and grounds of opposition.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 33-37.

§ 26. — In general.

[a] (Sup. 1882)

It is not ground, in ejectment, for the refusal of the appointment of a receiver to take charge of the crops, that it is not shown that the action cannot be speedily tried.—*Bitting v. Ten Eyck*, 85 Ind. 357.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 33-35.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

Agreement to consent to appointment as consideration for receiver's contract to perform services gratuitously, see *CONTRACTS*, § 56.

Amendment of complaint asking appointment of receiver so as to demand damages for fraud, see *PLEADING*, § 249.

Ancillary appointment, see post, § 206.

Appearance authorizing appointment, see *APPEARANCE*, § 12.

Appellate jurisdiction of appeal from decree appointing receiver as between appellate and supreme courts, see *COURTS*, § 220 (1).

Appointment as judicial act, see *CONSTITUTIONAL LAW*, § 67.

Effect of supersedeas or stay, see *APPEAL AND ERROR*, § 489.

In proceedings to foreclose mortgage, see *MORTGAGES*, § 469.

In proceedings to wind up corporation, see *CORPORATIONS*, § 621.

Pleading, see post, § 183.

Receivers of railroad companies, see *RAILROADS*, § 206.

Review of decisions, see *APPEAL AND ERROR*, §§ 71, 80, 101, 162, 863, 874, 955, 1024, 1043.

§ 29. Jurisdiction and authority of court or judge.

[a] (Sup. 1874)

Where a statute authorizes or contemplates the doing of an act by the court (as to appoint a receiver), it must be understood that the court in term time may or must do it.—*Newman v. Hammond*, 46 Ind. 119.

A judge has no power to appoint a receiver during vacation.—*Id.*

[b] (Sup. 1882)

The powers of the courts in appointing receivers are the same under the Code as under the general rule of equity.—*Bitting v. Ten Eyck*, 85 Ind. 357.

The fact that the judge called in to dispose of an application for the appointment of a receiver after a change has been taken from the regular judge proceeded at once before the record of his appointment had been entered and signed was no ground of objection.—*Id.*

[c] (Sup. 1885)

Under Code 1852, providing that a receiver may be appointed by the court, no such appointment can be made by a judge in vacation.—*Pressley v. Harrison*, 1 N. E. 188, 102 Ind. 14.

[d] (Sup. 1886)

Where the defendant voluntarily appears, the court at plaintiff's instance may, in an otherwise proper case, appoint a receiver in vacation.—*Pressley v. Lamb*, 105 Ind. 171, 4 N. E. 682; *First Nat. Bank v. United States Encaustic Tile Co.*, 105 Ind. 227, 4 N. E. 846.

[e] (Sup. 1886)

The words "court" and "judge," as they are used in Rev. St. 1881, §§ 1222-1231, providing for the appointment of receivers, are to be regarded as synonymous terms.—*Pressley v. Lamb*, 105 Ind. 171, 4 N. E. 682.

[f] (Sup. 1889)

The fact that the owner of personal property which is within the jurisdiction of a court is a nonresident of the state does not deprive the court of jurisdiction to appoint a receiver for the property.—*Hellebush v. Blake*, 119 Ind. 340, 21 N. E. 976.

[g] (Sup. 1895)

Where an action to enforce a lien for taxes on property of a railway company within Hamilton county was begun in the circuit court of that county, and the venue changed to Tipton county, which, with Howard county, then formed one judicial circuit, the judge of such circuit, sitting in chambers in Howard county, whose court was then in session, had jurisdiction to appoint a receiver in such action, under Rev. St. 1894, § 1236 (Rev. St. 1881, § 1222), providing that receivers "may be appointed by the court, or the judge thereof, in vacation."—*Chicago & S. E. Ry. Co. v. St. Clair*, 144 Ind. 371, 42 N. E. 225.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 38-42, 409.

See, also, 34 Cyc. pp. 101-109.

§ 31. Appointment on consent of parties.

[a] (Sup. 1886)

Where, in proceedings for the appointment of a receiver, a corporation enters its voluntary appearance, and answers, admitting the allegations of the complaint, the appointment of a receiver is not invalid on the ground that the proceedings in which he was appointed were not adversary in character.—*First Nat. Bank v. United States Encaustic Tile Co.*, 105 Ind. 227, 4 N. E. 846.

[b] (App. 1906)

A receiver will not be appointed in an improper case, though both parties consent.—*Durbin v. Northwestern Scraper Co.*, 36 Ind. App. 123, 73 N. E. 297.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, § 44.

See, also, 34 Cyc. p. 106.

§ 32. Form and requisites of application for appointment in general.

Pleading matters of fact or conclusions, see PLEADING, § 8.

[a] (Sup. 1881)

A receiver should be appointed only upon affirmative showing of a necessity therefor, and not upon allegations of the petitioner's ignorance of material facts.—*Heavilon v. Farmers' Bank of Frankfort*, 81 Ind. 249.

[b] (Sup. 1885)

Pleadings and demurrers are not relevant to an application for a receiver.—*Pressly v. Harrison*, 102 Ind. 14, 1 N. E. 188.

[c] (Sup. 1885)

Ordinarily the sufficiency of a complaint or petition for the appointment of a receiver cannot be tested by demurrer.—*Bufkin v. Boyce*, 104 Ind. 53, 3 N. E. 615.

[d] (Sup. 1886)

While a complaint for the appointment of a receiver will be liberally construed, it must nevertheless state a cause for such appointment, and, in case the appointment is without notice, it must appear either in the verified complaint or by affidavit that there was a valid cause for such appointment without notice.—*Sullivan Elec. Light & P. Co. v. Blue*, 41 N. E. 805, 142 Ind. 407.

[e] (Sup. 1901)

The complaint in an action for the appointment of a receiver is not insufficient because it does not show that plaintiffs have exhausted their legal remedies; it appearing that such remedies are inadequate or would be ineffectual, or that the appointment of a receiver is necessary to preserve the property fund, or to secure justice to the parties.—*Chicago & S. E. Ry. Co. v. Kenney*, 62 N. E. 26, 159 Ind. 72.

The complaint is not defective in merely averring that the defendant is insolvent, without setting out specifically the facts from which the insolvency could be inferred.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 45–50, 64.

See, also, 34 Cyc. pp. 110–114.

§ 33. Time for application.

[a] (Sup. 1908)

Where a summons in an action for the appointment of a receiver, was dated August 15th, and the complaint was filed and a receiver appointed the same day, while the summons

was not delivered to the serving officer until the next day, the appointment was made before the action was commenced, and hence while the court had no jurisdiction.—*Marshall v. Matson*, 171 Ind. 238, 86 N. E. 339.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, § 51.

§ 34. Parties on application.

[a] (Sup. 1881)

The appointment of a receiver of a firm is not invalidated by the fact that one of the firm was not made a party to the proceedings; it not appearing that the copartner was within the jurisdiction of the court, or had a substantial interest in the partnership.—*Stelzer v. La Rose*, 79 Ind. 435.

[b] (Sup. 1889)

On motion for the appointment of a receiver of rents and profits pending an action for partition of real estate, a party defendant served with notice of the motion, and appearing, cannot object that other parties are not brought in.—*Rapp v. Reehling*, 122 Ind. 255, 23 N. E. 68.

[c] (Sup. 1901)

Under the Code, providing that all persons having an interest in the subject of an action, and in obtaining the relief demanded, shall be joined as plaintiffs, the creditors of a railroad company may jointly prosecute an action for the appointment of a receiver, though, in other respects than having a common interest in the relief sought, their interests are distinct.—*Chicago & S. E. Ry. Co. v. Kenney*, 62 N. E. 26, 159 Ind. 72.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 52, 53.

See, also, 34 Cyc. pp. 114–117.

§ 35. Notice of application.

[a] (Sup. 1881)

Where the appointment of a receiver is prayed for as a measure of final relief, the process that brings the defendant into court to answer the complaint is sufficient notice to him of the final relief sought. The statute intends that special notice shall be given only when a receiver is asked for pending the action.—*Newell v. Schnull*, 73 Ind. 241.

[b] (Sup. 1881)

Under Act March 12, 1873, an order appointing a receiver to take possession of property upon an allegation that it belonged to a certain person is void, if no notice of the application for a receiver is given to such person.—*May v. Greenhill*, 80 Ind. 124.

[c] (Sup. 1885)

A receiver in insolvency may not be appointed in an ex parte proceeding.—*Pressley v. Harrison*, 102 Ind. 14, 1 N. E. 188.

[d] (Sup. 1892)

Where a complaint does not show fraud, or that the property or any part of it is about

to be wasted, misappropriated, or removed beyond the jurisdiction of the court, and it is apparent that plaintiffs will suffer no great loss during the time necessary to give notice to a railroad company operating a line through the county in which the suit is brought, a receiver should not be appointed *ex parte*.—*Chicago & S. E. Ry. Co. v. Cason*, 133 Ind. 49, 32 N. E. 827.

[e] (Sup. 1892)

The verified complaint, in an action by a stockholder of a railroad company against such company and another company having a 99-year lease of the former's road, alleged that such lease was void; that the lessee has wrecked the leased property, and has carried off to its main line, and converted to its own use, all the engines, cars, machinery and rolling stock of the lessor; that the directors and certain stockholders of the latter are assisting the lessee to destroy the lessor's franchise; that the former designs moving the shops from the latter's road, and locating them on the lessee's main line; that the lessee is insolvent; that the large stockholders of the lessor, in league with the lessee, elect directors of the former from among their own number, who are invariably nonresidents; that the secretary and treasurer resides in an Eastern city, and has in his possession the lessor's records and papers, and the only copy of the inventory of its rolling stock is in possession of the lessee; "that there is an emergency for the immediate appointment of a receiver for said" lessor, "its property and franchises, before summons and notice can be given," because of the nonresidence of its officers and directors; that in the time required for service irreparable damage will be done lessor, its property and franchises, and plaintiff's cause of action will be defeated, as he believes, because the lessee "will resort to desperate measures to retain possession of said road," and will, if necessary, proceed to another jurisdiction, and procure the appointment of a receiver friendly to its interests for said lessor, or both of said roads, and institute other actions to harass plaintiff; that it will make way with said inventory, tear up and convert to its own use the remaining tracks, move the repair and machine shops, and scatter and run off the rolling stock beyond the jurisdiction of the court, so that it cannot be found; that some accident is liable to occur whereby great injury may be done to life and property, subjecting the lessor to heavy damages. *Held*, that the appointment of a receiver, without notice to the lessee, when the same could be served in the county where the proceedings were had, was erroneous.—*Wabash Ry. Co. v. Dykeman*, 133 Ind. 56, 32 N. E. 823.

The nonresidence and delay that would have been necessary to give to the officers of one railroad company notice of an application for the appointment of a receiver of the company were no excuse for failure to give such notice to another defendant in the action.—*Id.*

Under Rev. St. 1881, § 1230, providing that no receiver shall be appointed without notice to the adverse party, except on sufficient cause shown, the sufficient cause must be first, for the appointment of a receiver at all; and, second, for not giving notice to the adverse party.—*Id.*

Rev. St. 1881, § 1230, provides that receivers shall not be appointed in any case until the adverse party shall have appeared, or shall have reasonable notice of the application for such appointment, "except upon sufficient cause shown by affidavit." *Held*, that where a verified complaint stated that there was an emergency for the *ex parte* appointment of a receiver, but failed to state the facts on which the opinion of plaintiff was founded, such appointment was not justified.—*Id.*

[f] (Sup. 1886)

Where the judge was absent on the day set for the hearing of a petition for the appointment of a receiver, he has jurisdiction to hear it on the following day, without further notice to defendants.—*Stephens v. Kaga*, 142 Ind. 523, 40 N. E. 807, 41 N. E. 930.

[g] (Sup. 1896)

Rev. St. 1894, § 1244 (Rev. St. 1881, § 1230), provides that receivers shall not be appointed until the adverse party shall have appeared, or shall have had reasonable notice of the application for such appointment, except upon sufficient cause shown by affidavit. *Held*, in an action solely for the appointment of a receiver, where defendant had appeared, that it was error to appoint such receiver at chambers, and not in open court, though during term time, on an allegation of emergency, without notice to defendant, stating time and place of the application, and without an affidavit showing sufficient cause for appointing him without notice.—*Winchester Electric Light Co. v. Gordon*, 143 Ind. 681, 42 N. E. 914.

[h] (Sup. 1907)

In order to justify the appointment of a receiver without notice there must be a case of imperious necessity where protection cannot be afforded in any other way.—*Continental Clay & Mining Co. v. Bryson*, 168 Ind. 485, 81 N. E. 210; *Henderson v. Reynolds*, 168 Ind. 522, 81 N. E. 494, 11 L. R. A. (N. S.) 960.

[i] (Sup. 1907)

A complaint averring that a corporation was insolvent, that its president was a nonresident of the state, and that, if he were permitted to turn the assets into cash or available securities, he would, in all probability, take the same outside the jurisdiction of the court, and that plaintiff believes that he would not dispose of the assets to the best advantage of the minority stockholders, and that the corporation was threatening to sell the property of the corporation over the protest and objection of the plaintiff, was not sufficient to authorize the appointment of a receiver without notice, since there were no facts alleged showing that it

reparable injury or any loss of property would have resulted if notice had been given.—*Continental Clay & Mining Co. v. Bryson*, 168 Ind. 485, 81 N. E. 210.

[l] (Sup. 1907)

In the absence of statutory provisions therefor, the court will not ordinarily appoint a receiver without notice to defendant or a rule to show cause.—*Henderson v. Reynolds*, 168 Ind. 522, 81 N. E. 494, 11 L. R. A. (N. S.) 960.

A receiver may be appointed without notice, where defendant is beyond the jurisdiction of the court, or where an emergency exists to prevent waste, or where notice would jeopardize the delivery of the property in dispute, or where protection can be afforded in no other way.—*Id.*

[k] (Sup. 1908)

To warrant appointment of a receiver without notice, under *Burns' Ann. St. 1908*, § 1288, providing that receivers shall not be appointed until the adverse party shall have appeared, or shall have had reasonable notice of the application, except upon sufficient cause shown by affidavit, it must appear, either in the verified complaint or by affidavit, not only that there is cause for the appointment of a receiver, but that there is cause for the appointment without notice.—*Marshall v. Matson*, 171 Ind. 238, 86 N. E. 339.

Independent of statute, courts of equity, being adverse to interference ex parte, will entertain in ordinary cases an application for the appointment of a receiver only after notice to defendant or a rule to show cause.—*Id.*

In a proceeding for the appointment of a receiver, where it did not appear that defendants were beyond the jurisdiction of the court, or could not be found, nor that there was an emergency rendering interference before there was time to give notice necessary to prevent waste or destruction, nor that notice itself would jeopardize the taking possession of the property in question, nor that there was any imperious necessity requiring immediate action, nor that protection could not be offered plaintiff by a temporary restraining order without notice, or in any other way, the appointment of a receiver without notice was error.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 54-60.

See, also, 34 Cyc. pp. 117-126; note, 88 C. C. A. 7.

§ 36. Use and effect of pleadings on application.

Complaint for foreclosure of mortgage and appointment to receiver, see MORTGAGES, § 445.

[a] (Sup. 1891)

Though pleadings and demurrers are not relevant to an application for the appointment of a receiver, the court must look to and consider the facts stated in the application, and, unless they are sufficient to justify the appoint-

ment, it must be denied.—*Steele v. Aspy*, 27 N. E. 739, 128 Ind. 367.

[b] (Sup. 1908)

A complaint, in an action for the dissolution of a partnership and a receiver, to be admissible in evidence on an ex parte application for a receiver, must be verified in positive terms, and a verification on the "belief" of the party making it is not sufficient.—*Marshall v. Matson*, 171 Ind. 238, 86 N. E. 339.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, § 61.

See, also, 34 Cyc. pp. 129, 130.

§ 37. Affidavits for appointment.

[a] (Sup. 1907)

An affidavit that the statements in an application for a receiver without notice "are true to the best of the knowledge and belief of the affiant," or "to the best of his information and belief," is insufficient, and not entitled to any weight as evidence at the hearing, as such application must be verified in positive terms.—*Henderson v. Reynolds*, 168 Ind. 522, 81 N. E. 494, 11 L. R. A. (N. S.) 960.

An affidavit, in an application for a receiver for a crop of mint, alleging the necessity for harvesting and distilling it without delay, does not show any excuse for not giving defendant notice of the application, where no reason is assigned why the application was not made earlier.—*Id.*

The allegation of an affidavit, in an application for a receiver for a crop of mint, "that if notice is served said defendant can and will cut said mint and haul the same from the premises before a hearing can be had upon affiant's petition," was the mere statement of an opinion, and, in the absence in the affidavit of facts upon which such opinion was founded, was insufficient to justify the appointment of a receiver without notice.—*Id.*

[b] (Sup. 1908)

Burns' Ann. St. 1908, § 1288, prohibiting the appointment of receivers without notice, except upon sufficient cause shown by affidavit, limits the evidence at a hearing without notice, to affidavits, which must be filed in the cause, and includes the complaint if properly verified.—*Marshall v. Matson*, 171 Ind. 238, 86 N. E. 339.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, § 62.

See, also, 34 Cyc. p. 130.

§ 40. Hearing and determination of application.

[a] (App. 1892)

Where, in the application for a receiver of a mutual fire insurance company, the complaint averred insolvency, and the answer admitted it, the court is presumed to know the fact of insolvency, and to have acted upon it in appointing a receiver; and it is not necessary that a finding of such fact should appear in the decree.

—*Reliance Lumber Co. v. Brown*, 4 Ind. App. 92, 30 N. E. 625.

[b] (Sup. 1901)

On an application by creditors of a railroad company for the appointment of a receiver, it was not error to refuse to postpone the hearing of the application to enable defendant to investigate some of the claims, as the decision of the court as to such claims was interlocutory only, and not final; their validity being subject to full investigation and proof upon the final hearing.—*Chicago & S. E. Ry. Co. v. Kenney*, 62 N. E. 26, 159 Ind. 72.

On an application by creditors of a railroad company for the appointment of a receiver, it was not error to refuse to postpone the hearing of the application to enable defendant to obtain evidence against certain claims, on the tender of a bond to secure their payment, which bond was not large enough to cover all claims set out in the complaint.—Id.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 64-67, 71.

See, also, 34 Cyc. pp. 127-139.

§ 48. Eligibility for appointment.

[a] (Sup. 1896)

Rev. St. 1881, § 1223 (Rev. St. 1894, § 1237), providing that no person interested shall be appointed receiver, does not, in case an order appointing a receiver is set aside as void, prevent the reappointment of the same person as receiver.—*Robinson v. Dickey*, 143 Ind. 214, 42 N. E. 638.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 73-76.

See, also, 34 Cyc. pp. 140-153.

§ 49. Selection of receiver.

[a] (Sup. 1908)

Though the appointment of a receiver is a judicial act, which cannot be abdicated by the court to any or all of the parties, and they have no power to choose a receiver, even by agreement, based on their views of the fitness of the one chosen, nevertheless it is proper for the court to counsel with those interested in the property with respect to the fitness of the various candidates for the position.—*Polk v. Johnson*, 66 N. E. 752, 160 Ind. 202, 98 Am. St. Rep. 274.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 77-82, 84.

See, also, 34 Cyc. pp. 146-148.

§ 51. Bond.

Liabilities on bonds or undertakings, see post, §§ 214, 218.

[a] (Sup. 1874)

There being no statute authorizing a clerk of court to take and approve a receiver's bond in vacation, he had no right to do so.—*Newman v. Hammond*, 46 Ind. 119.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 85-88.

See, also, 34 Cyc. pp. 150-153.

§ 54. Operation and effect of order in general.

[a] (App. 1906)

The appointment of a receiver does not affect the relation of creditors to the assets in his hands, but merely suspends the ordinary remedies for enforcement of debts.—*Hubbard v. Security Trust Co.*, 38 Ind. App. 156, 78 N. E. 79.

FOR CASES FROM OTHER STATES,

See 34 Cyc. pp. 54-57.

§ 55. Effect of irregular or invalid appointment.

[a] (Sup. 1895)

Though a nonresident, under Rev. St. 1894, § 508 (Rev. St. 1881, § 589), must file a bond for costs, under penalty of a dismissal of the action, the failure to do so will not render invalid an order, made in the action, appointing a receiver to take charge of the property in controversy.—*Galloway v. Campbell*, 142 Ind. 324, 41 N. E. 597.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 94, 400.

See, also, 34 Cyc. p. 158.

§ 58. Revocation or modification of order of appointment.

Setting aside order as precluding appeal, see APPEAL AND ERROR, § 165.

[a] (Sup. 1896)

Where an order appointing a receiver is set aside, and the goods ordered to be delivered to defendant, it is not error to hear another application for a receiver before the goods are restored to defendant.—*Robinson v. Dickey*, 143 Ind. 214, 42 N. E. 638.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 97-102.

See, also, 34 Cyc. pp. 158-161.

§ 59. Collateral attack on appointment.

[a] (Sup. 1868)

Where the facts alleged in the complaint in proceedings under Code, § 199, for the appointment of a receiver of an insolvent corporation, are sufficient to give the court jurisdiction of the subject-matter, an error in the proceedings or in the judgment of the court as to the amount necessary to be assessed for expenses of settlement, etc., cannot be attacked collaterally.—*Howard v. Whitman*, 29 Ind. 557.

[b] (Sup. 1883)

An order appointing a receiver cannot be attacked collaterally.—*Storm v. Ermantrout*, 89 Ind. 214.

[c] (Sup. 1885)

Where it affirmatively appears from an inspection of the record that no jurisdiction over

defendant's person was acquired, it cannot be presumed that the court had jurisdiction; and hence an order entered is subject to collateral attack on that ground, both by parties to the record and their privies.—*Pressley v. Harrison*, 1 N. E. 188, 102 Ind. 14.

[d] (*Sup.* 1885)

A judgment appointing a receiver cannot be attacked in an answer to a complaint in a separate action praying for the enforcement of a foreclosure decree.—*Bodkin v. Merit*, 1 N. E. 625, 102 Ind. 293.

[e] (*Sup.* 1886)

Where a judge has power to appoint a receiver in vacation, and properly acquires jurisdiction of the persons of the parties, his orders or proceedings in the matter cannot be collaterally attacked.—*Pressley v. Lamb*, 105 Ind. 171, 4 N. E. 682.

[f] (*Sup.* 1896)

The validity of the appointment of a receiver by a court of competent jurisdiction cannot be questioned in a collateral action.—*Hatfield v. Cummings*, 50 N. E. 817, 53 N. E. 231, 152 Ind. 280.

[g] (*Sup.* 1908)

An appeal from an interlocutory order appointing a receiver is not a collateral, but a direct, attack on the order.—*Marshall v. Matson*, 171 Ind. 238, 86 N. E. 339.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 103, 104.
See, also, 34 Cyc. pp. 164-168.

§ 62. Removal.

Discharge, see post, § 204.

[a] (*Sup.* 1895)

A creditor, after establishing his claim by intervening in the suit in which a receiver is appointed, acquires a sufficient standing in court to ask the court for orders and directions on the receiver in furtherance of the interest of creditors, and, if he disobeys such orders, the creditors may ask for his removal by the court appointing him.—*Voorhees v. Indianapolis Car & Manufacturing Co.*, 39 N. E. 738, 140 Ind. 220.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 100-111.
See, also, 34 Cyc. pp. 174-178.

§ 64. Appointment of successor.

[a] (*Sup.* 1893)

Where the order appointing a receiver is in force, refusing to appoint a successor on the death of the receiver is error.—*Smith v. Harris*, 135 Ind. 621, 35 N. E. 984.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, § 113.
See, also, 34 Cyc. p. 170.

III. TITLE TO AND POSSESSION OF PROPERTY.

Concurrent and conflicting jurisdiction of state and federal courts as to property in possession of receiver, see COURTS, § 500.

Estoppel of tenant in possession to deny title of receiver, see LANDLORD AND TENANT, § 65. Foreign and ancillary receivership, see post, § 207.

§ 67. Property vesting in receiver in general.

[a] (*Sup.* 1881)

A receiver is entitled to all the rents in arrears at the date of his appointment and to all the rents which accrue during the continuance of his receivership.—*Cook v. Citizens' Nat. Bank*, 73 Ind. 256.

[b] (*Sup.* 1889)

A depositor of a bank instructed it to charge to his account a note upon which he was surety and which was payable to the bank. The note was not so charged, but it was agreed that the bank should at any time thereafter have the right to make such entry, and that the note should be held by the bank, to be collected for the benefit of the depositor. The account of the depositor was at no time to be drawn down to an amount less than the amount of the note. *Held*, that such agreement gave to the bank a right which it would not otherwise have had, and that the depositor became the owner of the note, and entitled to the amount collected on it, as against the receiver of the bank.—*Lamb v. Morris*, 118 Ind. 179, 20 N. E. 746, 4 L. R. A. 111; *Harrison v. Harrison*, Id.

[c] (*Sup.* 1889)

The receiver of an insolvent debtor cannot enforce against the debtor and his sureties the penalty of an official bond executed by them.—*State ex rel. Shepard v. Sullivan*, 120 Ind. 197, 21 N. E. 1093, 22 N. E. 325.

[d] (*Sup.* 1894)

Under Rev. St. 1894, § 1242, which declares that the authority of a receiver to sue and perform other acts respecting property is under the control of the court, the receiver of a corporation may, when directed to do so by the court, sue for the specific performance of a contract of the corporation for the purchase of land.—*Davis v. Talbot*, 137 Ind. 235, 36 N. E. 1098.

[e] (*Sup.* 1895)

After a receiver has been appointed for a corporation, its creditors cannot sue to set aside mortgages by the corporation.—*National State Bank v. Vigo County Nat. Bank*, 141 Ind. 352, 40 N. E. 790.

[f] (*Sup.* 1896)

When a receiver is in charge of a corporation, a creditor cannot maintain a suit to reach assets withheld from the corporation for the payment of debts, in the absence of an allegation that the receiver refused to sue.—*First*

Nat. Bank of Crawfordville v. Dovetail Body & Gear Co., 143 Ind. 534, 42 N. E. 924.

[g] (Sup. 1896)

If in any case it could be lawful to appoint a receiver of an individual defendant's property in proceedings brought by a creditor for that sole purpose, such appointment could only be for the property on which plaintiff had an existing lien.—*State v. Union Nat. Bank*, 145 Ind. 537, 44 N. E. 585.

[h] (Sup. 1901)

A bank obtained a loan from plaintiff bank, for which a certificate of deposit was issued, under an agreement that it would assign a certain note to the plaintiff as security. The note was assigned by the president of the bank under the agreement; the bank then being a going concern, but in an insolvent condition. It subsequently suspended. *Held*, that the receiver was not entitled to the note as against the plaintiff bank.—*Harris v. Randolph County Bank*, 60 N. E. 1025, 157 Ind. 120.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 117-122.
See, also, 34 Cyc. pp. 183-235; note, 21 L. R. A. 623.

§ 68. Property fraudulently conveyed.

[a] (Sup. 1898)

A receiver may avoid a fraudulent or invalid transfer to the same extent and on the same grounds as the general creditors could have done if there had been no receivership.—*Franklin Nat. Bank v. Whitehead*, 49 N. E. 592, 149 Ind. 560, 39 L. R. A. 725, 63 Am. St. Rep. 302.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, § 123.

§ 69. Title or right acquired by receiver in general.

[a] (App. 1906)

Where an execution had been levied on certain property, and it was returned to the execution defendant on the giving of a delivery bond, a receiver of the execution defendant occupies the same position with regard to the property as the execution defendant would have done.—*Hubbard v. Security Trust Co.*, 78 N. E. 79, 88 Ind. App. 156.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 124, 125.
See, also, 34 Cyc. p. 183; note, 2 L. R. A. (N. S.) 1013.

§ 74. Interference with possession of receiver, and punishment thereof.

[a] (Sup. 1881)

In foreclosure, a receiver was appointed, and made his report, proceedings being then instituted against A. for contempt in refusing to give up possession to the receiver of wheat standing ready to be cut on the mortgaged premises. A. answered, denying that such receiver

had ever qualified, and alleging that he had made no resistance, but that, on failure by the receiver to take possession, he had, as an employé of one B., who had actual possession of the wheat under a chattel mortgage made before the foreclosure suit was brought, and to which B. was not a party, cut the wheat, harvested and marketed it, intending no contempt. *Held*, that A. was not in contempt.—*Cook v. Citizens' Nat. Bank*, 73 Ind. 256.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 132-135;
10 CENT. DIG. Contempt, § 56.
See, also, 34 Cyc. p. 205.

§ 76. Equities of third persons in general.

[a] (Sup. 1882)

Existing rights of third persons are not divested by the appointment of a receiver.—*Favorite v. Deardorff*, 84 Ind. 555.

[b] (App. 1908)

Receivers take property which comes into their hands for administration, subject to all legal and equitable claims.—*Shopt v. Indiana Nat. Bank*, 41 Ind. App. 474, 83 N. E. 515.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, § 137.
See, also, 34 Cyc. p. 193.

§ 77. Liens on and adverse claims to property.

Priorities between, see post, § 162.

Priority of receivers' certificates, see post, § 128.

[a] (Sup. 1881)

The appointment of a receiver will not in general affect or divest, but is made subject to, existing rights and liens.—*Lorch v. Aultman*, 75 Ind. 162.

[b] (Sup. 1887)

A mortgagee has a right to a personal judgment and to a decree establishing his lien, although the mortgaged property is in the hands of a receiver.—*Muncie Nat. Bank v. Brown*, 112 Ind. 474, 14 N. E. 358.

[c] (Sup. 1890)

Liens acquired by judgment creditors on their debtor's property, by placing their executions in the hands of the sheriff, are not divested by the subsequent appointment of a receiver of the debtor's estate and the sale of his property under order of the court, in proceedings to which the execution creditors were not made parties, and of which they had no notice; and they have the right to levy upon and sell the property after it has passed into the hands of the purchaser at the receiver's sale.—*J. W. Dann Mfg. Co. v. Parkhurst*, 125 Ind. 317, 25 N. E. 347.

[d] (Sup. 1897)

A mechanic's lien is not lost by the subsequent appointment of a receiver.—*Totten &*

Hogg Iron & Steel Foundry Co. v. Muncie Nail Co., 47 N. E. 708, 148 Ind. 372.

[c] (Sup. 1899)

Where property is placed in the hands of a receiver, he takes it subject to all existing rights and equities of the creditors, and the standing of liens remains unaffected by the receivership.—American Trust & Savings Bank v. McGettigan, 52 N. E. 793, 152 Ind. 582, 71 Am. St. Rep. 345.

[f] (App. 1906)

The object of appointing a receiver is to preserve the property for the benefit of all interested parties, and the appointment does not change the title to the property of the insolvent, and every legal and equitable lien upon the property is preserved with the power of enforcing it.—Durbin v. Northwestern Scraper Co., 36 Ind. App. 123, 73 N. E. 297.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 91, 138-144; 32 CENT. DIG. Land. & Ten. § 1095.

See, also, 34 Cyc. pp. 224-235; note, 71 Am. St. Rep. 352.

§ 78. Remedies to establish or enforce liens or claims.

[a] (Sup. 1890)

It is error to order a seizure and sale of property in the hands of a receiver, it being then in the custody of court and held, not for the benefit of any particular creditor, but for all.—Knode v. Baldrige, 73 Ind. 54.

[b] (Sup. 1896)

That the court granted permission to a person claiming a mechanic's lien against the property in the hands of its receiver to join such receiver as a party to an action in another court to enforce the lien does not authorize such other court to order a sale of the property on execution.—Premier Steel Co. v. McElwaine-Richards Co., 144 Ind. 614, 43 N. E. 876.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 145-147.
See, also, 34 Cyc. pp. 224-235.

§ 80. Effect of appointment, and rights of receiver, as to pending actions.

[a] (App. 1891)

A receiver must continue the prosecution of a suit in the name of the corporation, and after the sale and assignment of the demand sued on, and a transfer thereof by the receiver to a third person, it was proper for the court to permit suit to be carried on as it was originally begun, for the benefit of such third person.—Hasselman v. Japanese Developing Co., 27 N. E. 318, 28 N. E. 207, 2 Ind. App. 180.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, § 149.
See, also, 34 Cyc. pp. 224-235.

IV. MANAGEMENT AND DISPOSITION OF PROPERTY.

By receivers in proceedings to foreclose mortgage, see MORTGAGES, § 473.

By receivers of railroad companies, see RAILROADS, § 210.

Effect of operation of railroad by receiver on liability for injuries from operation of road, see RAILROADS, § 265.

Receiver's report as part of appeal record, see APPEAL AND ERROR, § 516.

(A) ADMINISTRATION IN GENERAL.

§ 81. Representation by receiver of court and of parties.

[a] (Sup. 1890)

The office of a receiver is treated as one of confidence and trust. As a rule, he can do nothing to impair the funds in his hands without the order of the court, and can make no dividend without the special sanction of the court, as the funds in his possession are considered in the custody of the law, for whomsoever may ultimately establish a title thereto. He is the agent of all the parties to the suit in his capacity of an officer of the court.—Herrick v. Miller, 24 N. E. 111, 123 Ind. 304.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, § 150.

See, also, 34 Cyc. pp. 236-241.

§ 82. Authority of receiver in general.

[a] (Sup. 1890)

The available legal authority of a receiver is coextensive only with the jurisdiction of the court by which he was appointed when the right of precedence or priority of creditors is asserted in respect to property or funds of a nonresident debtor which the receiver has not yet reduced to possession.—Catlin v. Wilcox Silver-Plate Co., 24 N. E. 250, 123 Ind. 477, 8 L. R. A. 62, 19 Am. St. Rep. 338.

A receiver is nothing more than an officer or creature of the court that appoints him. His acts are those of the court whose jurisdiction may be aided, but in no wise enlarged or extended, by his appointment. His power is only coextensive with that of the court which gives him his official character.—Id.

[b] (Sup. 1908)

The general statute concerning receiverships must be construed in the light of the settled doctrine of courts of equity respecting the powers of receivers.—Marion Trust Co. v. Blish, 170 Ind. 686, 84 N. E. 814, 85 N. E. 344, 18 L. R. A. (N. S.) 347.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 151, 152.
See, also, 32 Cyc. pp. 242-294.

§ 89. Incumbrances and charges on property.

[a] (App. 1902)

Where a receiver of certain premises, who had leased the same under order of court, accepted a surrender thereof before the term expired, which the court approved, those having a lien against the leasehold estate for work and material could no longer enforce it by sale in the ordinary way, but equity might direct their payment by the receiver.—*McAnally v. Glidden*, 65 N. E. 291, 30 Ind. App. 22.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, § 163.

See, also, 34 Cyc. pp. 261-264; notes, 3 L. R. A. (N. S.) 1073, 16 L. R. A. 603.

§ 92. Continuance and conduct of business.

Expenses of continuance as prior claim against property in hands of receiver, see post, § 155.

[a] (App. 1897)

The receiver of a manufacturing corporation, who was authorized to continue the business, contracted, for a period of 10 months in advance, without the sanction of the court, for materials for use in carrying on such business, to be delivered on notice by him, a part of which he received and paid for. He refused to accept the balance, and was discharged from his trust without having reported such contract to the court. In an action against the corporation for damages, there was evidence that the quantity of materials contracted for was greater than could be used within the time named and that it could have been purchased at a price less than that contracted for if it had been ordered as used. *Held*, that the trial court was invested with the discretion to allow or disallow such claim for damages.—*Brunner, Monds & Co. v. Central Glass Co.*, 47 N. E. 686, 18 Ind. App. 174, 63 Am. St. Rep. 339.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, § 169.

See, also, 34 Cyc. pp. 283-287.

§ 95. Contracts of receiver in general.

Annulment or modification by court, see post, § 116.

Receivers' certificates, see post, §§ 126-128.

[a] (App. 1897)

Those dealing with a receiver are bound to know that he possesses limited powers, and is constantly subject to the orders of the power which created him.—*Brunner, Monds & Co. v. Central Glass Co.*, 47 N. E. 686, 18 Ind. App. 174, 63 Am. St. Rep. 339.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 173-175.

See, also, 34 Cyc. pp. 274-281.

§ 103. Individual interest in transactions.

[a] (Sup. 1890)

A receiver is regarded as occupying a fiduciary relation in the sense that he cannot be allowed to purchase for his own benefit property connected with or forming part of the subject-matter of his receivership, or in his possession in that capacity. The courts will not permit him any more than any other trustee to subject himself to the temptation arising from the conflict between the interest of a purchaser and a trustee.—*Herrick v. Miller*, 24 N. E. 111, 123 Ind. 304.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, § 190.

See, also, 34 Cyc. pp. 254, 255.

(B) SUPERVISION AND INSTRUCTIONS OF COURT.

Decisions reviewable, see APPEAL AND ERROR, § 71.

§ 110. Jurisdiction to instruct and control receiver in general.

[a] (Sup. 1886)

The words "court" and "judge," as used in Rev. St. 1881, §§ 1222-1231, providing for the management and disposal of property in the hands of receivers, are to be regarded as synonymous terms.—*Pressley v. Lamb*, 105 Ind. 171, 4 N. E. 682.

[b] (Sup. 1890)

Courts have power over their own receivers to control them in the settlement of all demands against the property in their hands, and, as officers of the court, it is their duty to obey the orders of the courts. A receiver has no discretion in general in the application of funds in his hands by virtue of his receivership, but holds them strictly subject to the order of the court, and to be disposed of as the court may direct. When ordered to pay the money to any particular person, he will not be allowed to offset a claim due to him personally, since to allow this would render the disposition of the money as uncertain as before the receiver's appointment, and would defeat the very object of his appointment.—*Herrick v. Miller*, 24 N. E. 111, 123 Ind. 304.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 195-197.

See, also, 34 Cyc. p. 246.

§ 116. Annulment or modification of acts or contracts of receiver.

[a] (App. 1902)

A court has no power to annul or revoke a lease properly made by a receiver under its order, except under the same conditions that empower individuals to annul or revoke a con-

tract.—*McAnally v. Glidden*, 65 N. E. 291, 30 Ind. App. 22.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, § 203.

(C) RECEIVERS' CERTIFICATES.

§ 126. Negotiability and transfer.

Guarantee of payment on transfer as within statute of frauds, see FRAUDS, STATUTE OF, § 28.

[a] (Sup. 1883)

The assignor of a certificate of indebtedness issued by a receiver is not bound as a guarantor, nor by any implied warranty that the certificate is collectible and will be paid.—*McCurdy v. Bowes*, 88 Ind. 583.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, § 215.

See, also, 34 Cyc. p. 302.

§ 128. Lien and priorities.

[a] (Sup. 1894)

Defendants owned receiver's certificates for right of way sold by them to a railroad, and agreed with plaintiffs that their claims should be postponed to certificates to be sold by the receiver to plaintiffs. Afterwards, on a foreclosure sale of the railroad, defendants were paid for the right of way, but plaintiffs' certificates were not paid in full, plaintiffs were entitled to recover from defendants the amount so paid them.—*Fletcher v. Waring*, 137 Ind. 159, 36 N. E. 806.

Defendants sold cars to the receiver of a railroad, and received receiver's certificates, with a condition that on default in payment the cars should again become the property of defendants, who should then receive rental for them. A default having occurred, an order was made for the return and leasing of the cars, and that, on accounting, the certificates be canceled, except such as represented depreciation in the value of the cars. Afterwards defendants agreed in writing with plaintiffs that the certificates owned by them, which represented only such depreciation of which plaintiffs had notice, "should be postponed and subordinated" to other certificates about to be sold by the receiver to plaintiffs. On foreclosure sale of the railroad, plaintiffs received less than the amount of their certificates. The cars were not sold, and nothing was paid on defendants' certificates. *Held*, that defendants' agreement was not violated, since there was no pledge of their certificates, and the agreement was simply that, if the proceeds should not be sufficient to pay all, plaintiffs' certificates should be paid first.—*Id.*

Where defendants owned receiver's certificates for parts of the right of way sold by them to a railroad, and also owned part of the right of way, which they had not sold, and agreed to waive their claims for a first lien for their right of way, and that such claims should

be postponed to certificates to be sold by the receiver to plaintiffs, the parts of the right of way not sold were not included in the agreement.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 205, 219–222.

See, also, 34 Cyc. pp. 306–308.

(D) SALE AND CONVEYANCE OR REDELIVERY OF PROPERTY.

Abatement of action for purchase price by filing in suit appointing receiver of plea asking for deduction of purchase price on sale by receiver, see ABATEMENT AND REVIVAL, § 5.

§ 133. Proceedings to procure and order for sale.

[a] (App. 1910)

A description of realty sold under an order of court is sufficient if it furnishes means of identification, and property sold at a receiver's sale was sufficiently identified by the order of sale where it described the beginning point of the land as the northwest corner of land now occupied by a certain company, thence northwesterly along the west line of a certain railroad as now laid out and occupied by it, across certain sections to the northwest end of said right of way, at what is known as P. town, near the southeast end of Lake J. in a specified section, and thence northeasterly along the east line of said right of way, through said sections to a point 25 feet east of the beginning point and thence westerly to the point of beginning.—*Pilliod v. Angola Ry. & Power Co.*, 91 N. E. 829.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, § 220.

See, also, 34 Cyc. p. 313.

§ 141. Operation and effect of sale in general.

[a] (App. 1904)

Where a contract is not, as between the parties, assignable, a receiver of one of the parties does not, by a transfer of the contract, confer rights on the transferee.—*Sargent Glass Co. v. Matthews Land Co.*, 72 N. E. 474, 35 Ind. App. 45.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, § 247.

See, also, 34 Cyc. pp. 330–336.

§ 142. Title and rights of purchasers.

[a] (Sup. 1881)

A sale of mortgaged property of a firm by a receiver under order of court cannot divest or affect the lien of the mortgagee, who is a stranger to the record; and the fact that an agent of the mortgagee was present at the sale, and allowed the same to proceed without objection, and without disclosing the mortgagee's ti-

tle, makes no difference, it not appearing that the agent was authorized to waive or sacrifice the rights of the mortgagee.—*Lorch v. Aultman*, 75 Ind. 162.

[b] (App. 1910)

A receiver, being an officer of the court in selling property under an order of court, passes the title which the court has jurisdiction to convey, and not any title in himself.—*Pilliod v. Angola Ry. & Power Co.*, 91 N. E. 829.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 248-251.

See, also, 34 Cyc. pp. 332-334.

§ 145. Proceeds of sale.

[a] (App. 1902)

A receiver sold the debtor's property to the mortgagee for a sum much less than the mortgage. A resale was ordered on the application of junior creditors, who guarantied a bid at a resale of at least 10 per cent. more than the sum realized at the first sale, and who deposited a designated sum with the court as evidence of their good faith. The amount of the guarantied bid and the amount so deposited were much less than the amount of the mortgage debt. The mortgagee at the resale became the purchaser for the sum bid at the first sale. The deposit, without objection by the depositors, was declared forfeited, and ordered paid to the receiver. *Held*, that the amount of the deposit, after application of a part to the payment of the costs and expenses, should be paid to the mortgagee.—*Bass v. McDonald*, 64 N. E. 934, 29 Ind. App. 596.

FOR CASES FROM OTHER STATES,

See 34 Cyc. p. 334.

V. ALLOWANCE AND PAYMENT OF CLAIMS.

§ 151. Allowance or disallowance.

[a] (Sup. 1903)

In the absence of statute, a judgment of allowance against a fund in the hands of a receiver does not become a technical lien on the property which comprises the assets, and hence the discharge of a receiver and the surrender of jurisdiction over the trust by the court, without any reservation as to existing claims, is a release not only of the receiver, but also of the property, from further liability.—*Johnson v. Central Trust Co.*, 65 N. E. 1028, 159 Ind. 605.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 269-271.

See, also, 34 Cyc. p. 345.

§ 152. Priorities in general.

Priorities of receivers' certificates, see ante, § 128.

[a] (App. 1906)

The surety on a delivery bond, who is compelled to pay such bond, is entitled to priority

in his claim filed with the receiver of the execution debtor, and, if such priority be denied by the trial court, he may appeal.—*Hubbard v. Security Trust Co.*, 38 Ind. App. 156, 78 N. E. 79.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 272-275, 278.

See, also, 34 Cyc. pp. 346-363.

§ 153. Taxes.

[a] (Sup. 1898)

Under Horner's Rev. St. 1897, § 6436, providing that where a receiver neglects to pay taxes on property he may be cited to show cause why such taxes, with penalty, should not be paid, it was a "good and sufficient cause" that the receiver had sold the property, which was realty, by the court's order and approval, and that the purchaser had taken it subject to taxes.—*Stoner v. Bitters*, 52 N. E. 149, 151 Ind. 575; *Stetson v. Rochester Shoe Co.*, Id.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 276-277.

See, also, 34 Cyc. p. 346.

§ 154. Expenses of receivership.

[a] (App. 1906)

While expenses incurred in the administration of a receivership for an insolvent, including expenses of litigation by which the trust fund is created or preserved, are chargeable against such fund, yet services rendered in litigation intended and operating to diminish the trust fund cannot be made the basis of a claim for compensation out of such fund, although the result of such litigation was to establish a rule by which similar claims were expeditiously settled without litigation, and it was thus incidentally advantageous to the trust fund.—*Bartholomew v. Union Trust Co.*, 75 N. E. 31, 36 Ind. App. 328; *Myers v. Mutual Life Ins. Co.*, Id.

Services rendered by an attorney who successfully attacked a receivership fund in afterwards aiding the receiver by explaining the effect of the court's decision to persons sent him by the receiver, and advising them to settle their claims in accordance with such decision, is not ground for an allowance of compensation to the attorney from the receivership fund.—Id.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 279-282;

13 CENT. DIG. Costs, § 341.

See, also, 34 Cyc. pp. 350-352; note, 2 L.

R. A. (N. S.) 1051, 1067.

§ 155. Expenses of continuance of business by receiver.

[a] (Sup. 1896)

A receiver obtained an order to make claims held by certain persons "preferred claims upon said claimants' releasing mortgages to secure same, and are made preferred claims next to those who may loan receiver money to carry on the business," and further authorizing him

"to borrow \$10,000 for that purpose, said sum to be a prior claim upon the articles manufactured," and the proceeds thereof. *Held*, that on the release of the mortgages the claims of the mortgagees became a lien on the assets next in priority to that of those who might thereafter lend the receiver money to carry on the business under orders of court, and that the priority of lien for money thus loaned over the mortgagees' claim was not confined to the \$10,000 which this first order authorized the receiver to borrow.—*Blythe v. Gibbons*, 141 Ind. 332, 35 N. E. 557.

[b] (App. 1898)

Through proceedings in an action in which a receiver was appointed, a mortgagee acquired title to the property. On the trial of his exceptions to the receiver's report, a laborer was adjudged to have a lien on the property for services performed for the receiver. *Held*, in an action by the laborer to foreclose the lien, that the mortgagee's grantee could not question the validity of the lien.—*Shelburn Coal Min. Co. v. Delashmutt*, 52 N. E. 102, 21 Ind. App. 257.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 283-292.
See, also, 34 Cyc. pp. 353-363.

§ 156. Priority of unsecured debts, incurred before receivership, to pre-existing liens.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 293-311.
See, also, 34 Cyc. pp. 355-363; note, 2 L. R. A. (N. S.) 1013.

§ 158. — Purpose for which debt contracted.

[a] (Sup. 1899)

In an action to declare a lien against a street-railway company for material furnished for paving its track preferential to a mortgage of the road prior to the paving, a petition failing to allege that general improvements in the plant were made from the current earnings of the company is insufficient to bring the claim within the rule that, where current earnings are used to the benefit of the mortgage security in preference to current expenses, the mortgage security is chargeable with the restoration of the fund.—*Cambria Iron Co. v. Union Trust Co. of St. Louis*, 55 N. E. 745, 56 N. E. 665, 154 Ind. 291, 48 L. R. A. 41.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 301-306.
See, also, 34 Cyc. pp. 350-352.

§ 162. Priorities of liens and incumbrances.

[a] (Sup. 1893)

Acts 1885, p. 37, § 3, making debts for manual labor a preferred claim against any individual, copartnership, etc., where the property

thereof passed into the hands of an assignee or receiver, does not apply to labor claimants who have filed no notice of lien on the owner, where, prior to the appointment of a receiver, the property had been assigned by the owner to part of the creditors in payment of pre-existing debts.—*McElwaine v. Hosey*, 135 Ind. 481, 35 N. E. 272.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, § 277.
See, also, 34 Cyc. pp. 348-350.

VI. ACTIONS.

By or against foreign or ancillary receivers, see post, § 210.

By or against receivers in supplementary proceedings, see EXECUTION, § 411.

Establishment and enforcement of liens and claims on property, see ante, § 78.

On bonds or undertakings, see post, § 218.

Remedies and proceedings by receiver to obtain possession of property, see ante, § 72.

§ 167. Rights of action by receivers.

[a] (Sup. 1889)

Where a receiver was in possession of property pursuant to the order of the court, and such possession was wrongfully wrested from him, he had such a special or qualified interest in the property as entitles him to maintain an action in conversion.—*Kehr v. Hall*, 20 N. E. 279, 117 Ind. 405.

[b] (Sup. 1890)

A receiver may invoke the aid of a foreign court in obtaining possession of property or funds within its jurisdiction to which he is entitled, but aid will only be extended as against those who were parties to, or in some way in privity with, the proceedings in the course of which his appointment was made, or who are in possession of the property or fund to which the receiver has a right, and not against creditors of a nonresident debtor, who are seeking to subject the property or fund to the payment of their debts by proceedings duly instituted for that purpose.—*Catlin v. Wilcox Silver-Plate Co.*, 24 N. E. 250, 123 Ind. 477, 8 L. R. A. 62, 18 Am. St. Rep. 338.

[c] (Sup. 1897)

A receiver appointed to take charge of the funds abandoned by an absconding county clerk may maintain an action to set aside a fraudulent transfer of assets made by the clerk, etc.—*Shephard v. Meridian National Bank*, 48 N. E. 346, 149 Ind. 532.

[d] (Sup. 1899)

Under Burns' Rev. St. 1894, § 3435 (Hornor's Rev. St. 1897, § 3012), providing that when a receiver of a corporation is appointed to wind up its affairs, upon the expiration of its charter, he may sue in the name of the corporation or otherwise, a receiver suing to col-

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lent a debt due the corporation may sue in his own name.—*Hatfield v. Cummings*, 50 N. E. 817, 53 N. E. 231, 152 Ind. 280.

[e] (Sup. 1899)

A receiver cannot sue to cancel a mortgage given by a corporation, of which he is receiver, to secure bonds transferred as collateral for a loan made at the time, under averments, not that the contract was fraudulent as against prior creditors, but that an agreement to withhold the mortgage from record was fraudulent against those who became creditors on the faith that the property was unincumbered; the matter being one to be determined on distribution, to which all the creditors should be made parties.—*American Trust & Savings Bank v. McGettigan*, 52 N. E. 793, 152 Ind. 582, 71 Am. St. Rep. 345.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, § 320.

See, also, 34 Cyc. pp. 388-403.

§ 169. Defenses against receivers.

[a] (Sup. 1881)

Where suit is brought on a note by one who has been appointed receiver of the payee, all defenses are open which might have been made had the suit been brought by the payee himself.—*Johnston v. May*, 76 Ind. 293.

[b] (Sup. 1889)

The right of sureties upon the official bond of an insolvent debtor to oppose the efforts of the receiver of the latter to enforce the bond was not taken away from them by the decree appointing the receiver.—*State ex rel. Shepard v. Sullivan*, 120 Ind. 107, 21 N. E. 1093, 22 N. E. 325.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, § 323.

See, also, 34 Cyc. pp. 405-407.

§ 171. Set-off and counterclaim.

Set-off by receiver as affecting motion to dismiss action, see DISMISSAL AND NONSUIT, § 32.

[a] (App. 1898)

A receiver of a bank, who sues on a note, against which defendants present a set-off, cannot successfully plead in abatement or in bar of such set-off that it had never been filed with him, as receiver, in pursuance of the general notice to creditors.—*Paxton v. Vincennes Mfg. Co.*, 50 N. E. 583, 20 Ind. App. 253.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, § 325.

See, also, 34 Cyc. p. 423; note, 23 L. R. A. 319.

§ 173. Leave of court to receiver to sue.

Pleading, see post, § 183.

Suit in own name, see post, § 178.

[a] (Sup. 1871)

Under 2 Gav. & H. St. p. 153, § 205, the court is not authorized to empower the receiver

to bring an action in any and all cases, but only in cases where the party whose effects he receives could have brought the action, save, perhaps, some exceptional cases.—*La Follett v. Akin*, 36 Ind. 1.

[b] (App. 1891)

A receiver, in the absence of authority of the court appointing him, cannot maintain a suit for the enforcement of a claim in his own name, and, no such authority having been established, it must be presumed that none was given.—*Hassleman v. Japanese Developing Co.*, 27 N. E. 318, 28 N. E. 207, 2 Ind. App. 180.

[c] (Sup. 1893)

A receiver cannot sue without leave of the court appointing him.—*Wayne Pike Co. v. State ex rel. Whitaker*, 134 Ind. 672, 34 N. E. 440.

[d] (Sup. 1898)

In foreclosure by the receiver of an association, a special finding upon his authority to sue stated that the court then and there, upon said hearing, appointed plaintiff as receiver for said association (naming it), and empowered and directed said receiver to take charge of its property, and to collect all claims due to said association, by suit or otherwise. *Held* sufficient.—*Hatfield v. Cummings*, 50 N. E. 817, 53 N. E. 231, 152 Ind. 280.

[e] (App. 1909)

In general a receiver of a corporation cannot sue without leave of the court making the appointment is first obtained.—*Harmon v. Perkins*, 88 N. E. 961.

FOR CASES FROM OTHER STATES.

SEE 42 CENT. DIG. Receivers, §§ 327-332.

See, also, 34 Cyc. p. 379; note, 74 Am. St. Rep. 285.

§ 174. Leave of court to sue receiver.

[a] (Sup. 1880)

In an action against a railroad company for injuries received, the company cannot plead, either in bar or abatement, that it is in the hands of a receiver, and that the suit was brought without obtaining leave of the court by which such receiver was appointed.—*Ohio & M. Ry. Co. v. Nickless*, 71 Ind. 271.

A receiver appointed by the United States court cannot say that it will be sued only on leave of that court.—*Id.*

[b] (Sup. 1888)

The objection that leave was not obtained to sue a receiver cannot be raised where the receiver, without objecting to the proceedings against him, united with other defendants in a general denial, and made no objection until after the finding.—*Elkhart Car Works Co. v. Ellis*, 113 Ind. 215, 15 N. E. 249.

[c] An action cannot be brought against a receiver without leave of the court by which he was appointed.—(Sup. 1893) *Wayne Pike Co. v. State ex rel. Whitaker*, 134 Ind. 672, 34 N. E.

440; (App. 1899) *Peirce v. Chism*, 23 Ind. App. 505, 55 N. E. 795, 77 Am. St. Rep. 441.

[d] (Sup. 1899)

Under 25 Stat. 436, providing that every receiver of any property, appointed by any United States court, may be sued in respect to any act or transaction of his in carrying on the business connected with such property, without previous leave of the court in which he was appointed, but such suit shall be subject to the general equity jurisdiction of the court in which he was appointed so far as necessary to the ends of justice, an action can be maintained in the state courts against a receiver operating a railroad for negligence, without first obtaining leave from the United States court appointing him.—*Malott v. Shimer*, 54 N. E. 101, 153 Ind. 35, 74 Am. St. Rep. 278.

[e] (Sup. 1902)

Under Act Cong. Aug. 13, 1888, c. 806, § 3, 25 Stat. 436, providing that every receiver of any property, appointed by any United States court, may be sued in respect to any act of his in carrying on the business connected with such property, without previous leave of the court, but that such suit shall be subject to the general equity jurisdiction of the court in which he is appointed, so far as necessary to the ends of justice, an action may be maintained in a state court against a receiver operating a railroad for negligent killing, without first obtaining leave of the federal court which appointed the receiver.—*Malott v. Hawkins*, 63 N. E. 308, 159 Ind. 127.

[f] (Sup. 1908)

Even though the court authorized the receiver of an insolvent corporation to bring an action on the individual liability of the stockholders the order of the court will not give plaintiff the right to maintain the action, if the law does not authorize the court to make such order.—*Hammond v. Cline*, 170 Ind. 452, 84 N. E. 827.

[g] (App. 1909)

Act March 3, 1887, c. 373, § 3, 24 Stat. 554, as corrected by Act Aug. 13, 1888, c. 806, § 3, 25 Stat. 436 (U. S. Comp. St. 1901, p. 510), provides that any receiver appointed by any court of the United States may be sued in respect to any act or transaction of his in carrying on the business connected with such property without previous leave of the court appointing the receiver. *Held*, that such section is limited to suits arising out of transactions of the receiver after his appointment and assumption of control of the property, and does not apply to causes of action against the corporation arising, but not sued on, prior to the receiver's appointment.—*Harmon v. Perkins*, 88 N. E. 961.

In general a receiver of a corporation cannot be sued without leave of the court making the appointment is first obtained.—*Id.*

[h] (Sup. 1910)

The federal Circuit Court appointed a receiver for a railroad, and thereafter entered an order in the receivership proceedings appointing a commissioner to hear garnishment suits against employes of the railroad, and provided how such claims could be adjusted. A garnishment suit was filed with the commissioner, and the receiver, in pursuance to the order, certified the amount due the employe, and the garnishment was satisfied. The employe then sued the receiver in the state court without leave of the federal court to recover the full amount of the wages due. *Held*, under the judiciary act (Act Cong. Aug. 13, 1888, c. 806, § 3, 25 Stat. 436 [U. S. Comp. St. 1901, p. 582]), providing that every receiver of any property appointed by any court of the United States may be sued in respect of any act or transaction of his "in carrying on the business connected with such property" without leave of court within which the receiver was appointed, that the employe could not maintain the suit without leave of court, since the commissioner and receiver in satisfying the garnishment acted only under order of the court, and the transaction did not amount to a carrying on of business connected with the property.—*Harmon v. Best*, 91 N. E. 19.

It is a general rule that, in the absence of statutes authorizing the same, a receiver can neither sue nor be sued without leave of court appointing him being first obtained, and the rule applies to federal receivers as well.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 333-343.
See, also, 34 Cyc. pp. 411-423.

§ 176. Jurisdiction.

Concurrent and conflicting jurisdiction of state and federal courts as to actions in respect to property in possession of receivers, see COURTS, § 501.

Jurisdiction of federal courts in actions by or against receivers appointed by federal courts, see COURTS, § 295.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, § 345.
See, also, 34 Cyc. p. 423.

§ 178. Parties.

[a] (Sup. 1840)

A receiver appointed by a court of equity has no authority, by virtue of his appointment, to sue in his own name on a contract not made or assigned to himself, but is obliged to use the name of the person in whom is the legal title.—*Ingersoll v. Cooper*, 5 Blackf. 426.

[b] (Sup. 1871)

A receiver, unauthorized either by statute or by the court which appointed him, to sue in his own name, can only sue in the name of the corporation or person in whom the right of action was before his appointment.—*Manlove v. Burger*, 38 Ind. 211.

[c] (Sup. 1880)

The receiver of an insolvent corporation has no authority to sue in his own name on promissory notes executed to the corporation, in the absence of any authority so to do conferred either by statute or by the judgment of a court of competent jurisdiction.—*Garver v. Kent*, 70 Ind. 428; *Moriarty v. Same*, 71 Ind. 601.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 346-351.
See, also, 34 Cyc. pp. 426-434.

§ 183. Pleading.

Matters to be proved, see PLEADING, § 377.

Pleading set-off or counterclaim, see PLEADING, § 144.

Time for filing or service, see PLEADING, § 140.

[a] (Sup. 1876)

A complaint averring an indebtedness by defendant, and that plaintiff was the duly appointed receiver of a certain person named, and authorized to sue for and collect the debts of such person, was sufficient after verdict, though there was no averment as to when or by what court the receiver was appointed.—*Griesel v. Schmal*, 55 Ind. 475.

[b] (Sup. 1880)

Failure of a complaint to aver that the court appointing the plaintiff as receiver authorized him to bring the action in his own name in matters concerning his receivership was fatal to an action instituted by a receiver in his own name.—*Garver v. Kent*, 70 Ind. 428.

A complaint by a receiver must aver permission from the appointing court to bring the suit in his own name; and a failure so to do renders the complaint demurrable for want of facts.—*Id.*

[c] (Sup. 1884)

A complaint alleging that "the defendant S., receiver of his codefendant company, is the duly appointed receiver of said company, and is accordingly made a party defendant to this action," was not demurrable because not showing that leave had been obtained to sue S.; there being nothing in the complaint showing that S. had possession of the property, and no question being presented as to the property being in legal custody.—*Ft. Wayne, M. & C. R. Co. v. Mellett*, 92 Ind. 535.

[d] (Sup. 1884)

A complaint against a receiver on a money demand must allege leave of court obtained.—*Keen v. Breckenridge*, 96 Ind. 69.

A complaint against a receiver which does not allege that leave to bring a suit has been granted is demurrable.—*Id.*

[e] (Sup. 1888)

Where a receiver answers the complaint without objecting that plaintiff failed to obtain leave to sue him, he cannot afterwards object that the complaint does not aver that

fact.—*Elkhart Car Works Co. v. Ellis*, 113 Ind. 215, 15 N. E. 249.

[f] (Sup. 1891)

A complaint in an action by a receiver to recover possession of land leased by him as receiver to defendant, on the ground that defendant is unlawfully holding over, need not allege that the receiver has been authorized to bring the action by the court which appointed him.—*Pouder v. Catterson*, 127 Ind. 434, 26 N. E. 66.

[g] (Sup. 1891)

In an action for the specific performance of a parol contract to convey real estate the complaint set forth that plaintiff, T., was appointed a receiver of the Ladoga Creamery Company, claiming ownership and possession of the lands by purchase from defendants, but omitted to allege that said receiver had authority from the court to bring suit. *Held*, that such omission rendered the complaint fatally defective.—*Davis v. Ladoga Creamery Co.*, 128 Ind. 222, 27 N. E. 494.

[h] (Sup. 1895)

In an action by a receiver for the collection of notes due the association of which he is receiver, and for the foreclosure of mortgages upon real estate to secure the same, the complaint showing the receiver's appointment, that he was ordered to collect the debts, the giving of the notes and mortgages, and failure to pay the notes and that the same are due and unpaid, giving the sum due, the complaint was sufficient.—*Hatfield v. Cummings*, 40 N. E. 53, 140 Ind. 547.

[i] (Sup. 1895)

In an action by a receiver, a complaint alleging merely that plaintiff was, in a certain action, appointed receiver, and empowered to collect by suit all claims due his insolvent, is demurrable for failure to show authority from the court to sue.—*Hatfield v. Cummings*, 142 Ind. 350, 39 N. E. 859.

[j] (App. 1896)

A complaint in a suit by a receiver, which alleges his appointment and qualification, and states that he entered on his duties as receiver, "and accordingly he brings this suit," does not show that leave of court was obtained.—*Rhodes v. Hilligoss*, 45 N. E. 666, 16 Ind. App. 478.

Under a statute giving a receiver power "under control of the court or of the judge thereof in vacation to bring and defend actions," a complaint by a receiver on a claim due to it must show leave of court obtained before suit brought.—*Id.*

[k] (Sup. 1899)

In foreclosure by the receiver of an association, the complaint need not show that the association is in debt, or that any claims have been allowed or judgments rendered against it, making the foreclosure necessary.—*Hatfield v. Cummings*, 50 N. E. 817, 53 N. E. 231, 152 Ind. 280.

A complaint alleging that plaintiff was duly appointed receiver of a certain association, and was by the court duly empowered and directed to collect by suit, if necessary, all claims due said association, alleges that plaintiff had been authorized to sue.—*Id.*

In a suit to collect a debt by the receiver of a corporation, appointed to wind up its affairs after the expiration of its charter, the answer alleged that no receiver was appointed or applied for until after the three years from the expiration of the charter allowed by law in which to wind up its affairs. The reply alleged that, before the expiration of such period, a creditor of the corporation sued to recover his debt and for the appointment of a receiver; that issues were formed therein, calling in question the power of the court to appoint a receiver; that the court found that plaintiff was entitled to recover, and that a receiver ought to be appointed, and appointed plaintiff herein receiver; that the latter duly qualified, and entered upon the discharge of his duties, etc. *Held*, that such reply sufficiently shows the authority of the court to appoint a receiver.—*Id.*

[l] (App. 1899)

In an action against a receiver, the complaint must allege that plaintiff had obtained leave of the court in which the receivership action was pending to sue the receiver.—*Pierce v. Chism*, 55 N. E. 795, 23 Ind. App. 505, 77 Am. St. Rep. 441.

[m] (App. 1900)

A complaint in an action against the receiver of a railroad company, which did not allege that leave had been obtained to sue the receiver, or that he had been appointed by a federal court, is insufficient, since only federal receivers may be sued without leave of the court appointing them, and it cannot be presumed, without averment, that defendant was such.—*Peirce v. Jones*, 56 N. E. 683, 24 Ind. App. 286.

[n] (Sup. 1901)

In an action by a receiver to enjoin the collection of notes assigned by the bank for which he is receiver, the complaint alleged that he was duly and legally appointed by the court in which his action was brought, in an action within the court's jurisdiction, and that in the order of his appointment he was commanded to reduce to possession all the property, rights, credits, and choses in action of every description, and, as such receiver, to bring and maintain in his own individual name any action necessary in the discharge of his duties as such receiver. *Held* a sufficient averment of authority to bring the action.—*Taylor v. Canada*, 57 N. E. 524, 59 N. E. 20, 155 Ind. 671.

[o] (App. 1901)

A complaint by a receiver averring that the judge entered an order empowering him to collect all claims due to the company, and to bring in his own name, as receiver, suits to collect

the same, sufficiently shows authority in the receiver to maintain an action to recover a premium.—*Robison v. Wolf*, 62 N. E. 74, 27 Ind. App. 683.

[p] (Sup. 1902)

An application for mandamus against the receiver of a railroad, which fails to allege either that he was appointed by the United States court, or that leave from the court appointing him has been obtained to sue him, is demurrable.—*Malott v. State ex rel. Board of Com'rs of Clay County*, 64 N. E. 458, 158 Ind. 678.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 361-366.

See, also, 34 Cyc. pp. 436-438.

§ 186. Judgment.

Arrest, see JUDGMENT, § 263.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 374-377.

See, also, 34 Cyc. pp. 445-447; note, 94 Am. St. Rep. 54-58.

§ 188. Appeal and error.

Persons entitled to appeal, see APPEAL AND ERROR, § 150.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, § 378.

See, also, 34 Cyc. p. 447.

VII. ACCOUNTING AND COMPENSATION.

Persons entitled to appeal, see APPEAL AND ERROR, §§ 150, 151.

§ 195. Compensation for services.

Fixing compensation as judicial act, see CONSTITUTIONAL LAW, § 67.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 387-396.

See, also, 34 Cyc. pp. 467-477.

§ 196. — Right in general.

[a] Where, pending proceedings for the appointment of a receiver, one who is largely interested in the continuance of the debtor's business, and also creditor to a large amount, agrees with the debtor that if he will recommend his appointment as receiver, and he is appointed, he will act without compensation, and the debtor and other creditors, relying on such agreement, consent to such appointment, no compensation should be allowed the receiver, though claimed in his final report.—(App. 1902) *Polk v. Johnson*, 65 N. E. 536, 35 Ind. App. 478; (Sup. 1903) *Id.*, 66 N. E. 752, 160 Ind. 292, 98 Am. St. Rep. 274.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 387, 389-391.

See, also, 34 Cyc. pp. 467-469.

§ 200. Liabilities of parties, property, or funds for compensation and expenses.

[a] (Sup. 1896)

In a suit to foreclose a mortgage on mining property, B. was appointed receiver on petition of plaintiff. H., a defendant, holding a junior mortgage, filed a cross complaint, asking for a receiver until the year for redemption expired. An order appointing B. receiver on said cross complaint provided that he should create no indebtedness except as authorized by the court on notice to the other lienholders, such order being made after a decree ordering a sale to satisfy all liens, subject to expenses and costs. Thereafter the receiver obtained an order to borrow money from H., who was the purchaser at the sale, for the purchase of machinery and the payment of labor, and to issue certificates therefor; and, during the receivership, the receiver incurred liabilities for labor and for repairs necessary for the proper operation of the mine, rendering periodical reports to the court and to H. *Held*, that H. could not, after the receiver had resigned and turned over the property in its improved condition, avoid liability for the receiver's expenses, on the ground that they were made without order of court.—*Helsen v. Binz*, 147 Ind. 284, 45 N. E. 104.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 397-399, 401.

§ 202. Objections to account and proceedings thereon.

[a] (Sup. 1897)

Where an attorney was discharged by a receiver and another employed, without any increase of fees, the amount which would have been allowed to the one, if he had rendered all the services, being divided between the two, the purchaser of the property under a sale, not having his burdens increased thereby, could not complain of the compensation allowed such attorney.—*Helsen v. Binz*, 45 N. E. 104, 147 Ind. 284.

[b] (Sup. 1903)

The report of a receiver, and an exception filed thereto, stand as the complaint and answer of the respective parties.—*Johnson v. Central Trust Co.*, 65 N. E. 1028, 159 Ind. 605.

Where exceptions were filed to the report of a receiver, the filing of a supplemental report did not have the effect of taking the first report out of the record, so as to prevent a consideration on appeal of exceptions reserved to the ruling on exceptions to the first report.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, § 403.
See, also, 34 Cyc. pp. 457-459.

§ 204. Discharge of receiver.

Of corporation, see CORPORATIONS, § 558.
Record for purpose of review, see APPEAL AND ERROR, § 520.

[a] (Sup. 1903)

A judgment of allowance was obtained against a fund in the hands of a receiver, and an appeal taken from the judgment. Before determination of the appeal, the receiver reported the filing of a bond; stating that it was given in consideration of the discharge of the receiver and the release of the trust property, and providing that the obligors agreed that they might be substituted in any litigation in any court on such claim as defendants in lieu of the receiver, and that they would enter an appearance to such litigation, and submit to such determination as might be made at the close of such litigation, and pay the judgment rendered against them. The bond was made payable to the clerk of the court in which the receivership proceedings were had, and for the use of the plaintiff in the judgment of allowance, and all other unpaid claimants. *Held*, that as the plaintiff in the judgment of allowance was a stranger to the contract, so that its benefit only inured to him, and could only be enforced by him, in case he elected to accept its benefit, it was, as to him, only an offer to contract, acceptance of which would require him to pursue his remedy in another and different cause of action, so that an order discharging the receiver was erroneous.—*Johnson v. Central Trust Co.*, 65 N. E. 1028, 159 Ind. 605.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 319, 407, 408.

See, also, 34 Cyc. pp. 478-480.

VIII. FOREIGN AND ANCILLARY RECEIVERSHIPS.

Appointment of ancillary receivers for foreign corporations, see CORPORATIONS, § 688.

§ 206. Ancillary appointment.

[a] (Sup. 1898)

Where a receiver has been appointed for a corporation in the state of its domicile, on application by a creditor in another state for a receiver therein of the assets in that state, the question whether the affairs of the association might be settled to the best interest of all the stockholders and creditors by the home receiver, rather than by the action of separate receivers, is to be decided on the judgment of the trial court when all the facts are known.—*Security Savings & Loan Ass'n v. Moore*, 50 N. E. 869, 151 Ind. 174.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, § 410.
See, also, 34 Cyc. pp. 499-504.

§ 207. Title to and possession of property.

[a] (Sup. 1890)

The receiver of an insolvent debtor appointed by the court of another state is not entitled to funds of such debtor in the hands of a person in Indiana who has been garnished by other creditors of the insolvent, though the garnishing creditors are also nonresidents, and though the insolvent, being a citizen of the state in which the receiver was appointed, had, before the garnishment took place, assigned all his property to the receiver, in obedience to an order of said court.—*Catlin v. Wilcox Silver Plate Co.*, 123 Ind. 477, 24 N. E. 250, 18 Am. St. Rep. 338, 8 L. R. A. 62.

[b] (Sup. 1898)

The legal authority of a receiver is coextensive only with the jurisdiction wherein he is appointed, as to creditors in a different jurisdiction seeking a preferential lien on assets therein, and not yet reduced to his possession.—*Security Savings & Loan Ass'n v. Moore*, 50 N. E. 869, 151 Ind. 174.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 411-415.

See, also, 34 Cyc. pp. 489-492; note, 23 L. R. A. 52.

§ 210. Actions by or against foreign receivers.

[a] (Sup. 1884)

A receiver, on the ground of interstate comity, may sue in the courts of another state than that in which he was appointed.—*Metzner v. Bauer*, 98 Ind. 425.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, §§ 417-420.

See, also, 34 Cyc. pp. 494-498; note, 4 L. R. A. (N. S.) 824; notes, 6 Am. St. Rep. 185, 8 Am. St. Rep. 49.

IX. LIABILITIES ON BONDS OR UNDERTAKINGS.**§ 214. Breach or fulfillment of condition.**

[a] (Sup. 1882)

Where, in a suit on a receiver's bond, the complaint alleged merely that the receiver, as such, had money which he refused to pay over, any defense was valid which showed either that he had no money as receiver or that he had paid over all that he had.—*Colgate v. Roberts*, 85 Ind. 464.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, § 423.

See, also, 34 Cyc. p. 508.

§ 218. Actions.

[a] (Sup. 1882)

Where a bond given by the receiver of a building and loan association was conditioned for the faithful performance of duty and for the proper payment of all moneys received by him as such officer, a complaint thereon alleging that plaintiff was the successor of such receiver, and that the latter was directed and ordered to pay over the goods and chattels remaining in his hands to plaintiff, but nevertheless, being short in his accounts as receiver more than \$1,000, did not obey such order of court in the payment of all such moneys so received and collected by him to the plaintiff, but of said moneys more than \$1,000 now remains long past due and unpaid, etc., shows a breach of the second specification in the condition of the bond.—*Colgate v. Roberts*, 85 Ind. 464.

In an action on a receiver's bond, no breach can be taken advantage of which has not been assigned.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Receivers, § 427.

See, also, 34 Cyc. pp. 507-509.

X. WRONGFUL RECEIVERSHIPS.**FOR CASES FROM OTHER STATES,**

SEE 42 CENT. DIG. Receivers, § 428.

See, also, 34 Cyc. pp. 510-512.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

RECEIVING STOLEN GOODS.

Scope-Note.

[INCLUDES fraudulently receiving or concealing property stolen, embezzled, or obtained by false pretenses, etc., by another, knowing it to have been so stolen, embezzled, or obtained; nature and elements as a distinct crime of such receiving or concealing; nature and extent of criminal responsibility therefor, and grounds of defense; and prosecution and punishment of such acts as public offenses.

[EXCLUDES liabilities of persons receiving such goods as accessories to larceny, etc. (see *Larceny*; and other specific heads). For complete list of matters excluded, see cross-references, post.]

Analysis.

- § 1. Nature and elements in general.
- § 6. Persons liable.
- § 7. Indictment or information.
- § 8. Evidence.
- § 9. Trial and review.
- § 10. Sentence and punishment.

Cross-References.

See—

Conversion of stolen goods. TROVER AND CONVERSION, § 11.
Former jeopardy. CRIMINAL LAW, § 178.

Limitations. CRIMINAL LAW, §§ 147, 149.

Thief as accomplice of receiver of stolen goods within rules relating to testimony of accomplices. CRIMINAL LAW, § 507.

§ 1. Nature and elements in general.

Indictment and information, see post, § 7.

[a] (Sup. 1860)

Where defendant, charged with receiving stolen goods, is tried before the thief, the state must prove the larceny of the goods by some thief, the subsequent reception of the stolen goods by the accused, and that he knew at the time that they were stolen.—*Reilley v. State*, 14 Ind. 217.

[b] (Sup. 1902)

Burns' Rev. St. 1901, § 2012 (Horner's Rev. St. 1901, § 1935; Rev. St. 1881, § 1935), defining the crime of receiving stolen goods as the buying, receiving, concealing, or aiding in the concealment of any property which has been stolen, knowing the same to have been stolen, renders three elements essential to the crime: (1) the receipt (2) of goods which have been stolen, (3) knowing them to have been stolen.—*Semon v. State*, 62 N. E. 625, 158 Ind. 55.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. REC. S. GOODS, §§ 1-3.
See, also, 34 Cyc. pp. 515-519.

§ 6. Persons liable.

[a] (Sup. 1886)

To sustain the charge of receiving stolen goods it must be proved that the goods were

received, either directly or indirectly, from the thief, knowing them to have been stolen; and a second receiver of the goods is not guilty of such offense unless he receives them under circumstances connecting him with the thief.—*Foster v. State*, 106 Ind. 272, 6 N. E. 641.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. REC. S. GOODS, § 8.
See, also, 34 Cyc. p. 518.

§ 7. Indictment or information.

Allegations as to place of offense as showing venue, see INDICTMENT AND INFORMATION, § 86.

Amendment, see INDICTMENT AND INFORMATION, § 161.

Discretion of court as to requiring state to elect between counts, see INDICTMENT AND INFORMATION, § 132.

Duplicity, see INDICTMENT AND INFORMATION, § 125.

Joinder of parties, see INDICTMENT AND INFORMATION, § 124.

Reference from one count to another, see INDICTMENT AND INFORMATION, § 99.

Variance between indictment or information and preliminary affidavit, see INDICTMENT AND INFORMATION, § 122.

[a] An indictment or information for receiving stolen property need not allege the time and place of the theft.—(Sup. 1827) *Holford v.*

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State, 2 Blackf. 103; (1874) *Kaufman v. State*, 49 Ind. 248.

[b, c] (Sup. 1832)

An indictment for receiving stolen goods, knowing them to be stolen, omitted to state that the defendant had received them with intent to defraud the owner; but it stated that he had feloniously received them, knowing, etc. *Held*, on motion in arrest of judgment, that the indictment was insufficient.—*Pelts v. State*, 3 Blackf. 28.

[d] (Sup. 1870)

An indictment under the statute, which punishes any "person who shall buy, receive, conceal," etc., "any stolen property, knowing the same to have been stolen," need not charge that the accused received the goods with intent to defraud any person.—*Gandolpho v. State*, 33 Ind. 439.

An indictment for receiving stolen goods alleged a felonious larceny of said goods on, etc., by certain persons named, other than defendant, and that defendant afterwards on, etc. "did then and there, unlawfully and feloniously, receive, conceal, and aid in concealing said goods, he then and there well knowing said goods to have been, as aforesaid, unlawfully and feloniously stolen, taken and carried away," etc. *Held*, that it sufficiently alleged a felonious intent and that the defendant knew at the time he received the goods that they had been stolen.—*Id.*

[e] (Sup. 1874)

An indictment for receiving stolen goods with knowledge of the fact need not allege that the property was at such time a proper subject of larceny.—*Kaufman v. State*, 49 Ind. 248.

[f] (Sup. 1836)

In an indictment for receiving stolen goods, it is sufficient to charge that the goods were stolen by some person to the grand jurors unknown, but it must be shown at the trial that reasonable diligence was used to ascertain the name of the thief, and he must in some manner be identified or singled out at the trial.—*Foster v. State*, 106 Ind. 272, 6 N. E. 641.

[g] (Sup. 1902)

Where an information for receiving stolen property unnecessarily alleges the name of the thief, or that his name is unknown, such allegations must be proved, to identify the offense.—*Semon v. State*, 62 N. E. 625, 158 Ind. 55.

On a prosecution for receiving stolen goods, the identity of the thief and the person from whom the goods were received is immaterial, the offense being substantive; and hence an information for receiving stolen goods is not defective for failing to allege the name of the thief, or of the person from whom the property was received.—*Id.*

An information for a criminal offense being, under *Burns' Rev. St.* 1901, § 1747 (*Horner's Rev. St.* 1901, § 1678; *Rev. St.* 1881, § 1678), the official statement to the court by

the prosecuting attorney hat a person is guilty of a designated crime, based upon the affidavit of a competent person, an averment in an information for receiving stolen goods that the thief is unknown to the affiant is mere surplusage, and hence the absence of evidence that the thief was unknown to the affiant is immaterial.—*Id.*

An averment in an information for receiving stolen goods that they were received "feloniously," while not making it so in fact, is essential as a matter of pleading, and characterizes the act as having been done in a manner prohibited by law.—*Id.*

An affidavit and information which charged that defendant "feloniously did buy" certain goods described, which goods, "prior to the time they were so bought, * * * had been feloniously stolen," and that defendant, "at the time he so bought, * * * well knowing that the same" had been so stolen, etc., is equivalent to charging defendant with receiving goods which at the time were stolen, and then held under the larcenous taking, and that he knew it, and hence is sufficient.—*Id.*

[h] (Sup. 1905)

An indictment for receiving stolen goods is not fatally defective for failure to charge the name of the thief or state that his name was to the grand jury unknown.—*Beuchert v. State*, 76 N. E. 111, 165 Ind. 523.

[i] (Sup. 1905)

An indictment under *Burns' Ann. St.* 1901, § 2012 (*Rev. St.* 1881, § 1935; *Horner's Ann. St.* 1901, § 1935), for receiving stolen goods, describing the property stolen and received as brass of a stated value, of the personal goods and chattels, etc., sufficiently described the property.—*Miller v. State*, 76 N. E. 245, 165 Ind. 566.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rec. S. Goods, §§ 9-14.

See, also, 34 Cyc. pp. 520-523.

§ 8. Evidence.

Confession of thief, see CRIMINAL LAW, § 424.

Evidence of acts showing knowledge, see CRIMINAL LAW, § 370.

Necessity of showing conspiracy before admitting statements of thief, see CRIMINAL LAW, § 427.

[a] (Sup. 1857)

Under an indictment for receiving stolen goods, evidence that the alleged thief had stolen other goods of the same kind is irrelevant.—*McIntire v. State*, 10 Ind. 26.

[b] (Sup. 1860)

Where defendant charged with receiving stolen goods is tried before the thief, the state may not prove the larceny by the confession of the thief, though made under circumstances rendering it admissible if the thief were on trial.—*Reilley v. State*, 14 Ind. 217.

[c] (Sup. 1895)

On a trial for receiving stolen goods, evidence of the character of parties who frequented defendant's house is competent.—*Goodman v. State*, 141 Ind. 35, 39 N. E. 939.

On a trial for receiving a Jersey calf which had been stolen, and which was found on defendant's premises, there was evidence that no Jersey stock was owned in the neighborhood; that various goods, apparently stolen, were found secreted in defendant's house; and that there was found in his possession a horse which he knew had been stolen by a suspicious character who stayed occasionally at his house. *Held*, that a verdict of guilty was justified.—*Id.*

[d] (Sup. 1905)

In a prosecution for receiving certain steel bars stolen from a corporation, evidence held to sufficiently prove the corporation's nonconsent to the taking of the bars.—*Beuchert v. State*, 76 N. E. 111, 165 Ind. 523.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. REC. S. GOODS, §§ 15-18.

See, also, 34 Cyc. pp. 523-529; note, 101 Am. St. Rep. 481.

§ 9. Trial and review.

Application of instructions to case, see CRIMINAL LAW, § 814.

Instructions invading province of jury, see CRIMINAL LAW, §§ 763, 764.

[a] (Sup. 1876)

On the trial of an indictment containing a count for larceny and a count for receiving stolen goods, the court, having charged the jury, as to the former count, that one of the essentials thereof was that the goods "were so stolen by the identical" defendant, naming him, "named in the indictment, alone, or by him acting jointly with others," instructed as to the latter count that it was material thereunder "that the articles named in that count, or some of them, were by some one feloniously stolen, taken, and carried away from" the owner named in the indictment. *Held*, that the jury could not have been misled by such instruction as to the receiving of stolen goods, by its failure to state that the goods must have been feloniously taken by some one other than the defendant.—*Owen v. State*, 52 Ind. 379.

On trial of an indictment for receiving stolen goods, an instruction that it was essential that the identical defendant named in the indictment did feloniously, knowing that such goods were stolen, receive or conceal them, etc., was not erroneous for not stating that the goods must have been received from the thief or his agent.—*Id.*

[b] (Sup. 1898)

The verdict of a jury in the trial of one accused of receiving stolen property was as follows: "We, the jury, find the defendant guilty as charged in the indictment; and we

further find that he is 32 years of age." *Held*, that the verdict, in not fixing the punishment, was not defective, as it was expressly authorized by the indeterminate sentence law.—*Bealer v. State*, 50 N. E. 302, 150 Ind. 390.

[c] (Sup. 1905)

In a prosecution for receiving steel bars stolen from a corporation, an instruction that the jury should find that the corporation's want of consent to the taking of the bars was not sufficiently shown until the state had proved the nonconsent of each and every person that was authorized by the corporation to buy and sell "goods," not limited to the particular steel bars in question, was properly refused as too broad.—*Beuchert v. State*, 76 N. E. 111, 165 Ind. 523.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. REC. S. GOODS, §§ 19-22.

See, also, 34 Cyc. pp. 530, 531.

§ 10. Sentence and punishment.

[a] (Sup. 1860)

The punishment for stealing and for receiving stolen goods is the same under our statute.—*Maynard v. State*, 14 Ind. 427.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. REC. S. GOODS, § 23.

See, also, 34 Cyc. p. 531.

RECEPTION.

See—

Evidence at hearing before referee. REFERENCE, §§ 62-66.

At trial—

CRIMINAL LAW, §§ 661-687.

EQUITY, § 385.

HOMICIDE, §§ 263-267.

RAPE, § 56.

TRIAL, §§ 32-105, 376-379.

In arbitration proceedings. ARBITRATION AND AWARD, § 34.

On assessment of damages. DAMAGES, § 207.

On new trial. APPEAL AND ERROR, § 1214.

Verdict—

CRIMINAL LAW, § 872.

TRIAL, § 321.

RECITALS.

See—

Estoppel by recitals in deeds or other written obligations. ESTOPPEL, § 22.

Presumptions on appeal. APPEAL AND ERROR, § 904.

Recital of sealing in instrument sealed. SEALS, § 5.

In particular instruments.

See—

Bail bond. BAIL, § 57.

Deed. DEEDS, §§ 33–35, 96.

As waiver of vendor's lien. VENDOR AND PURCHASER, § 266.

From city on sale for nonpayment of assessment for street improvement. MUNICIPAL CORPORATIONS, § 582.

To purchaser at execution sale. EXECUTION, § 311.

INDICTMENT AND INFORMATION, § 70.

Judgment. JUDGMENT, §§ 130, 220.

Construction and operation. JUDGMENT, § 525.

Mortgage as affecting priority. MORTGAGES, § 159.

Construction and operation. CHATTEL MORTGAGES, § 103.

PLEADING, §§ 17, 34.

Prison limits bonds. EXECUTION, § 448.

Release of mortgage. MORTGAGES, § 313.

Replevin bonds. EXECUTION, § 158.

Sheriff's deeds. MORTGAGES, § 554.

STATUTES, § 210.

Tax deed. TAXATION, §§ 756–761.

WILLS, § 467.

RECKLESSNESS.

Element of willful negligence, see NEGLIGENCE, § 11.

RECLAMATION.

Districts, see DRAINS, §§ 12–20.

RECOGNITION.

See—

Highway as existing. HIGHWAYS, § 9.

Illegitimate child. BASTARDS, § 13.

Effect on property rights. BASTARDS, § 105.

RECOGNIZANCES.

Scope-Note.

[INCLUDES obligations of record, entered into before a court or officer duly authorized, as security for the performance of some particular act required in a judicial proceeding; nature, requisites, validity, construction, operation, and effect of such instruments in general; breach and forfeiture of recognizances; and proceedings to enforce liabilities of sureties.

[EXCLUDES recognizances incident to particular proceedings (see *Bail*; *Breach of the Peace*; *Appeal and Error*; *Costs*; and other specific heads). For complete list of matters excluded, see cross-references, post.]

Analysis.

- § 1. Nature and essentials in general.
- § 2. Requisites and validity.
- § 3. Construction and operation.
- § 4. Discharge of sureties.
- § 6. Extent of liability.
- § 8. Relief from liability or forfeiture.
- § 9. Entry of judgment on default or forfeiture.
- § 11. Scire facias.
- § 12. Actions.

Cross-References.

See—

BAIL.

Pleading according to legal effect. PLEADING, § 10.

Public record. RECORDS, § 1.

Retroactive operation of repealing acts. STATUTES, § 275.

In particular actions or proceedings.

See—

Appeal—

APPEAL AND ERROR, §§ 371–395, 462–470, 1223–1247.

Appeal—(Cont'd).

CRIMINAL LAW, §§ 1076, 1077, 1194–1199.

JUSTICES OF THE PEACE, § 159.

Appearance of witness. WITNESSES, § 19.

Bastardy proceedings. BASTARDS, §§ 46, 47.

Security for costs. COSTS, §§ 108–145.

Stay of execution. EXECUTION, §§ 158, 177.

In justice's court. JUSTICES OF THE PEACE, § 135.

§ 1. Nature and essentials in general.
Requisites and validity, see post, § 2.

[a] (Sup. 1829)

In all cases in which the state takes an obligation from an individual for the performance of any duty, it should be by recognizance, unless the law otherwise direct.—*Dickerson v. Gray*, 2 Blackf. 230.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Recogn. §§ 1-19.

See, also, 34 Cyc. p. 538.

§ 2. Requisites and validity.

[a] (Sup. 1823)

A recognizance may be entered into by the sureties alone, without the principal.—*Minor v. State*, 1 Blackf. 236.

[b] (Sup. 1825)

It is no objection to a recognizance entered into before an associate judge of the county that it does not state him to be a judge of the circuit court.—*McCarty v. State*, 1 Blackf. 338.

[c] (Sup. 1834)

If a penal bond, taken by a sheriff, show on its face that it was signed and sealed in his presence, and approved by him, it is good as a recognizance; the defect in its form, if any, being cured by the statute under which it was taken.—*Kearns v. State*, 3 Blackf. 334.

[d] (Sup. 1840)

A recognizance, from the caption of which it appears that the recognizance was taken in the proper county, sufficiently shows that the recognizance was taken in such county.—*Wellman v. State*, 5 Blackf. 343.

A recognizance, filed at the proper time, but not then entered of record, may be entered of record at a subsequent term, nunc pro tunc.—*Id.*

[e] (Sup. 1842)

A circuit judge may take a recognizance at his chambers.—*Crandall v. State*, 6 Blackf. 284.

[f] (Sup. 1843)

A party's name was omitted in the body of a recognizance, but it appeared that he had signed and sealed it with the others, and that it was taken and approved. *Held*, that the recognizance, notwithstanding the omission, was valid, under the statute, as to all the parties.—*Burton v. State*, 6 Blackf. 339.

[g] (Sup. 1846)

The president judge and one of the associates is a competent tribunal before whom to take a recognizance.—*Saxton v. State*, 8 Blackf. 200.

[h] (Sup. 1850)

The statute did not formerly require parties entering into recognizances to subscribe their names thereto.—*Doe ex dem. Cooper v. Harter*, 2 Ind. 252.

[i] (Sup. 1858)

A deputy sheriff's return of a recognizance: "Taken and approved by me this 20th day of Oct., 1852. M., Sheriff, by C., Deputy"—was in the proper form for such a return by a deputy, and was sufficient.—*Patterson v. State*, 10 Ind. 296.

[j] A recognizance need not be signed by the recognizers.—(Sup. 1862) *Campbell v. State*, 18 Ind. 375, 81 Am. Dec. 363; (1871) *State v. Elder*, 35 Ind. 368; (1876) *Grinestaff v. State*, 53 Ind. 238.

[k] A recognizance is not required to be under the seal of the parties.—(Sup. 1862) *Campbell v. State*, 18 Ind. 375, 81 Am. Dec. 363; (1876) *Grinestaff v. State*, 53 Ind. 238.

[l] (Sup. 1876)

Defendant, under a verified plea of non est factum, introduced evidence to show that after the execution of the recognizance sued on it had been altered by the interlineation of certain immaterial words. *Held* that, even if proved, such alteration, by whomsoever made, could not destroy its validity.—*Harris v. State ex rel. Brownlee*, 54 Ind. 2.

[m] (Sup. 1877)

A defective recognizance is cured by section 790, p. 311, 2 R. S. 1876.—*Black v. State ex rel. McAllister*, 58 Ind. 589.

[n] (Sup. 1881)

A recognizance, invalid at the time it is entered into, will not be validated by subsequent acts of the court or officer.—*State v. Winninger*, 81 Ind. 51.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Recogn. §§ 1-19.

See, also, 34 Cyc. pp. 540-551.

§ 3. Construction and operation.

[a] (Sup. 1839)

A. and B. entered into a recognizance by which they acknowledged themselves indebted to the state in the sum of \$1,000 each. *Held*, that the recognizance was several, and not joint and several.—*Hildreth v. State*, 5 Blackf. 80.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Recogn. §§ 20, 22.

See, also, 34 Cyc. p. 551.

§ 4. Discharge of sureties.

[a] (Sup. 1858)

Under 2 Rev. St. p. 366, the death of the principal, after forfeiture entered, making surrender impossible, like an actual surrender, discharges the surety in a recognizance, on payment of costs.—*Woolfolk v. State*, 10 Ind. 532.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Recogn. § 23.

See, also, 34 Cyc. pp. 552, 553.

§ 6. Extent of liability.

[a] (Sup. 1859)

The recognizance must be certified and recorded to be a lien on land.—Patterson v. State ex rel. Neff, 12 Ind. 86.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Recogn. §§ 24, 25.

See, also, 34 Cyc. p. 552.

§ 8. Relief from liability or forfeiture.

[a] (Sup. 1863)

The courts can remit judgments on forfeited recognizances, only for cause shown.—State ex rel. Lewis v. Speck, 20 Ind. 211.

[b] (Sup. 1875)

In a proceeding to set aside the forfeiture of a recognizance, a complaint is not necessary. A written motion is sufficient.—State v. Shideler, 51 Ind. 64.

The power to set aside the forfeiture of a recognizance is not vested exclusively in the governor, but exists also in the proper court.—Id.

[c] (Sup. 1890)

The forfeiture of a recognizance by a justice of the peace, certified by him, and filed in the office of the clerk of the circuit court, under the provisions of Rev. St. 1881, §§ 1630, 1631, cannot be set aside by the circuit court on motion in an action on the recognizance.—Day v. State, 125 Ind. 582, 25 N. E. 817.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Recogn. § 28.

See, also, 34 Cyc. pp. 556, 557.

§ 9. Entry of judgment on default or forfeiture.

Collateral attack on judgment forfeiting, see JUDGMENT, § 479.

Pleading in action on recognizance, see post, § 12.

[a] (Sup. 1832)

If the principal makes default, and the recognizance be declared forfeited, a scire facias may issue against the cognizor, without the entry of a judgment.—Andress v. State, 3 Blackf. 108.

[b] (Sup. 1834)

The rendering of judgment for the amount of a recognizance at the time of declaring the same forfeited is mere surplusage, and cannot be assigned for error.—Kearns v. State, 3 Blackf. 334.

[c] (Sup. 1859)

Forfeiture is necessary to the maintenance of action on a recognizance.—Votaw v. State, 12 Ind. 497.

[d] (Sup. 1874)

A recognizance may be the foundation of an action without a certificate of forfeiture indorsed thereon.—Adams v. State, 48 Ind. 212.

[e] (Sup. 1882)

A judge cannot delegate to the clerk authority to enter up judgment of forfeiture after the end of the term; and, when it is apparent that judgment was so entered, a suit on the recognizance cannot be maintained.—State v. Thistlethwaite, 83 Ind. 317.

[f] (Sup. 1884)

Where the proper entry and certificate of forfeiture is made, the judgment of forfeiture cannot be questioned by plea or proof in a suit on the recognizance.—Friedline v. State, 93 Ind. 366.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Recogn. § 27.

See, also, 34 Cyc. pp. 554, 555.

§ 11. Scire facias.

Entry of judgment as condition precedent to scire facias, see ante, § 9.

[a] (Sup. 1822)

A scire facias against all the obligors on a recognizance was served on two of them, and two nihil returned as to the other. *Held*, that execution was rightly awarded against the two; the award of execution being considered not as joint, but as several, conformably to the nature of the obligation.—Adair v. State, 1 Blackf. 200.

[b] (Sup. 1823)

If a recognizance entered into by two persons be forfeited, one scire facias may issue against both, and a separate execution be awarded against each for the amount of his obligation.—Minor v. State, 1 Blackf. 236.

[c] (Sup. 1832)

A scire facias, on a recognizance not taken in a court of record, should show by whom it was taken and filed, and that the person who took and filed it was authorized to do so.—Andress v. State, 3 Blackf. 108.

[d] (Sup. 1834)

The writing of "Octh." for October, in a sci. fa., to designate the time for appearance to the writ, cannot be assigned for error.—Kearns v. State, 3 Blackf. 334.

Two returns of "not found" to a sci. fa., like two returns of nihil, are equivalent to service.—Id.

[e] (Sup. 1834)

A scire facias on a recognizance, taken out of court, must show that the recognizance was taken by a person legally authorized to take it, and that it was duly acknowledged before him, and that it was filed and recorded in the proper court.—Lang v. State, 3 Blackf. 344.

[f] Where a recognizance by two or more is several and not joint, a joint scire facias against the recognizors cannot be sustained.—(Sup. 1839) Hildreth v. State, 5 Blackf. 80; (1840) Chandler v. Same, Id. 471.

[g] (Sup. 1840)

A scire facias against two or three recognizors bound severally is erroneous.—Wellman v. State, 5 Blackf. 343.

Where the caption of a recognizance set forth in a scire facias thereon shows that the recognizance was taken in the proper county, this is a sufficient allegation of that fact.—Id.

[h] (Sup. 1840)

In scire facias on a recognizance taken by a justice of the peace, it must appear that the recognizance was filed in, or returned to, and made a record of, the court to which it was returnable.—Davis v. State, 5 Blackf. 374.

[i] (Sup. 1841)

An objection to a sci. fa. on a recognizance, because it shows a variance in amount between the judgment and execution, is untenable.—Tatem v. Potts, 5 Blackf. 534.

[j] (Sup. 1842)

If a sci. fa. on a recognizance entered into by two persons jointly issue against one only, the omission of the other can only be taken advantage of by plea in abatement; and the plea in such case must show that the party not sued is living.—Wilson v. State, 6 Blackf. 212.

If the defendant in scire facias, on a recognizance, wish to deny the forfeiture of the recognizance, he must plead nul tiel record.—Id.

[k] (Sup. 1842)

Where a recognizance is in a sum beyond the justice's jurisdiction, and is forfeited, it should be certified to the circuit court; and a scire facias on it may, in such case, issue from that court.—Ross v. State, 6 Blackf. 315.

Though a recognizance be substantially defective, a scire facias suggesting the defect may, by statute, be issued on it; and the omission of such suggestion (the recognizance being copied into the scire facias) can only be taken advantage of, if at all, by special demurrer.—Id.

[l] (Sup. 1843)

In a scire facias against A., B., and C. on a recognizance conditioned for A.'s appearance, etc., the plaintiff cannot, on a suggestion that the writ had not been served on A., proceed to judgment against B. and C. alone.—Burton v. State, 6 Blackf. 339.

If plaintiff undertake in sci. fa. on a recognizance to give a recognizance in hæc verba, he is bound to set out an exact copy.—Id.

A party's name was omitted in the body of a recognizance, but it appeared that he had signed and sealed it with the others, and that it was taken and approved by a judge. *Held*, that no suggestion of the omission was necessary in the sci. fa. which set out in hæc verba the part of the recognizance objected to.—Id.

[m] (Sup. 1844)

Averments in a scire facias on a recognizance that the recognizance was filed in the

clerk's office on a certain day, and it was then recorded, and that it was afterwards, on a different day, filed and recorded in open court, are not repugnant.—Paine v. State, 7 Blackf. 206.

A plea to a scire facias on a recognizance, of a former judgment in the same cause of action, must show what the defense in the first action was, and that it involved the merits of the case.—Id.

A scire facias on a recognizance averred that it was taken by the president judge of a certain circuit, while the recognizance, which was set out in hæc verba in the scire facias, did not show where it was taken. *Held*, that there was no variance.—Id.

[n] (Sup. 1844)

In the case of a forfeited recognizance, an execution cannot be awarded against a recognizor on whom a scire facias has not been served, and who has not appeared, until there have been two returns of "not found" to writs of scire facias against him, directed to the sheriff of the county in which the recognizance was taken.—Graham v. State, 7 Blackf. 313.

[o] (Sup. 1845)

A joint action or scire facias will not lie on a several recognizance.—Lockwood v. State, 7 Blackf. 417.

[p] (Sup. 1881)

As a rule, the entry of a recognizance cannot be collaterally impeached.—State v. Wenzel, 77 Ind. 428.

[q] (Sup. 1881)

In a suit on a recognizance against the sureties, joining also the principal debtor as a defendant, the complaint averred sufficient to make it good against the sureties, and also that the principal had placed in the hands of the sureties a sum named, to secure them. *Held*, that a demurrer by the principal debtor should have been sustained.—Shields v. Smith, 78 Ind. 425.

An instruction declaring correctly the legal effect of a recognizance sued on was proper.—Id.

[r] (Sup. 1882)

It is necessary that a complaint on a forfeited recognizance should show that a proper judgment of forfeiture was duly entered of record.—State v. Thistlethwaite, 83 Ind. 317.

[s] (Sup. 1883)

A complaint on a forfeited recognizance taken before a justice of the peace need not exhibit a copy of the justice's certificate of forfeiture, since such certificate is not the foundation of the action, but only presumptive evidence of the forfeiture of the recognizance.—Fowler v. State, 91 Ind. 507.

[t] (Sup. 1884)

A complaint on a forfeited recognizance alleging the jurisdiction of the court and its entry of judgment of forfeiture is good against demurrer.—Friedline v. State, 93 Ind. 366.

Where the complaint, in an action on a forfeited recognizance, alleges that a judgment of forfeiture was entered by the justice, it will be presumed that the proper steps authorizing such forfeiture had been taken.—Id.

FOR CASES FROM OTHER STATES.

SEE 42 CENT. DIG. Recogn. §§ 31-71.

See, also, 34 Cyc. pp. 562-565.

§ 12. Actions.

Forfeiture as condition precedent to action, see ante, § 9.

Parol evidence to vary, see EVIDENCE. § 401.

Sufficiency of findings by court, see TRIAL, § 395.

[a] (Sup. 1838)

It is no defense to a suit on a recognizance that the proceedings against the principal are erroneous.—Cutshaw v. Birge, 4 Blackf. 511.

[b] (Sup. 1842)

If the recognizance was not entered into by the party sued on it so as to be obligatory on him, the objection should be made by plea.—Ross v. State, 6 Blackf. 315.

[c] (Sup. 1844)

Debt lies on a recognizance.—State v. Inman, 7 Blackf. 225.

Where the penalty on a recognizance taken by a justice of the peace is beyond the jurisdiction of a justice, it may be sued on in the circuit court.—Id.

[d] (Sup. 1845)

Where, in debt on a recognizance, defendant pleads former recovery, the reply of plaintiff should plead that the cause of action was not the same, instead of replying nul tiel record.—James v. State, 7 Blackf. 325.

[e] (Sup. 1845)

The declaration in debt on a recognizance should set out the recognizance in terms, or according to its legal effect.—Bolles v. Haines, 7 Blackf. 398.

If, in debt on a recognizance, some of the issues are on pleas of nul tiel record, and the others on pleas of payment, and are all found for plaintiff, the former by the court, and the latter by the jury, the jury should find the amount due the plaintiff.—Id.

[f] (Sup. 1849)

While standing in full force on the record, a recognizance cannot be collaterally impeached for alleged incapacity by drunkenness of the party who entered into it; no steps having been taken by the party bound to have it avoided on that ground.—Doe ex dem. Cooper v. Harter, 1 Ind. 427.

[g] (Sup. 1858)

The objection to the authority of a deputy sheriff to make return of a recognizance should be raised by answer.—Patterson v. State, 10 Ind. 296.

Under 2 Rev. St. p. 213, § 790, providing that no recognizance shall be void for want of form or substance or recital of condition, and that in an action on such a recognizance plaintiff or relator may suggest a defect in the complaint, the failure to make such suggestion in the first instance can always be cured by amendment.—Id.

[h] (Sup. 1859)

2 Rev. St. p. 499, §§ 12-15, and page 366, § 49, require the designated record and certificate of a recognizance taken by a justice only in order to make the same a lien on land; and it can be the subject of a personal action without them.—Patterson v. State ex rel. Neff, 12 Ind. 86.

[i] (Sup. 1859)

In an action on a forfeited recognizance, a copy thereof must be filed with the complaint; but 2 Rev. St. p. 44, § 78, does not require that the minutes of the court showing the forfeiture, nor a copy thereof, should be so filed. The recognizance is a written instrument within the meaning of the statute, while the judgment of forfeiture thereof is not.—Votaw v. State, 12 Ind. 497.

If, in an action on a forfeited recognizance, the answer admits its execution, its admission in evidence is not an error of which defendant can complain.—Id.

[j] In a suit on a recognizance taken and approved by a sheriff, the facts authorizing him to take it must be averred.—(Sup. 1859) Blackman v. State, 12 Ind. 556; (1862) Myers v. State, 19 Ind. 127.

[k] (Sup. 1859)

An answer to a complaint on a forfeited recognizance taken by a sheriff, averring that the person who took the recognizance was not a sheriff, and was not authorized to take it, was sufficient on demurrer.—Blackman v. State, 12 Ind. 556.

[l] Where an action is founded on a recognizance, the recognizance, or a copy of it, must be filed with the complaint.—(Sup. 1859) Kiser v. State, 13 Ind. 80; (1861) Swinney v. State, 16 Ind. 309.

[m] (Sup. 1860)

Under 2 Rev. St. §§ 47, 48, 50, pp. 366, 367, providing that actions by the prosecuting attorney on forfeited recognizances shall be governed by the rules of civil pleading so far as applicable, an action against sureties on a forfeited recognizance must be brought in the county where such defendants or one of them has his usual place of business, as required by 2 Rev. St. §§ 29-33, in civil actions.—State v. Vanvalkenburg, 15 Ind. 185.

[n] (Sup. 1862)

A complaint on a recognizance, setting it out in hæc verba, is sufficient.—Campbell v. State, 18 Ind. 375, 81 Am. Dec. 363.

[o] A suit on a forfeited recognizance need not be brought at the relation of anybody, and, if so brought, the name of the relator may be stricken out on motion.—(Sup. 1865) *Hawkins v. State ex rel. Read*, 24 Ind. 288; (1877) *Black v. State ex rel. McAllister*, 58 Ind. 589.

[p] (Sup. 1865)

An averment in the complaint that the recognizance "is defective, in this: that the subscribing was Joseph K. Hiney, Smith & St. Clair, and it should be John St. Clair and Andrew J. Smith, for that the said sureties did intend to bind themselves jointly and severally in the aforementioned sum,"—is sufficient where a copy of the instrument filed shows that it was signed, "Smith & St. Clair."—*State v. Hiney*, 24 Ind. 381.

[q] (Sup. 1867)

The right of action upon a recognizance taken by a justice of the peace, under section 14 of the justice's act (2 Gav. & H. St. 639), is complete when the recognizance has been forfeited. It does not depend upon the indorsement of a certificate of forfeiture or the filing of the recognizance in the clerk's office, as required by other provisions of the statute. The object in requiring the justice to indorse a certificate of the forfeiture on a recognizance taken under section 14, and the filing and recording of the recognizance and certificate in the clerk's office of the proper court, and the entry thereof on the judgment docket, is to make it operate as a lien upon the lands of the parties thereto, and not to perfect it as a valid cause of action.—*Gachenheimer v. State*, 28 Ind. 91.

In an action on a forfeited recognizance, where a copy of the recognizance is filed with the complaint, the certificate of the justice showing the forfeiture, or a copy thereof, need not be filed.—*Id.*

On the trial of an action on a recognizance taken under section 14 of the justices' act (2 Gav. & H. St. p. 639), no transcript of the proceedings of the justice was given in evidence. *Held*, that there could be no recovery by the state, for want of proof of the authority of the justice to take the recognizance in suit.—*Id.*

[r] (Sup. 1868)

In an action on a forfeited recognizance, under 2 Gav. & H. St. § 37, the complaint need not show that there was an order of the court requiring the defendant to enter into a recognizance, but only the fact that it was taken in a fixed penalty by the court, in open session.—*McClure v. State*, 29 Ind. 359.

[s] (Sup. 1871)

In a suit upon a recognizance, the complaint must show that the principal in the recognizance was called and defaulted.—*Urton v. State*, 37 Ind. 339.

[t] (Sup. 1871)

In an action on a recognizance taken before a justice of the peace, it must be alleged

in the complaint that there has been a forfeiture.—*Hannum v. State*, 38 Ind. 32.

[u] A recognizance may be the foundation of an action without its having been filed with the clerk, as is contemplated by 2 Gav. & H. St. p. 639, § 15, and as is necessary where it is desired to make the recognizance a lien on real estate.—(Sup. 1874) *Adams v. State*, 48 Ind. 212, overruling *Urton v. State* (1871) 37 Ind. 339.

[v] (Sup. 1876)

On the trial of an action on a forfeited recognizance taken in open court and entered of record, it need not be proved that the court required the principal to enter into the same.—*Grinestaff v. State*, 53 Ind. 238.

[w] (Sup. 1886)

Want of authority to take and approve a forfeited recognizance sued on should be shown as a matter of defense.—*Carmony v. State*, 105 Ind. 546, 5 N. E. 679.

In an action on a forfeited recognizance, an answer averring that the "continuing" recognizance taken was not directed by the court to be a "continuing" one is not good unless it avers that the principal did not voluntarily consent to the execution thereof.—*Id.*

In an action on a forfeited recognizance, the authority of a deputy to act for the sheriff in taking and approving the recognizance will be presumed.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. *Recogn.* §§ 31-71.

See, also, 34 Cyc. pp. 537-573.

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County recorders, incompatibility of offices of county recorder and county commissioner. **OFFICERS**, § 30.

Limitations as to time of holding office within certain period. **OFFICERS**, § 25.

Occurrence and existence of vacancy in office. **OFFICERS**, § 55.

County, etc.—(Cont'd).

Resignation. **COUNTIES**, § 66.

Statement of claim against county. **COUNTIES**, § 201.

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Limitation of action against recorder for making erroneous record of mortgage. **LIMITATION OF ACTIONS**, §§ 57, 104.

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RECORDS.*Scope-Note.*

[INCLUDES public memorials in writing of acts, transactions, and proceedings, and instruments in writing or copies thereof, preserved as evidence of the matters to which they relate, more particularly matters affecting title to or interests in property and registration of titles to land; nature and requisites of such records, deposit and reception of instruments for filing or record, and custody and care thereof; amendment of defects therein; access to and use of such records; supplying lost records and establishing titles after loss or destruction of records thereof; and offenses of altering, defacing, mutilating, or destroying public records.

[EXCLUDES making, custody, amendment, and operation of court records in general (see *Courts*); records of particular judicial proceedings (see *Judgment*; and titles of particular proceedings), and transcripts and abstracts of such records for purposes of review thereof (see *Appeal and Error*; and specific heads); recording particular instruments, and effect of record or of failure to record in general (see *Deeds*; *Mortgages*; and titles of particular instruments), and operation of record as constructive notice to purchasers, mortgagees, etc. (see *Vendor and Purchaser*; *Mortgages*); and recording officers (see *Registers of Deeds*). For complete list of matters excluded, see cross-references, post.]

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§ 1. Nature and essentials in general.

[a] (Sup. 1850)
 An execution when returned is a record;
 and a recognizance indorsed on the execution
 and returned is a record also.—Doe ex dem. In-
 gram v. Allen, 2 Ind. 166.

[b] (Sup. 1883)
 The books of a township trustee are pub-
 lic records.—Anderson School Tp. v. Thompson,
 92 Ind. 556.

FOR CASES FROM OTHER STATES,
 SEE 42 CENT.DIG. Records, § 1.
 See, also, 34 Cyc. p. 585; note, 15 Am. St.
 Rep. 294.

§ 5. Payment of fees.

[a] (Sup. 1896)
 Where the statute provides that the fee for
 filing an instrument shall be paid in advance of
 the filing of the document, and where the mon-
 ey therefor does not under the law go to the
 officer with whom the same is required to be
 filed as his own remuneration, but goes into the
 public treasury for the benefit of the state, the
 officer must be considered as the agent of the
 state, and, as such, he is not authorized to file

the document presented and required to be filed
 until the fee is first paid.—State v. Chicago &
 E. I. R. Co., 43 N. E. 226, 145 Ind. 229.

FOR CASES FROM OTHER STATES,
 See 34 Cyc. p. 588.

§ 6. Recording written instruments.

[a] (Sup. 1883)
 Under Acts 1855, p. 226, requiring the ar-
 ticles of association of a fire company to be re-
 corded in "the book of record of deeds," such
 articles may be recorded in any public record
 not exclusively devoted to the record of other
 instruments.—Tipton Fire Co. v. Barnheisel, 92
 Ind. 88.

[b] (Sup. 1889)
 Where a statute simply requires that let-
 ters patent to land shall be recorded, it is im-
 material that the book in which they are re-
 corded is not designated on the outside as a re-
 cord of patents, or that it does not contain an
 official certificate.—Nitcher v. Earle, 117 Ind.
 270, 19 N. E. 749.

FOR CASES FROM OTHER STATES,
 SEE 42 CENT. DIG. Records, § 7.
 See, also, 34 Cyc. pp. 588-590.

§ 7. Filing written instruments or copies thereof.

[a] A paper is filed when it is delivered to the proper officer and by him received to be kept on file.—(App. 1891) *Everman v. Hyman*, 28 N. E. 1022, 26 Ind. App. 165, 84 Am. St. Rep. 284; (1909) *Meek v. State ex rel. Linnville*, 172 Ind. 654, 88 N. E. 299, 89 N. E. 307.

[b] (Sup. 1910)

A paper is filed when delivered to the proper officer, and by him received to be kept on file.—*Gfroerer v. Gfroerer*, 90 N. E. 757.

A paper is filed in open court when presented in open court, the purpose of filing announced, and it is received by the court as a part of the permanent files of the cause.—Id.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Records, § 6.

See, also, 34 Cyc. pp. 587, 588.

§ 8. Index.

Fees of clerks of courts for indexing, see CLERKS OF COURTS, § 18.

Recovery on quantum meruit for services in making, see WORK AND LABOR, § 22.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Records, § 4.

See, also, 34 Cyc. pp. 586, 587; note, 14 L. R. A. 393.

§ 10. Defects, amendment, and correction.

Court records, see COURTS, § 116.

[a] (Sup. 1873)

Where a deed by mistake incorrectly describes the property intended and agreed to be conveyed, and is correctly copied by the recorder, he cannot be compelled to change the record to make it conform to a change in the deed made by the court.—*King v. Bales*, 44 Ind. 219.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Records, §§ 8–12.

See, also, 34 Cyc. pp. 590–592.

§ 13. Custody, care, and use in general.

Court records, see COURTS, § 113.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Records, § 3.

See, also, 34 Cyc. p. 590.

§ 14. Access to records or files.

[a] (Sup. 1900)

Citizens and taxpayers of a county are not deprived of the right to examine the records and papers in the county auditor's office, to discover if the public funds have been properly administered, by *Burns' Rev. St. 1894, §§ 7830, 7995* (*Horner's Rev. St. 1897, §§ 5745, 5917*), requiring the county board of commissioners to audit the accounts of county officers, and have the care and management of such funds, and that such records and papers be kept open to

their inspection.—*State ex rel. Colscott v. King*, 57 N. E. 535, 154 Ind. 621.

Under *Burns' Rev. St. 1894, § 7831* (*Horner's Rev. St. 1897, § 5746*), requiring all county records and papers to be open to the inspection of any person, a taxpayer and citizen of a county is entitled to examine the records and papers in the county auditor's office, to discover the condition of the public revenue.—Id.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Records, §§ 13–18.

See, also, 34 Cyc. pp. 592–595; note, 49 C. C. A. 210; notes, 27 L. R. A. 82, 5 L. R. A. (N. S.) 545; note, 124 Am. St. Rep. 911.

§ 15. Making and use of copies.

[a] (Sup. 1900)

Where it appeared that citizens and taxpayers of a county believed that the public funds had been unlawfully used, and appointed a committee of their number to examine the records and papers of the auditor's and treasurer's offices, to discover if such funds had been properly administered, a member of such committee, aside from any statutory authority, was entitled, as a corporator of the county, to make copies and abstracts of such records, under reasonable regulations to prevent misuse of the same, and material interruption of the duties of their custodian.—*State ex rel. Colscott v. King*, 57 N. E. 535, 154 Ind. 621.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Records, §§ 19, 20.

See, also, 34 Cyc. pp. 594, 595.

§ 17. Supplying or restoring records or instruments lost or destroyed.

Lost or destroyed judgment record, see JUDGMENT, § 283.

Lost or destroyed pleadings, see PLEADING, § 340.

Record of cause for purpose of review, see APPEAL AND ERROR, § 543.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Records, §§ 25, 26, 28–35; 13 CENT. DIG. Courts, § 370.

See, also, 34 Cyc. pp. 606–610.

§ 19. Construction and operation in general.

[a] (Sup. 1882)

The records of a municipal corporation are public records and supply notice to all persons interested in the action of the municipal authorities.—*City of Madison v. Smith*, 83 Ind. 502.

[b] (Sup. 1887)

Act March 5, 1883, § 1, provides that when a deed shall have been made by an executor or administrator by virtue of any order of court or terms of the will, and the record shall have been destroyed by the burning of the courthouse, then such deed, or the record of it,

shall be prima facie evidence of its regularity and sufficiency. An administrator's deed purported to have been made in accordance with the will, which provided for an appraisal of the property. The records were destroyed by fire. *Held*, that the property would be presumed to have been duly appraised.—*Davis v. Hoover*, 112 Ind. 423, 14 N. E. 468.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Records, § 44.

See, also, 34 Cyc. p. 614.

§ 22. Mutilation or destruction.

Loss or destruction of record of indictment or presentment, see INDICTMENT AND INFORMATION, § 14.

Loss or destruction of record of information or complaint, see INDICTMENT AND INFORMATION, § 44.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Records, §§ 43-47.

See, also, 34 Cyc. p. 615.

RECOUPMENT.

See SET-OFF AND COUNTERCLAIM.

RECRIMINATION.

Defense to action for divorce, see DIVORCE, §§ 52-55.

RE-CROSS-EXAMINATION.

See WITNESSES, § 291.

REDELIVERY.

See—

Bill of exchange or promissory note to acceptor or maker. BILLS AND NOTES, § 142.

Bond—

ATTACHMENT, § 191.

EXECUTION, §§ 151-155.

Deed to grantor, as relinquishment of rights thereunder. DEEDS, § 179.

Property by bailee. BAILMENT, § 23.

REDEMPTION.

See—

Bank notes. BANKS AND BANKING, §§ 199, 207, 208.

Equity of redemption, judgment as lien on. JUDGMENT, § 780.

Judicial sale of. JUDICIAL SALES, § 50.

Execution sale. EXECUTION, §§ 292-302.

JUDICIAL SALES, §§ 50, 60.

Laws impairing obligation of contracts. CONSTITUTIONAL LAW, § 183.

Mortgage sale—

CHATTEL MORTGAGES, §§ 293-296.

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Mortgage, etc.—(Cont'd).

Agreement of mortgagor cutting off right.

MORTGAGES, § 20.

Right of assignee in bankruptcy to redeem.

BANKRUPTCY, § 213.

Pledged property. PLEDGES, §§ 49-51.

Sale by assignee for benefit of creditors. ASSIGNMENTS FOR BENEFIT OF CREDITORS, § 251.

On foreclosure of liens. LIENS, § 23.

Sale to enforce assessment for public improvements. MUNICIPAL CORPORATIONS, § 581.

Sale to enforce mechanic's lien. MECHANICS' LIENS, § 299.

Shares in building and loan association.

BUILDING AND LOAN ASSOCIATIONS, § 14.

Surrender of right to redeem as consideration of contract. CONTRACTS, § 54.

Tax sale. TAXATION, §§ 695-725.

REDIRECT EXAMINATION.

See WITNESSES, §§ 285-290.

REDUCTION.

See—

Amount of recovery as condition of denying motion for new trial. NEW TRIAL, § 162.

Capital stock of corporations. CORPORATIONS, § 67.

Compensation of public officers. OFFICERS, § 100.

Of state officers. STATES, § 63.

Damages, by insurance. DAMAGES, § 64.

By person injured. DAMAGES, § 62.

For causing death. DEATH, § 91.

For wrongful discharge of servant, effect of other employment or opportunity therefor. MASTER AND SERVANT, § 42.

Instructions. DAMAGES, § 214.

Loss by owner of property insured. INSURANCE, §§ 481, 505.

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REFORMATORIES, § 8.

To possession by husband of wife's property. HUSBAND AND WIFE, § 11.

REDUNDANCY.

See PLEADING, §§ 22, 364.

RE-ENACTMENT.

See STATUTES, §§ 170, 225%.

RE-ENTRY.

Lost or destroyed judgment, see JUDGMENT, § 283.

RE-EXAMINATION.

See WITNESSES, §§ 286, 285-291.

REFERENCE.

Scope-Note.

[INCLUDES judicial examination and determination of issues and questions arising in civil cases in general by persons especially selected for the purpose; nature of the proceeding, power to refer causes for trial, and what causes may be so referred, by consent of parties or compulsorily; grounds for ordering references, and proceedings therefor; appointment, qualification, rights, powers, and duties of referees and control over them exercised by courts; trials or hearings before referees; reports and findings of referees, objections and exceptions thereto, setting aside such reports or findings, and recommitting cause for further report; and operation and effect of report and findings in general.]

[EXCLUDES right to trial by jury and waiver thereof in general (see *Jury*); references in particular forms or classes of action (see *Divorce*; *Account*, *Action on*; and other specific heads), references to masters in equity, auditors, etc., to inform the court (see *Equity*; and titles of particular proceedings); and submissions of controversies to arbitrators chosen by the parties (see *Arbitration and Award*), or to the courts on statements of facts agreed upon, without action (see *Submission of Controversy*). For complete list of matters excluded, see cross-references, post.]

Analysis.

I. Nature, Grounds, and Order of Reference.

- § 1. Nature and purpose of remedy.
- § 4. Issues and questions which may be referred on consent.
- § 24. Consent to reference.
- § 31. Vacating or setting aside order.
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- § 41. Objections to referee.
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- § 79. Time for report.
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- § 98. Filing and record.
- § 99. Operation and effect.
- § 100. Objections and exceptions, and hearing thereof in general.
- § 101. Recommittal.
- § 102. Confirmation.
- § 106. Different decision or findings by court.
- § 107. Review on motion in trial court.

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*Cross-References.**See—***ARBITRATION AND AWARD.**

Consent to reference as waiver of right to trial by jury. **JURY**, § 28.

Effect of reference in abstract of record on appeal to record. **APPEAL AND ERROR**, § 583.

In assignment of errors to record. **APPEAL AND ERROR**, § 743.

In brief to record or assignment of errors. **APPEAL AND ERROR**, § 760.

From one plea or paragraph of answer to another. **PLEADING**, § 95.

Presumptions on appeal. **APPEAL AND ERROR**, § 924.

Restraining proceedings. **INJUNCTION**, § 28.

Review of decisions relating to reference. **APPEAL AND ERROR**, §§ 198, 220, 266, 687, 1016, 1017.

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By executor or administrator. **EXECUTORS AND ADMINISTRATORS**, § 507.

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Claims against counties. **COUNTIES**, § 204.

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I. NATURE, GROUNDS, AND ORDER OF REFERENCE.**§ 1. Nature and purpose of remedy.**

Nature of arbitration as distinguished from reference, see **ARBITRATION AND AWARD**, § 1.

[a] (**Sup.** 1871)

The appointment of a committee by the board of county commissioners to examine the books and accounts of a county treasurer, who presents his claim for services, and to report whether there is any money due the treasurer, does not amount to a reference to referees, and the report of the committee so appointed is not binding, either on the county or the claimant.—*Gilmore v. Board of Com'rs of Putnam County*, 35 Ind. 344.

Before there can be a reference for trial, there must be an action pending; and there can be no action pending, unless there are adversary parties.—*Id.*

[b] (**Sup.** 1882)

A submission of a cause not at issue to one as a master commissioner to complete the issues and take the evidence, and to submit his conclusions on the law and proof to a subsequent term of the court, is a reference, under Rev. St. 1881, § 556-8, providing that all or any of the issues in an action, except in actions for divorce and for the nullification of marriages, may be referred on the written consent of the parties.—*Beard v. Hand*, 88 Ind. 183.

[c] (**Sup.** 1882)

A master commissioner, referred to "for finding," is a general referee.—*Lee v. State ex rel. Templeton*, 88 Ind. 256.

[d] (**Sup.** 1884)

A reference to a master is merely a method of enabling the court to arrive at the facts.—*McNaught v. McAllister*, 93 Ind. 114.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Refer. § 1.

See, also, 34 Cyc. pp. 774-777.

§ 4. Issues and questions which may be referred on consent.

[a] (**Sup.** 1851)

In a suit on an official bond, the inquiry of damages, after an interlocutory judgment, may be submitted to referees by consent of the parties.—*Kintner v. State ex rel. Skelton*, 3 Ind. 86, 92.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Refer. § 5.

See, also, 34 Cyc. p. 777.

§ 24. Consent to reference.

As waiver of right to trial by jury, see **JURY**, § 28.

Issues and questions which may be referred on consent, see ante, § 4.

[a] (**Sup.** 1818)

The consent of parties to a rule of reference must appear in the record.—*Mills v. Conner*, 1 Blackf. 7.

[b] (**Sup.** 1858)

A reference by order of court, under 2 Rev. St. p. 116, § 349, is not binding where the consent of the parties appears neither of record nor by a writing on file.—*Shaw v. Kent*, 11 Ind. 80.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Refer. § 40.

See, also, 34 Cyc. p. 793.

§ 31. Vacating or setting aside order.

[a] (**App.** 1909)

Where a submission is made under a rule of court, as expressly allowed by *Burns' Ann. St.* 1908, § 896, its revocation rests within the

sound discretion of the court.—*Heritage v. State ex rel. Crim*, 43 Ind. App. 595, 88 N. E. 114.

FOR CASES FROM OTHER STATES.

SEE 42 CENT. DIG. Refer. §§ 57, 58.

See, also, 34 Cyc. p. 802.

§ 34. Objections and exceptions to order.

To referee, see post, § 41.

[a] (Sup. 1862)

The error in referring a cause to a commissioner to take accounts before answer filed is cured by consent of parties.—*State ex rel. Lipperd v. Carrington*, 19 Ind. 258.

[b] (App. 1893)

Where the record on appeal shows that appellant consented to a reference, and voluntarily appeared before the referee, his objection that the judgment is void because of failure to comply with Rev. St. 1881, § 556, requiring the written consent of both parties to the reference, will not be sustained.—*Taylor v. Trustees First Congregational Church and Society of Michigan City*, 34 N. E. 655, 7 Ind. App. 388.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Refer. §§ 61, 62.

See, also, 34 Cyc. pp. 799, 800.

II. REFEREES AND PROCEEDINGS.

Dismissal of part of cause of action, see DISMISSAL AND NONSUIT, § 3.

In equity, see EQUITY, § 404.

Presumptions on appeal or writ of error, see APPEAL AND ERROR, § 924.

Record for purpose of review, see APPEAL AND ERROR, § 526.

Review of proceedings as dependent on presentation of question in lower court, see APPEAL AND ERROR, § 220.

Review of proceedings as dependent on presentation of question in record, see APPEAL AND ERROR, § 687.

Review of proceedings as dependent on taking of exception in lower court, see APPEAL AND ERROR, § 266.

§ 41. Objections to referee.

[a] (Sup. 1869)

Parties to an action made a written agreement "to submit all matters in controversy in the above action to the referees chosen by the parties, naming the referees A. and B., and, in case they cannot agree, they are to choose a third person as umpire." The order of reference provided: "By the written consent of the parties and by the consent of their attorneys in open court, this cause and all the issues joined therein are now referred to A. and B. and C., the three disinterested persons mutually chosen in open court, and said referees are ordered to report their proceedings at the present term of this court." *Held*, that objection to the fact that C. acted as one of the referees was waived.—*Pitts v. Langsdale*, 32 Ind. 218.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Refer. § 67.

See, also, 34 Cyc. p. 807.

§ 42. Oath.

[a] The statute concerning references does not require referees to be sworn.—(Sup. 1835) *Dickerson v. Hays*, 4 Blackf. 44; (1863) *Daggy v. Cronnelly*, 20 Ind. 474.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Refer. § 68.

See, also, 34 Cyc. p. 807.

§ 48. Effect of provisions of order of reference.

[a] (App. 1905)

A reference to one, by agreement, to examine into all the issues, take evidence thereon, and report his findings of fact and the evidence heard by him, and his rulings thereon, is a reference to a master commissioner, under Burns' Ann. St. 1901, § 1462 et seq., and not to a referee, under sections 565-567.—*St. Joseph Mfg. Co. v. Hubbard*, 75 N. E. 17, 36 Ind. App. 84.

FOR CASES FROM OTHER STATES.

SEE 42 CENT. DIG. Refer. § 75.

See, also, 34 Cyc. p. 812.

§ 51. Mode and course of proceeding in general.

[a] (Sup. 1863)

The parties making a reference may agree that the referee may avail himself of the advice of another person in the determination of the matters referred to him.—*Daggy v. Cronnelly*, 20 Ind. 474.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Refer. §§ 69, 80.

See, also, 34 Cyc. p. 810.

§ 56. Appearance and participation of parties in proceedings.

[a] (Sup. 1835)

The want of notice of the time and place of the meeting of the arbitrators to whom a pending cause has been referred is no objection to an award, provided the party appeared and was heard before them.—*Dickerson v. Hays*, 4 Blackf. 44.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Refer. §§ 84-86.

See, also, 34 Cyc. pp. 816-818.

§ 61. Conduct of trial or hearing in general.

[a] (Sup. 1895)

Trials by referees are conducted in the same manner as a trial by the court.—*McCutchen v. McCutchen*, 41 N. E. 324, 141 Ind. 697.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Refer. §§ 93, 101.

See, also, 34 Cyc. pp. 821, 822.

§ 62. Reception of evidence.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Refer. §§ 94-100.

See, also, 34 Cyc. pp. 821-825.

§ 66. — Effect of error in admission of evidence.

[a] (Sup. 1891)

It is no ground for rejecting the entire report of a master appointed to report on both the law and the facts that he admitted some improper evidence.—*Lewis v. Godman*, 129 Ind. 359, 27 N. E. 563.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Refer. § 99.

See, also, 34 Cyc. p. 825.

III. REPORT AND FINDINGS.

Conformity of judgment to report of referee, see JUDGMENT, § 257.

Contrary to law and evidence, ground for new trial, see NEW TRIAL, § 80.

In equity, see EQUITY, §§ 406-410.

Interest on award of referees, see INTEREST, § 21.

Presumptions on appeal or writ of error, see APPEAL AND ERROR, § 931.

Record for purpose of review, see APPEAL AND ERROR, § 526.

Review of findings and report as dependent on mode of trial, see APPEAL AND ERROR, § 848.

Review of findings and report as dependent on prejudicial nature of error, see APPEAL AND ERROR, § 1071.

Review of findings and report as dependent on presentation of question in lower court, see APPEAL AND ERROR, § 220.

Review of findings and report as dependent on presentation of question in record, see APPEAL AND ERROR, § 687.

Review of findings and report as dependent on taking of exception in lower court, see APPEAL AND ERROR, § 260.

Review of questions of fact, see APPEAL AND ERROR, §§ 1016, 1017.

§ 79. Time for report.

Necessity of objections, see post, § 100.

[a] (Sup. 1818)

The award under a rule of reference must be made within the time limited by the rule.—*Mills v. Conner*, 1 Blackf. 7.

[b] (Sup. 1837)

Where a pending suit is referred to arbitrators, the award, if no time for making it be fixed, should be returned to the next term of court.—*Minton v. Moore*, 4 Blackf. 315.

[c] (Sup. 1878)

The court ordering a reference may, in its discretion, especially where no objection is made, allow referees to file their report at a day subsequent to that which, by the order of

reference, it should have been filed.—*Way v. Fravel*, 61 Ind. 162.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Refer. § 116.

See, also, 34 Cyc. pp. 831, 832.

§ 80. Effect of delay in making report.

[a] (Sup. 1837)

Failure to return an award to the next term of court, no time for making it having been fixed by the order of reference, will give the plaintiff the right to have the cause tried as if no reference had been made.—*Minton v. Moore*, 4 Blackf. 315.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Refer. §§ 56, 117.

See, also, 34 Cyc. p. 832.

§ 82. Making and form of report.

[a] (Sup. 1863)

Where parties making a reference agree that the referee may avail himself of the advice of another person in determining the matters referred to him, it is not necessary for such person to sign the report.—*Daggy v. Cronnelly*, 20 Ind. 474.

[b] (Sup. 1863)

Where a controversy pending in court is referred, by order of the court, to three referees, the parties may agree to receive a report from one or more of them.—*Wright v. Macey*, 21 Ind. 301.

[c] (Sup. 1864)

The report of referees to whom issues of fact or law, or both, in a pending action, are referred, is not a statutory award, but stands as a special verdict and need not be attested by a subscribing witness.—*Hedrick v. Judy*, 23 Ind. 548.

[d] (Sup. 1868)

Parties to an action made a written agreement "to submit all matters in controversy in the above action to the referees chosen by the parties, naming the referees, A. and B., and, in case they cannot agree, they are to choose a third person as umpire." The order of reference provided: "By the written consent of the parties and by the consent of their attorneys in open court, this cause and all the issues joined therein are now referred to A. and B. and C., the three disinterested persons mutually chosen in open court, and said referees are ordered to report their proceedings at the present term of this court." Held that, where the report showed that all the referees acted, the fact that only two of them concurred in and signed it would not make the report defective.—*Pitts v. Langsdale*, 32 Ind. 218.

[e] (App. 1909)

Under *Burns' Ann. St. 1908*, § 882, providing that an award of a majority of the arbitrators is valid, unless otherwise required by the submission, and section 898, providing that when a report of referees, to which a matter

in suit has been submitted under section 896, or a majority of them, is made, it shall be of the same effect as a jury verdict, a report of a majority of referees, under the section, was a valid report, where the written agreement of submission permitted it.—*Heritage v. State ex rel. Crim*, 43 Ind. App. 595, 88 N. E. 114.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Refer. §§ 119, 120.

See, also, 34 Cyc. pp. 834-845.

§ 83. Requisites and sufficiency of report in general.

[a] (Sup. 1882)

Where a cause not at issue is, by consent, referred to a master commissioner to complete the issues, take the evidence, and report his conclusions, his report is not defective because it fails to show rulings upon demurrer to the pleadings.—*Beard v. Hand*, 88 Ind. 183.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Refer. §§ 121-126.

See, also, 34 Cyc. pp. 834-838.

§ 84. Findings of fact and conclusions of law.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Refer. §§ 131-144.

See, also, 34 Cyc. pp. 838-843.

§ 85. — Duty to make.

[a] (Sup. 1899)

Parties to an action made a written agreement "to submit all matters in controversy in the above action to the referees chosen by the parties, naming the referees A. and B., and, in case they cannot agree, they are to choose a third person as umpire." The order of reference provided: "By the written consent of the parties, and by the consent of their attorneys in open court, this cause and all the issues joined thereon are now referred to A., B., and C., the three disinterested persons mutually chosen in open court, and said referees are ordered to report their proceedings at the present term of this court." *Held*, that the referees were not required to make special findings.—*Pitts v. Langsdale*, 32 Ind. 218.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Refer. § 131.

See, also, 34 Cyc. p. 839.

§ 86. — Facts and conclusions to be found.

[a] (Sup. 1879)

Where, in a trial by referees, plaintiff abandons part of the cause of action stated in his complaint, the referees are not required to report to the court the facts and their conclusions of law relative to the parts so abandoned.—*Barnard v. Daggett*, 68 Ind. 305.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Refer. § 132.

See, also, 34 Cyc. p. 839.

§ 87. — Requests for findings.

[a] (Sup. 1859)

A referee appointed to decide a matter in issue in a pending suit may report the facts found by him if so requested.—*Ware v. Adams*, 12 Ind. 359.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Refer. § 133.

See, also, 34 Cyc. p. 842.

§ 88. — Making and form.

Necessity of objection, see post, § 100.

[a] (Sup. 1855)

Under Rev. St. 1852, a referee need not state the facts found and the conclusions of law thereon separately, unless required to do so by the parties.—*Indiana Cent. R. Co. v. Bradley*, 7 Ind. 49.

[b] (Sup. 1859)

A referee's report must state the facts found and the conclusions of law separately.—*Board of Trustees of Wabash & E. Canal v. Huston*, 12 Ind. 276.

[c] (Sup. 1871)

A trial by referees is conducted in the same manner as a trial by the court. They may be required to state the facts and conclusions of law separately; otherwise, they may render a general finding.—*Gilmore v. Board of Com'rs of Putnam County*, 35 Ind. 344.

[d] (Sup. 1878)

Where a party to an action desires the referee to find the facts and conclusions of law separately, the practice is to have the order of reference require the referees to make such finding; but the party may make his request for such finding to the referees themselves, and it is their duty to comply therewith.—*Way v. Fravel*, 61 Ind. 162.

[e] (Sup. 1884)

On a trial before the master on a general reference, either party may require him to report the facts and conclusions of law separately under the provisions of Rev. St. 1881, § 557.—*McNaught v. McAllister*, 93 Ind. 114.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Refer. § 134.

See, also, 34 Cyc. p. 840.

§ 89. — Requisites and sufficiency.

[a] (Sup. 1835)

Where the matter of dispute in trespass *vi et armis* was referred, under a rule of court, and the arbitrators by their award merely say that they find for the defendant, whereupon, the plaintiff being called and not answering, the suit was dismissed at his costs, the court affirmed the judgment, on writ of error sued out by the plaintiff.—*McCracken v. Gregory*, 4 Blackf. 128.

[b] (Sup. 1861)

A referee has no authority to report to the court the facts found by him, unless he is so

required by the order of reference; and not being required, if he should report them, they will not be deemed legitimately before the court.—*Royal v. Baer*, 17 Ind. 332; *Thornburg v. Alleman*, Id. 434.

[c] (Sup. 1834)

An order of reference of a master, authorizing him "to hear the evidence, find the facts, and report the same, together with the evidence," did not authorize a finding of conclusions of law.—*McNaught v. McAllister*, 93 Ind. 114.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Refer. §§ 135-140.

See, also, 34 Cyc. p. 841.

§ 90. — Failure to find on particular questions.

[a] (Sup. 1879)

Where referees fail to report to the court the facts and their conclusions thereon in regard to certain items of demand in the complaint, such omission and failure is cured by the making and filing of a written retraxit by plaintiff's attorney, as authorized by 2 Rev. St. 1876, p. 305, § 772, of all matters alleged in the complaint, except those upon which the referees made and reported to the court their finding of facts and their conclusion of law thereon.—*Barnard v. Daggett*, 68 Ind. 305.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Refer. § 141.

See, also, 34 Cyc. p. 842.

§ 94. Report of evidence with decision or findings.

[a] (Sup. 1855)

Papers containing the evidence adduced before the referee, and filed two months later than the referee's report by one of the parties, cannot be taken as part of the report, nor are they admissible to impeach it.—*Indiana Cent. Ry. Co. v. Bradley*, 7 Ind. 49.

[b] (Sup. 1859)

Under a reference as to questions of fact or matters of account, it is the duty of the referee or auditor simply to state the facts found by him; and it is irregular for him to report or discuss the evidence.—*Board of Trustees of Wabash & E. Canal v. Huston*, 12 Ind. 276.

[c] (Sup. 1859)

Under the statute there is but one way of bringing the facts presented to a referee before the court, viz., by requiring the referee to report the facts found and the conclusions of law separately, and then on exception the court will review the decision of the referee as it would its own proceedings on a motion for a new trial.—*Ware v. Adams*, 12 Ind. 350.

[d] (Sup. 1862)

A commissioner, acting under a reference to him of matter in issue in a pending suit, has no right to report the evidence given before him, though he may report the facts proved by it if

authorized by the parties.—*McClure v. McClure*, 19 Ind. 185.

[e] (Sup. 1875)

Where by agreement of the parties entered of record a cause is referred to a master commissioner under the Indiana act of March 2, 1853 (1 Gav. & H. 433), to report the evidence and his findings thereon at the next term of the court, if he fails to report the evidence, his report will on motion be set aside.—*McGillis v. Slattery*, 52 Ind. 44.

[f] (Sup. 1881)

Where, by agreement of the parties, the cause was referred to a commissioner to hear the evidence, and to "report the facts found by him at the next term of court," such was not a direction that he should report the "evidence," but merely the ultimate facts.—*Watson v. State ex rel. School Town of Worthington*, 80 Ind. 212.

[g] (Sup. 1884)

Where the cause by agreement of parties was referred to a special commissioner to report the evidence and the facts, and he reported the facts without the evidence, the court of its own motion, or at the request of either party, might before discharging the commissioner have required him to complete his report by adding the evidence, but no such action having been taken, the objection to the incompleteness of the report was waived.—*Borchus v. Huntington Bldg. Loan & Savings Ass'n*, 97 Ind. 180.

Where a commissioner has reported the facts without the evidence, the court cannot be required to state conclusions of law; and any such statement, being mere surplusage, is not available error.—Id.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Refer. § 145.

See, also, 34 Cyc. p. 843.

§ 95. Report on reference to take testimony.

[a] (Sup. 1884)

On a special reference to report the facts only or the facts and the evidence, a master cannot exceed his authority, and has no right to make a general finding in the case or to state conclusions of law.—*McNaught v. McAllister*, 93 Ind. 114.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Refer. § 146.

See, also, 34 Cyc. p. 844.

§ 97. Amended and supplemental report.

[a] (Sup. 1855)

A power of the referee expires with the return of his report into court, and the report cannot afterwards be altered.—*Indiana Cent. R. Co. v. Bradley*, 7 Ind. 49.

[b] (Sup. 1872)

Where a referee or auditor has made his report, his powers and functions cease; and any

subsequent report, without order of the court or agreement of the parties, is a nullity.—Conklin v. Morton, 40 Ind. 76.

[c] (Sup. 1877)

Where a cause is referred to the master commissioner, his finding of the facts and his conclusions must be such that a judgment can be rendered thereon; and, if they are so imperfect that judgment cannot be rendered, the court should require him to perfect the same.—Reid v. State, 58 Ind. 406.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Refer. §§ 127, 128.

See, also, 34 Cyc. p. 846.

§ 98. Filing and record.

[a] (Sup. 1835)

Where a reference of the cause pending is made to arbitrators, their award must be filed, approved of by the court, and recorded before rendition of judgment thereon.—Dickerson v. Hays, 4 Blackf. 44.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Refer. §§ 129, 130.

See, also, 34 Cyc. p. 847.

§ 99. Operation and effect.

[a] (Sup. 1835)

An award of referees in plaintiff's favor cures the same defects in the declaration which would be cured by a verdict.—Dickerson v. Hays, 4 Blackf. 44.

[b] (Sup. 1855)

The report of referees, under a general order of reference, has the force and effect of a verdict of a jury.—Indiana Cent. R. Co. v. Bradley, 7 Ind. 49.

The report of a referee under Rev. St. 1852, is in the nature of a special verdict if the facts approved are imputed in it, but, if the result only is reported with the facts or reasoning of the referee, it then partakes of the nature of a general verdict, and stands as such.—Id.

[c] (Sup. 1871)

The report of referees stands as a general finding by a court, or as the special verdict of a jury, and must be followed by a judgment thereon, or will amount to nothing.—Gilmore v. Board of Com'rs of Putnam County, 35 Ind. 344.

[d] (Sup. 1896)

When the report of a referee is general, it stands as a general finding or verdict, and, when it is special with conclusions of law, it stands as a special verdict or special finding in the trial court.—McCutchen v. McCutchen, 41 N. E. 324, 141 Ind. 697.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Refer. §§ 148-156; 34

CENT. DIG. Mast. & S. § 1278.

See, also, 34 Cyc. p. 840.

§ 100. Objections and exceptions, and hearing thereof in general.

[a] (Sup. 1853)

An objection that a report of referees was filed in vacation, and not in open court, must have been made before the court to which the report was returned.—Ross v. Helton, 4 Ind. 273.

[b] (Sup. 1855)

Two months after the referee made his report in favor of plaintiff, defendant filed a package of papers as containing the evidence which was given before the referee, together with the affidavit of the persons who took down the evidence, alleging that it contained substantially all that was given. Held, that the package was no part of the report and was not admissible to impeach it.—Indiana Cent. R. Co. v. Bradley, 7 Ind. 49.

[c] (Sup. 1859)

Where referees err on any question of practice during the hearing, objection must be made at that time, and incorporated in their bill of exceptions, or a statement of the referees in their report.—Board of Trustees of Wabash & E. Canal v. Huston, 12 Ind. 276.

Where an issue has been referred to referees, the court cannot consider objections based on matters not found in the report of such referees.—Id.

[d] (Sup. 1863)

The admission of a referee is inadmissible to impeach his report.—Daggy v. Cronnelly, 20 Ind. 474.

[e] (Sup. 1878)

Failure of referee to make separate findings of facts and conclusions of law on the request of one of the parties must be excepted to at the time.—Way v. Fravel, 61 Ind. 162.

[f] (Sup. 1881)

In a suit by a state on the relation of a county auditor, against a county treasurer, for trust funds, and by order of the board of county commissioners for taxes not accounted for, a report of the referee, finding the facts and his conclusions of law, which finds a gross sum due from such treasurer, a failure to find that the board ordered the suit is not reached by exceptions to the conclusions of law.—Gauntt v. State ex rel. Stout, 81 Ind. 137.

Where a referee reports the facts and his conclusions thereon, such conclusions may be questioned only by exception thereto.—Id.

Where there are deficiencies arising from omissions or incorrect findings in a referee's report, the remedy is by motion for a new trial, and not for a venire de novo.—Id.

[g] (Sup. 1882)

The only way to get a fact before the court on a general reference to a master commissioner to make a finding is to require the facts and the conclusions of law to be separately reported by the master. If a motion to that effect be

overruled by the master and proper exception be taken, the court will review the decision of the referee as it would its own proceeding on a motion for new trial.—*Lee v. State ex rel. Templeton*, 88 Ind. 256.

[b] (App. 1906)

Exceptions to report and findings of a master not appearing to have been in writing will be presumed to have been oral.—*St. Joseph Mfg. Co. v. Hubbard*, 75 N. E. 17, 36 Ind. App. 84.

A general exception to the "report and findings" of a master is insufficient. It should specify the particular matters desired to be reviewed by the trial court.—*Id.*

[1] (App. 1905)

Where a special finding was not required from a master commissioner, exceptions to his alleged special findings present no question.—*Harrah v. State ex rel. Dyer*, 38 Ind. App. 495, 76 N. E. 443, 77 N. E. 747.

FOR CASES FROM OTHER STATES.

SEE 42 CENT. DIG. Refer. §§ 157-168; 21

CENT. DIG. Exceptions, Bill of, § 44.

See, also, 34 Cyc. p. 857.

§ 101. Recommittal.

[a] (Sup. 1869)

It is ground for a recommittal of the report of referees that they report the evidence instead of the facts.—*Board of Trustees of Wabash & E. Canal v. Huston*, 12 Ind. 276.

[b] (Sup. 1861)

Where a suit pending and at issue is referred by rule of court to arbitrators, the award, if defective, should be sent back on motion of the dissatisfied parties for correction.—*Moore v. Barnett*, 17 Ind. 349.

[c] (App. 1906)

A motion to refer a report back to a master, without any reason being assigned therefor, is properly denied.—*St. Joseph Mfg. Co. v. Hubbard*, 75 N. E. 17, 36 Ind. App. 84.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Refer. §§ 169-180.

See, also, 34 Cyc. pp. 878-883.

§ 102. Confirmation.

[a] (Sup. 1850)

It is ground for rejecting the report of the referees, if the report contain the evidence instead of facts found.—*Board of Trustees of Wabash & E. Canal v. Huston*, 12 Ind. 276.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Refer. §§ 181-187.

See, also, 34 Cyc. pp. 869, 870.

§ 106. Different decision or findings by court.

[a] (Sup. 1831)

Where a referee reported correct findings of fact, but erroneous conclusions of law thereon, and found the amount plaintiff was entitled to recover, if at all, it was not necessary on the court sustaining plaintiff's exceptions to the referee's conclusions that the case should be sent back to the referee for correction, but the court was entitled to draw the proper legal conclusion and render judgment on the facts reported.—*Roush v. Emerick*, 80 Ind. 551.

[b] (Sup. 1882)

Under 2 Rev. St. 1876, p. 178, § 350, providing that the report of the referees on the whole issue stands as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court, and, when the reference is to report the facts, the report has the effect of a special verdict, the court as no right to change and modify the report, and render judgment for any sum different from that reported by the referees.—*Stanton v. State ex rel. Green*, 82 Ind. 463.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Refer. § 206.

See, also, 34 Cyc. p. 885.

§ 107. Review on motion in trial court.

[a] (Sup. 1861)

Where a cause is sent to referees under Code, §§ 349-351, their report can be reviewed by the court only for matters appearing on its face, including all bills of exceptions taken before them.—*Moore v. Barnett*, 17 Ind. 349.

[b] (Sup. 1895)

Objections to a referee's conclusions of law cannot be made by motion to modify, but errors therein must be taken advantage of by exception before the referee or in the trial court.—*McCutchen v. McCutchen*, 141 Ind. 697, 41 N. E. 324.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Refer. §§ 207-210.

REFERENDUM.

See—

Enactment of ordinances granting franchises.

MUNICIPAL CORPORATIONS, § 108.

Of statutes. STATUTES, § 35½.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

REFORMATION OF INSTRUMENTS.

Scope-Note.

[INCLUDES actions for correction of instruments in writing which fail to express the real intention of the parties thereto, to conform to such intention; nature and scope of the remedy in general; what instruments may be so reformed; grounds of such actions, and defenses thereto; jurisdiction to decree such reformation and proceedings therefor; incidental or alternative relief; judgments or decrees and operation and effect thereof; review of proceedings; and costs in actions for such reformation.

[EXCLUDES mistake, fraud, etc., as grounds for invalidity of conveyances or contracts or as defenses to actions thereon (see *Decds*; *Contracts*; and titles of particular classes of conveyances and contracts); actions for cancellation, surrender, etc., of instruments in writing (see *Cancellation of Instruments*); and alterations of instruments in writing (see *Alteration of Instruments*). For complete list of matters excluded, see cross-references, post.]

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This Digest is compiled on the Key-Number System. For explanation, see page iii.

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II. Proceedings and Relief—Continued.

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Condition precedent to action for breach of covenant. COVENANTS, § 107.

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Void deed to purchaser at execution sale. EXECUTION, § 316.

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I. RIGHT OF ACTION AND DEFENSES.

In legal action, see ACTION, § 25.

§ 1. Nature and scope of remedy.

[a] (Sup. 1896)

A married woman is entitled to the reformation of a mistake in a deed to her from her husband the same as if it had been executed to her by one not her husband.—*Merchants' & Laborers' Building Ass'n v. Scanlan*, 42 N. E. 1008, 144 Ind. 11.

[b] (App. 1909)

Equity has power to reform and correct written instruments.—*Remm v. Landon*, 43 Ind. App. 91, 86 N. E. 973.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. § 1.

See, also, 34 Cyc. pp. 904-907.

§ 2. Right to reformation in general.

[a] (Sup. 1875)

After judgment upon a promissory note, it cannot be reformed.—*Heavenridge v. Mondy*, 49 Ind. 434.

[b] The fact that a mortgage has been foreclosed will not preclude reformation thereof.—(Sup. 1881) *Jones v. Sweet*, 77 Ind. 187; (1882) *Sanders v. Farrell*, 83 Ind. 28; (1884) *Armstrong v. Short*, 95 Ind. 326; (1884) *Burkam v. Burk*, 96 Ind. 270.

[c] (Sup. 1892)

In an action to reform a deed on the ground that it conveys more land than was intended, and to recover possession of the land mistakenly included, the deed must be reformed before plaintiff can recover the land.—*Popjoy v. Miller*, 133 Ind. 19, 32 N. E. 713.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. §§ 2, 3;

9 CENT. DIG. Chat. Mtg. § 105.

See, also, 34 Cyc. p. 905.

§ 5. Instruments which may be reformed.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. §§ 5-23;

23 CENT. DIG. Frds., St. of, § 267; 40

CENT. DIG. Princ. & S. § 4.

See, also, 34 Cyc. pp. 923-930.

§ 6. — In general.

[a] (Sup. 1871)

Equity has jurisdiction to correct mistakes in a will when they are apparent on its face.—*Grimes' Ex'rs v. Harmon*, 35 Ind. 198, 9 Am. Rep. 690.

[b] (Sup. 1874)

Where a mortgage misdescribes the property intended to be mortgaged, the mistake may be corrected by a proper proceeding before foreclosure, or in an action to foreclose; but when the mistake has been carried into the decree of foreclosure, the execution, advertisement, and sheriff's deed, the purchaser at the sheriff's sale cannot maintain an action to correct the mortgage and decree, the subsequent proceedings, and the deed, though the sheriff at the sale may have pointed out, as the property he was selling, the property that ought to have been described in the mortgage.—*Miller v. Kolb*, 47 Ind. 220.

[c] (Sup. 1877)

Mere inadequacy of consideration for a deed reciting, "in consideration of one dollar and natural love and affection," etc., is not ground for refusing to reform the same.—*Mason v. Moulden*, 58 Ind. 1.

[d] (Sup. 1881)

Where a mortgage misdescribes the land intended to be mortgaged, and the mistake is carried into the judgment, order of sale, notice, and sheriff's deed, such proceedings cannot be corrected either at the instance of the mortgagee or the purchaser at such sale. But such mistake may be corrected by reforming the mortgage, and foreclosing it as reformed.—*Conyers v. Mericles*, 75 Ind. 443.

[e] (Sup. 1882)

A tax deed will not be reformed in a proceeding instituted for that purpose, the mistake consisting of an erroneous description of the land.—*Keeper v. Force*, 86 Ind. 81.

[f] (Sup. 1884)

Where a mortgage has been foreclosed and the property sold, there can be no reformation of the sheriff's deed in the way of correcting an erroneous description.—*Armstrong v. Short*, 95 Ind. 326.

[g] (Sup. 1886)

Where a mistake in describing land-mortgaged is carried into the decree of foreclosure, the mistake may be corrected by reforming and reforeclosing the mortgage.—*McCasland v. Aetna Life Ins. Co.*, 108 Ind. 130, 9 N. E. 119.

[h] (Sup. 1896)

Any consideration that would support a mortgage would be sufficient to entitle the mortgagee to maintain an action to correct a mutual mistake in the same against the mortgagor and those holding under him as purchasers with notice, and their judgment creditors.—*Citizens' Nat. Bank v. Judy*, 43 N. E. 259, 146 Ind. 322.

[i] (App. 1902)

A sheriff's deed cannot be reformed.—*Griffin v. Durfee*, 64 N. E. 237, 29 Ind. App. 211.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. §§ 5-19;
40 CENT. DIG. Princ. & S. § 4.

See, also, 34 Cyc. p. 923.

§ 7. — Invalidity of instrument.

[a] (Sup. 1878)

A deed which is void for uncertainty of description cannot be reformed.—*Lewis v. Owen*, 64 Ind. 446.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. § 20; 23
CENT. DIG. Frds., St. of, § 267.

See, also, 34 Cyc. pp. 926, 927.

§ 8. — Voluntary conveyances.

[a] (Sup. 1859)

A deed of gift drawn by mistake for a different interest from that intended to be conveyed may be corrected if the mistake be clearly proved.—*Andrews v. Andrews*, 12 Ind. 348.

[b] (Sup. 1859)

Equity will not reform a voluntary deed.—*Froman v. Froman*, 13 Ind. 317.

[c] (Sup. 1862)

A voluntary deed will not be corrected for mistake on the application of the grantee against the grantor, but will be corrected on the application of the grantor against the grantee where by the mistake the conveyance is for a larger estate than was intended.—*Randall v. Ghent*, 19 Ind. 271.

[d] (Sup. 1877)

The rule that deeds will not be reformed, or mistakes in the description corrected, in favor of volunteers, does not apply if there was any valuable consideration whatever—as where there was a consideration of \$1.—*Mason v. Moulden*, 58 Ind. 1.

The grantee of land conveyed by a deed reciting that the conveyance is made in consideration "of the sum of one dollar, and natural love and affection," is a purchaser for a valuable consideration, so far that he may maintain an action against the grantor, or his heirs, to reform such deed, by correcting a mistake made in the description of the land intended to be conveyed.—*Id.*

[e] (Sup. 1877)

An agreement between a husband and wife, made during the pendency of a suit between them for divorce, and not sanctioned by the court, that he would pay to her a certain sum as alimony, is a mere voluntary act on his part, and can neither be enforced or reformed by her.—*Moon v. Baum*, 58 Ind. 194.

[f] (Sup. 1886)

Equity will not intervene for the reformation of a deed, which is purely voluntary resting on no valuable consideration, but, if there is a valuable consideration, no matter how small, supplemented by consideration of love and affection, a mistake in the deed may be reformed.—*Baker v. Pyatt*, 9 N. E. 112, 108 Ind. 61.

[g] (Sup. 1893)

An existing debt of a husband to his wife is such a good consideration for his conveyance of land to her as to warrant reformation in her favor of a mistake in the deed, as against a subsequent levy of execution for a debt of the husband.—*Comstock v. Coon*, 135 Ind. 640, 35 N. E. 909.

[h] (Sup. 1896)

A pre-existing debt is sufficient consideration for a mortgage to entitle the mortgagee to correction of a mutual mistake therein, as against the mortgagor and a subsequent purchaser with notice.—*Citizens' Nat. Bank v. Judy*, 146 Ind. 322, 43 N. E. 259.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. §§ 21, 22.
See, also, 34 Cyc. pp. 928, 929.

§ 10. Matters subject to reformation.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. §§ 24-67;
12 CENT. DIG. Corp. § 1870.
See, also, 34 Cyc. pp. 930-942.

§ 11. — In general.

[a] (Sup. 1874)

In an action on a delivery bond, where the bond is made payable to the constable who has levied the execution, instead of to the execution plaintiff, and the bond shows that the ex-

ecution was levied in favor of the plaintiff, the mistake is a clerical error and may be corrected, and the bond reformed.—*Bell v. Tanguy*, 48 Ind. 49.

[b] (Sup. 1876)

Where the terms of a contract are uncertain and loosely stated, a judgment reforming it will not be rendered.—*Winslow v. Winslow*, 52 Ind. 8.

[c] (Sup. 1890)

A purchaser of land subject to mortgage, without an agreement to assume the same, is not liable therefor, though the scrivener, by mistake, and without the knowledge of either party, inserted in the deed a stipulation that the grantee agreed to pay it, and equity will reform the instrument.—*Adams v. Wheeler*, 122 Ind. 251, 23 N. E. 760.

[d] (Sup. 1892)

A husband joined his wife in the execution and acknowledgment of a mortgage on the wife's land, but his name did not appear in the body of the instrument. The mortgagee filed his complaint to reform the mortgage by inserting in the conveying clause the husband's name, and to foreclose the mortgage. The complaint set forth the agreement to loan the money on the wife's note, secured by mortgage on her land, to be executed by herself and her husband joining; that the husband's name was omitted from the conveying clause by mutual mistake. *Held*, that sustaining a demurrer to that count of the complaint which sought to reform the mortgage was error.—*Collins v. Cornwell*, 131 Ind. 20, 30 N. E. 796.

[e] (Sup. 1894)

Where, in a deed by four owners of land, the names of one owner and his wife are omitted from the body of the deed by mistake, it may be reformed.—*Parish v. Camplin*, 139 Ind. 1, 37 N. E. 607.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. §§ 24-27, 32-41.

See, also, 34 Cyc. pp. 930, 932, 933, 935.

§ 12. — Defective execution.

[a] (Sup. 1878)

Equity will not correct a defect in a conveyance by a wife and husband of her land, where such defect is a want of compliance with the statutory requirements.—*Hamar v. Medsker*, 60 Ind. 413.

[b] (Sup. 1881)

Plaintiff received a tax certificate by an assignment not acknowledged as required by statute. *Held*, that his accepting such assignment as valid was a mistake of law for which he was remediless.—*Williamson v. Hitner*, 79 Ind. 233.

[c] (App. 1899)

Where the maker of a note for a company, which purports to be his personal obligation, shows that it was intended to be that of the company, and there was a mistake as to the form of the signature, a court of equity will reform it so as to express the intention of the parties.—*Prescott v. Hixon*, 53 N. E. 391, 22 Ind. App. 139, 72 Am. St. Rep. 291.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. §§ 28-31;

12 CENT. DIG. Corp. § 1870.

See, also, 34 Cyc. p. 932.

§ 13. — Matter of description.

Pleading, see post, §§ 36, 38, 39, 46.

[a] (Sup. 1871)

Though equity will give relief, and, on proper proof, correct a misdescription of land in a deed, even after it has been perpetuated through resales of subdivisions of the land, where possession has been given and the purchase money paid, yet when a judicial sale intervenes, and the error is carried through all the proceedings into the sheriff's deed, a correction of the description of a subdivision cannot be ordered at the suit of the purchaser at the sheriff's sale, or those claiming under him. If the mistake was in the deed only, perhaps it might be corrected in this way, but where it has existed in the judgment, the advertisement, the appraisal, and the sale, an attempt to correct the deed would give to the purchaser land which was not ordered by the court to be sold, nor advertised by the sheriff, nor sold by him, nor purchased by the plaintiff.—*Rogers v. Abbott*, 37 Ind. 138.

[b] (Sup. 1878)

A mistake in the description of lands intended to be mortgaged by a husband and wife may be corrected.—*McKay v. Wakefield*, 63 Ind. 27.

[c] (Sup. 1878)

Under 2 Rev. St. 1876, p. 188, § 380, one who conveyed by deed more land than the purchaser paid for—a mistake having been made in the estimation of acreage—may enforce any right he has to recover the balance of the purchase money by a suit for reformation.—*Fly v. Brooks*, 64 Ind. 50.

[d] (Sup. 1878)

A sheriff's deed of conveyance of real estate, founded on a sheriff's deed of sale on a decree of foreclosure of a mortgage, describing the premises as "part of lot No.," etc., is void for uncertainty, and cannot be reformed.—*Lewis v. Owen*, 64 Ind. 446.

[e] (Sup. 1878)

Where a mistake in a mortgage in describing the land is carried into the foreclosure decree, a sheriff's certificate of sale, and his deed to the assignee thereof, the latter is not en-

titled to a correction as against persons who claim under an intermediate deed and mortgage, executed by the same mortgagor.—*Angle v. Speer*, 66 Ind. 488.

[f] (Sup. 1879)

The proceedings of an administrator involving a mistake in the description of lands sold by him cannot be reformed.—*Walton v. Cox*, 67 Ind. 164.

A misdescription in the petition, decree, and deed of land sold by an administrator to pay debts cannot be reformed.—*Id.*

[g] Equity will reform a deed for mistake in matters of description.—(Sup. 1881) *Figart v. Halderman*, 75 Ind. 564; (1881) *Robbins v. Magee*, 76 Ind. 381; (1884) *Gordon v. Goodman*, 98 Ind. 269; (1886) *McCasland v. Aetna Life Ins. Co.*, 108 Ind. 130, 9 N. E. 119.

[h] (Sup. 1881)

The owner of a certain definite tract of land made a parol contract to convey the same, but through mistake the deed was of the "southeast" instead of "middle" division, and the boundaries were entirely omitted. *Held*, that the mistake was one of fact and subject to correction.—*Morrison v. Collier*, 79 Ind. 417.

[i] (Sup. 1890)

A mistake, common to the parties and the scrivener, whereby land intended to be mortgaged was imperfectly described, was a mistake of fact and not of law.—*Whipperman v. Dunn*, 124 Ind. 349, 24 N. E. 166, 1045.

[j] (Sup. 1893)

Where a deed purports to convey a tract entirely different from that intended by the parties, the mistake is one of fact, which equity will reform, unless it were caused by unconscionable neglect.—*Comstock v. Coon*, 135 Ind. 640, 35 N. E. 909.

[k] (Sup. 1894)

Where four owners of an undivided four-fifths of certain lands join in a deed intended to convey all their interest, but, through a mistake of the scrivener, the land conveyed is described as an undivided three-fifths, it may be reformed to conform to the true intent.—*Parish v. Camplin*, 139 Ind. 1, 37 N. E. 607.

[l] (Sup. 1896)

Where a husband in good faith makes a deed to his wife, in consideration that she joins him in a mortgage of other land belonging to him, and such deed, by their mutual mistake, does not describe the land intended to be conveyed, it will be reformed.—*Merchants' & Laborers' Building Ass'n v. Scanlan*, 144 Ind. 11, 42 N. E. 1008.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. §§ 42-60;
9 CENT. DIG. Chat. Mtg. § 105.

See, also, 34 Cyc. pp. 935-942.

§ 14. — Legal operation and effect.

[a] (Sup. 1872)

To entitle a party to have a deed reformed on the ground of mistake, it must appear that the intention and agreement of both parties to the deed were by mistake misrepresented by the terms of the deed; otherwise, the mistake is a mistake of law as to the legal effect of the terms of the instrument, and for mistake of law, except in cases of peculiar character, no relief can be granted.—*Nelson v. Davis*, 40 Ind. 366.

[b] (Sup. 1889)

Under Rev. St. 1881, § 1221, the parties in interest to a bond given to secure a free gravel road construction contract may have the same corrected so as to give it the effect the law intended it should have.—*Hart v. State ex rel. Rock*, 21 N. E. 654, 24 N. E. 151, 120 Ind. 83.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. §§ 61-67.
See, also, 34 Cyc. p. 930.

§ 15. Grounds for reformation.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. §§ 68-80.
See, also, 34 Cyc. pp. 907-922.

§ 16. — In general.

[a] (Sup. 1875)

A pleading asking the correction of a written instrument must show that there was fraud or mistake in its execution.—*Comer v. Himes*, 49 Ind. 482.

A complaint for the correction of a deed is insufficient, where it simply avers that one estate was agreed for and another conveyed, without showing that there was any fraud or mistake in the execution of the deed.—*Id.*

[b] (Sup. 1892)

If, by either fraud or mistake, more land was included in a deed than there should have been, it should be reformed, and the grantor be allowed to recover the excess.—*Popijoy v. Miller*, 32 N. E. 713, 133 Ind. 19.

[c] (Sup. 1896)

Equity will reform a written contract between the parties whenever through mutual mistake or mistake of one of the parties accompanied by the fraud of the other it does not correctly express the agreement.—*Citizens' Nat. Bank v. Judy*, 43 N. E. 259, 146 Ind. 322.

[d] (App. 1903)

Equity will reform a written contract whenever, through mutual mistake, it does not, as reduced to writing, correctly express the agreement of the parties.—*Webb v. Hammond*, 68 N. E. 916, 31 Ind. App. 613.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. § 68.
See, also, 34 Cyc. p. 907.

§ 17. — Mistake of fact.

Evidence, see post, § 43.

Parol evidence to show mistake, see EVIDENCE, § 415.

Pleading, see post, §§ 36, 38, 39.

Sufficiency of evidence, see post, § 45.

[a] (Sup. 1857)

Equity will rectify a mistake in a deed founded upon consideration, according to the intention of the parties, where it has been framed contrary to, or has gone beyond, their intention, upon satisfactory proof of the mistake.—*Hileman v. Wright*, 9 Ind. 126.

[b] (Sup. 1839)

It is error to hold that a written instrument can only be corrected where the mistake results from the omission or insertion of words different from those agreed upon, or contrary to the expressed intention of the parties. It is a mistake of fact when, through ignorance, inadvertence, negligence, or otherwise, the description in a deed does not in fact embrace the land which the parties intended it should, and which they supposed it did.—*Calton v. Lewis*, 21 N. E. 475, 119 Ind. 181.

[c] (Sup. 1894)

Where by mutual mistake of the parties the description of the premises in a deed erroneously conveyed an undivided three-fifths while the parties intended that an undivided four-fifths should be conveyed, the mistake constituted a mistake of fact, and not one of law, and was subject to reformation, though the parties really thought the deed sufficient to convey the four-fifths.—*Parish v. Camplin*, 37 N. E. 607, 139 Ind. 1.

[d] (Sup. 1896)

When it appears that by the mutual mistake of all the parties to a mortgage, as to a matter of fact, the instrument does not express their agreement, a court of equity will reform the instrument by correcting the mistake.—*Citizens' Nat. Bank v. Judy*, 43 N. E. 259, 140 Ind. 322.

[e] (Sup. 1898)

Where parties agree that a certain line, which both suppose is the correct one, shall be the dividing line between lands, which line is afterwards discovered not to be the true line, a court of equity cannot reform the contract, since it cannot decide what the parties would have agreed to if they had known the true line.—*Phillip Zorn Brewing Co. v. Malott*, 51 N. E. 471, 151 Ind. 371.

[f] (App. 1902)

Where the description in a deed is erroneously supposed by the parties to describe the land intended to be conveyed, there is a mistake of fact, and reformation may be had.—*Earl v. Van Natta*, 64 N. E. 901, 29 Ind. App. 532.

[g] (App. 1903)

A mistake in a deed, describing the "middle" instead of the "west" acre as the property

conveyed, is a mistake, not of law, but of fact.—*Wieneke v. Deputy*, 68 N. E. 921, 31 Ind. App. 621.

[h] (App. 1906)

A deed may be reformed where both parties intended that it should be expressed in the words used, if they both understood the boundaries to describe a smaller parcel identified by them than was described in fact.—*Johnson v. Sherwood*, 34 Ind. App. 490, 73 N. E. 180.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. §§ 69-71.

See, also, 34 Cyc. pp. 908-911; notes, 30

Am. St. Rep. 621, 117 Am. St. Rep. 227.

§ 18. — Mistake of law.**[a] (Sup. 1873)**

A court will not reform a written instrument by supplying the expression of the intention of the parties, omitted through mistake of law, and not of fact.—*Allen v. Anderson*, 44 Ind. 395.

[b] (Sup. 1875)

To entitle a party to the reformation of a written instrument, it must be clearly and satisfactorily shown that there was a mistake of fact, and not of law. It must be shown that words were inserted which were intended to be left out, or that words were omitted which were intended to be inserted.—*Heavenridge v. Mondy*, 49 Ind. 434.

Mistake of law is not ground for reformation.—*Id.*

[c] (Sup. 1881)

In a mortgage, certain property was described as "three town lots in the town of B."; the land intended by both parties being in fact a strip near the town, not platted or numbered as town lots. *Held* that, the mistake being one of law, equity would not reform the mortgage.—*Easter v. Severin*, 78 Ind. 540.

[d] (Sup. 1894)

Where by a mistake in the preparation of a deed the description was so written as to convey an undivided three-fifths instead of an undivided four-fifths, equity required such an amendment thereof as would make the contract what the parties supposed it was and intended it should be whether the mistake was one of law or fact.—*Parish v. Camplin*, 37 N. E. 607, 139 Ind. 1.

[e] (App. 1899)

Courts of equity will reform written instruments in all cases where the mistake is material, and is in the execution of such written instrument; but the courts cannot, except in rare cases, grant relief where the mistake was one of law, as when the legal effect of the language used differs from the intention of the parties at the time it was so written and signed.—*Prescott v. Hixon*, 53 N. E. 391, 22 Ind. App. 139, 72 Am. St. Rep. 291.

[f] (App. 1908)

A mistake of law in thinking that a deed signed and acknowledged by the owner of land and his wife, without the wife's name appearing in the body of the deed, was sufficient to convey all their title and estate, authorizes a correction, as would a mistake of fact arising from the supposition that the name did appear therein.—*Radebaugh v. Scanlan*, 41 Ind. App. 109, 82 N. E. 544.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. §§ 72, 73.

See, also, 34 Cyc. pp. 911-915.

§ 19. — *Mutuality of mistake.*

Pleading, see post, § 38.

Sufficiency of evidence, see post, § 45.

[a] A mistake, to be ground for reformation, must be mutual.—(Sup. 1874) *Baldwin v. Kerlin*, 46 Ind. 426; (1878) *Welshbillig v. Dienhart*, 65 Ind. 94; (1881) *Wood v. Deutchman*, 75 Ind. 148; (1887) *Roszell v. Roszell*, 109 Ind. 354, 10 N. E. 114.

[b] (Sup. 1878)

A defendant who alleges that he signed note by mistake must prove, not only that the mistake existed, but that it was mutual.—*Buck v. Steffey*, 65 Ind. 58.

[c] (Sup. 1879)

An instrument will not be reformed for mistake, in the absence of fraud, unless the mistake was mutual.—*Dowell v. Caffron*, 68 Ind. 196.

[d] (Sup. 1891)

Where, by reason of the mutual mistake of the parties, the description of the mortgaged premises is so defective that no title would pass under sale, or when by such mutual mistake land is described which does not belong to the mortgagor instead of land which does, there may be reformation even after sale.—*Ray v. Ferrell*, 27 N. E. 159, 127 Ind. 570.

[e] (Sup. 1896)

Where, without any previous agreement, a creditor prepared a mortgage, including part only of the debtor's lands, and the debtor executed it, reformation thereof, on the ground of mutual mistake, to include the remainder of the land, cannot be had, though each intended that it should include all the land, and believed that it did, neither having knowledge of the intent or belief of the other.—*Citizens' Nat. Bank v. Judy*, 146 Ind. 322, 43 N. E. 259.

[f] (App. 1902)

Where there is no mutual mistake in the description in a deed of the property to be conveyed, and the land described is that which the parties intend to convey, a reformation thereof is not warranted on the ground of mistake, though reformation may be granted where by mutual mistake the description fails to convey the tract intended.—*Sherwood v. Johnson*, 62 N. E. 645, 28 Ind. App. 277.

[g] (Sup. 1903)

Where a landowner executed several deeds to different parcels of the tract, which were accepted by the grantees without knowledge of any error in the descriptions of the lands conveyed, but there was such error, the mistake was a mutual one.—*St. Clair v. Marquell*, 67 N. E. 693, 161 Ind. 56.

[h] (App. 1908)

Equity will reform a deed made under a mutual mistake of fact or of law.—*Radebaugh v. Scanlan*, 41 Ind. App. 109, 82 N. E. 544.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. §§ 74-78.

See, also, 34 Cyc. pp. 915-919; note, 93 C. C. A. 10; note, 30 Am. St. Rep. 621.

§ 21. — *Fraud.*

[a] (Sup. 1891)

A court of equity will, at the suit of the wife, reform a deed in which she joined her husband, where a provision reserving to her for life the rents and profits, which it was agreed should be inserted, has been omitted through the husband's fraud.—*Koons v. Blanton*, 129 Ind. 383, 27 N. E. 334.

Equity will grant reformation where by fraud of one of the parties to the instrument the language used is materially different from that agreed upon.—Id.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. § 80.

See, also, 34 Cyc. pp. 920-922.

§ 23. *Estoppel or waiver.*

[a] (Sup. 1884)

A mortgage may be reformed and foreclosed notwithstanding a previous foreclosure by a mistaken and erroneous description.—*Burkam v. Burk*, 96 Ind. 270.

[b] (Sup. 1890)

A grantee of land subject to a mortgage is not estopped to have his deed reformed for mistake of the scrivener in inserting a stipulation that the grantee agrees to pay the mortgage debt, since the mortgagee is not prejudiced thereby.—*Adams v. Wheeler*, 23 N. E. 760, 122 Ind. 251.

[c] (App. 1905)

Where an administrator conveyed certain land in pursuance of a judicial sale, believing that the description in the deed only covered 12 acres of land, which belief he also held when he assigned purchase-money notes and a mortgage given for the land, the fact that such notes and mortgage were assigned to a third person, who foreclosed the same, did not estop the estate from maintaining a suit to reform the deed on the ground that the description included, by mutual mistake, more land than was intended

to be conveyed.—*Pierce v. Vansell*, 74 N. E. 554, 35 Ind. App. 525.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. § 82.

See, also, 34 Cyc. p. 942.

§ 24. Conditions precedent.

Allegations as to demand in action for reformation and foreclosure, see MORTGAGES, § 445. Pleading, see post, § 38.

[a] (Sup. 1882)

Where a suit is, primarily, for the foreclosure of a mortgage, and a correction of the mortgage is incidentally asked, it is not necessary to aver and prove a demand and refusal to make the correction; but the rule would be otherwise were the correction alone asked.—*Axel v. Chase*, 83 Ind. 546.

[b] (Sup. 1882)

In a suit to quiet title against the devisee of the grantee to a portion of land not intended to be conveyed, plaintiff may have a mutual mistake in the description corrected, and no demand for such correction need be shown.—*Lucas v. Labertue*, 88 Ind. 277.

[c] (Sup. 1892)

Before commencing an action to reform a deed a demand must be made on the grantee.—*Popijoy v. Miller*, 133 Ind. 19, 32 N. E. 713.

[d] (Sup. 1894)

Where the only relief sought is the reformation of a contract, a previous demand is essential.—*Sparta School Tp. of Dearborn County v. Mendell*, 37 N. E. 604, 138 Ind. 188.

Where, besides reformation, recovery is sought on the contract, no demand is required as precedent to the action.—*Id.*

[e] (Sup. 1896)

Where a cross-complaint asks, not only for reformation of mortgage, but for foreclosure thereof, prior demand for the reformation is not necessary.—*Citizens' Nat. Bank v. Judy*, 146 Ind. 322, 43 N. E. 259.

[f] (App. 1902)

Where, in a suit to reform a deed because of error in the description of the land intended to be conveyed, recovery of the land erroneously included is also sought, no previous demand for a correction of the mistake need be shown.—*Earl v. Van Natta*, 64 N. E. 901, 29 Ind. App. 532.

[g] (App. 1903)

In ejectment, defendant, who seeks to obtain title to the west of three acres, of which he is in possession, relying on a mistake in the description in his deed which described the middle instead of the west of three acres as that conveyed—plaintiff's deed, subsequently executed by the same grantor, having described the west acre—should tender plaintiff a deed to the middle acre, or otherwise disclaim any interest

therein, as a condition of relief.—*Wieneke v. Deputy*, 68 N. E. 921, 31 Ind. App. 621.

The fact that plaintiff could bring an independent action for a reformation of his deed is no excuse for a failure to make such tender.—*Id.*

[h] (App. 1906)

Where the grantee of land, who had given a mortgage for the purchase price, sued the grantor for an alleged breach of warranty, and the grantor counterclaimed, seeking a reformation of the deed, mortgage, and note, and foreclosure, the reformation of the deed, mortgage, and note being incidental to the foreclosure of the mortgage, no demand was necessary before filing the counterclaim.—*Johnson v. Sherwood*, 73 N. E. 180, 34 Ind. App. 490.

[i] (App. 1906)

Where defendant was sued on a contract for the sale of machinery, a demand that the contract be reformed was not a condition precedent to his right to demand a reformation in such action.—*Nichols & Shepard Co. v. Berning*, 76 N. E. 776, 37 Ind. App. 109.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. § 83.

See, also, 34 Cyc. p. 944.

§ 25. Defenses and objections to relief.

[a] (Sup. 1851)

In pursuance of an act of the Legislature, a bond was executed to the county of L. for the conveyance of 20 acres of land, in consideration of the location of the county seat at L. The obligors executed a deed, in alleged conformity with the bond, to A. and B., commissioners appointed to superintend the erection of public buildings in that county. Subsequently the commissioners of the county filed a bill in chancery for the correction of the deed as to the parties, and the deed was so corrected as to convey the land to the county agent for the use of the county. Afterwards a bill was filed by the board of commissioners and county agent to correct an alleged mistake in the description of the premises, but there was no pretense of misrepresentation, concealment, or fraud, or misunderstanding as to the contents of the deed at the time of its execution. *Held*, that the latter bill would not lie.—*Hobbs v. Board of Com'rs of Lagrange County*, 3 Ind. 183.

[b] (Sup. 1871)

To entitle a plaintiff to have a mistake in reducing the terms of a contract to writing corrected, it is not necessary that he allege and prove that the mistake was such as he could not have obtained a knowledge of by reasonable diligence when he was put on inquiry.—*Monroe v. Skelton*, 36 Ind. 302.

[c] (Sup. 1874)

A complaint to reform a deed must show that words have been inserted in or omitted from the instrument, contrary to the intention of the parties, through fraud or some mistake of

fact. Words inserted intentionally cannot be changed on the ground that one party misunderstood their meaning or effect, or that they conflict with a contemporaneous parol agreement.—*Barnes v. Bartlett*, 47 Ind. 98.

[d] (Sup. 1878)

A complaint to reform a mortgage alleged that a tract known as "the home farm," in a certain quarter section, was by mistake of the parties and of the scrivener described as "the west middle division" of the quarter section, that the mistake was not discovered until after foreclosure, and that the parties and judgment creditors had notice what property was intended. *Held*, that relief should not be granted, because of the negligence of the mortgagee.—*First Nat. Bank v. Gough*, 61 Ind. 147.

[e] (Sup. 1880)

Equity will not reform a deed where the misdescription of the land intended to be conveyed is the result of carelessness in not procuring correct descriptions.—*Toops v. Snyder*, 70 Ind. 554.

[f] (Sup. 1881)

Where the land intended to be mortgaged can be ascertained by the description in the mortgage, its reformation is unnecessary.—*Parker v. Teas*, 79 Ind. 235.

[g] (Sup. 1881)

The description of land in a mortgage was "27 acres, fractional section 15, town 8 south, of range 11 west," and it appeared that the mortgagor only owned 26 acres, and that there were more than 27 acres in the section, and that the parties were satisfied with the mortgage when executed. *Held*, that such description could not be corrected by parol evidence, in the absence of any evidence that there had been a mistake.—*Craven v. Butterfield*, 80 Ind. 503.

[h] (Sup. 1882)

The failure of a grantor to require the deed to be read to him, after it had been written, does not necessarily preclude him from having the deed reformed so as to include therein a reservation of a right of way.—*Schautz v. Keener*, 87 Ind. 258.

[i] (Sup. 1884)

Where the mortgagee, by the employment of a trusted son of mortgagor as his agent, induces the mortgagor to sign the mortgage without reading it, the mortgagor is not, on the ground of negligence, precluded from demanding a reformation of the mortgage.—*Robinson v. Glass*, 94 Ind. 211.

[j] (Sup. 1884)

The description in a mortgage cannot be reformed, though wholly insufficient, where it was as the parties intended it to be.—*Armstrong v. Short*, 95 Ind. 326.

[k] It cannot be said, as a matter of law, that one who accepts a mortgage with a wrong description of the land is guilty of such negli-

gence as to forfeit all right to relief in chancery.—(Sup. 1886) *Baker v. Pyatt*, 108 Ind. 61, 9 N. E. 112; (1888) *Keister v. Myers*, 115 Ind. 312, 17 N. E. 161.

[l] (Sup. 1886)

Where a description is complete and sufficient to convey the land described, if the grantor were the owner, but, by mutual mistake, the description does not apply to the land intended to be conveyed, the mistake is one of fact, and not of law, and the grantee is, on a proper showing, entitled to have the deed reformed, where no equities or rights of third persons have intervened, although he knew the words of description used in the deed.—*Baker v. Pyatt*, 108 Ind. 61, 9 N. E. 112.

[m] (Sup. 1887)

In order to reform a written instrument on the simple ground that a mistake has occurred in reducing the agreement as actually understood to writing, it must appear that the mistake was mutual; yet where the agreement is admitted, one of the parties, who, knowing of the mistake in the writing, and the ignorance of the other party thereof, remains silent when he should have spoken, is estopped to defeat a reformation on the ground of want of mutuality.—*Roszell v. Roszell*, 109 Ind. 354, 10 N. E. 114.

[n] (Sup. 1888)

A party who admits that an instrument which a court of equity is asked to reform does not set forth the agreement as it was actually made and as the other party believed it did will not be heard to say that he intentionally brought about or silently acquiesced in the discrepancy between the instrument and the agreement as made.—*Keister v. Myers*, 17 N. E. 161, 115 Ind. 312.

[o] (Sup. 1891)

Where the legal title to land intended by a mortgagor to be included in the mortgage, but which was omitted in the description, was held by him in trust for a ward whose money purchased it, the ward is entitled, on his cross-complaint to the bill by the mortgagee for reformation and foreclosure, to have the title decreed in him, as, the equities of the mortgagee and ward being equal, the legal title vested in the trustee for the latter's use must prevail.—*Ray v. Ferrell*, 127 Ind. 570, 27 N. E. 159.

Where a mortgage describing other land than that which was intended is foreclosed, and the land described, which also belonged to the mortgagor, is sold for a sum sufficient to pay the debt, the mortgage will not be reformed, for the purpose of foreclosure, to include the land originally intended, since, the debt being satisfied, there is no ground for such relief.—*Id.*

[p] (Sup. 1891)

A wife, who had been abandoned by her husband, joined him in a deed of land to their children, which it was agreed should expressly reserve to her the rents and profits for life, but the provision, through the husband's fraud, was

left out. The wife was unable to read, and the deed was not read to her. *Held*, that she had a right to rely on her husband's sincerity, and her failure to have the deed read is no defense to her suit to have it reformed.—*Koons v. Blanton*, 129 Ind. 383, 27 N. E. 334.

[q] (App. 1902)

A contract may be reformed for mutual mistake, though a party neglected to read it.—*Smelser v. Pugh*, 64 N. E. 943, 29 Ind. App. 614.

[r] (App. 1906)

Where defendant, who could neither read nor write English, relied on his cousin to properly reduce his agreement to guaranty the first payment for certain machinery to writing, and he believed that his cousin, who was acting as an agent for the seller, had so limited his obligation when defendant signed the instrument, which in fact made him liable as a joint purchaser, his failure to have the contract read over to him, and ascertain its contents before signing it, was not such negligence as precluded him from obtaining a reformation thereof.—*Nichols & Shepard Co. v. Berning*, 76 N. E. 776, 37 Ind. App. 109.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. §§ 84-90.
See, also, 34 Cyc. pp. 945-949.

§ 26. Persons entitled to reformation.

Parties plaintiff, see post, § 33.

[a] (Sup. 1857)

W., owner of a tract of land, sold a part to S., executing a title bond, and subsequently a deed. He afterwards sold the balance to H., and gave a deed. The title bond and the deed to H. made a certain line a common boundary. But the deed to S. made a different line as the boundary, leaving an angle of some acres claimed by both. S.'s deed was on record at the time of H.'s purchase, and W. was in possession of the whole. Upon a bill in equity, brought to correct the error in S.'s deed, by H., it was *held* that the fact of H. being a stranger to the deed he seeks to reform is entitled to little weight, and even if a valid objection, he would still be entitled, if the facts otherwise warranted, to a restraining order as to so much of the deed as went beyond the intention of the parties.—*Hileman v. Wright*, 9 Ind. 126.

[b] (Sup. 1832)

A grantor in the conveyance of land, as well as the grantee, may have a mutual mistake in the description thereof corrected.—*Lucas v. Labertue*, 88 Ind. 277.

[c] (Sup. 1883)

One purchasing lands at an execution sale, the execution debtor having no legal title by reason of a misdescription in his deed, acquires no title, equitable or legal, and cannot maintain a suit to reform the deed.—*Conner v. Wells*, 91 Ind. 197.

[d] (App. 1899)

A contract cannot be reformed for mistake in its execution, at suit of a party whose name is not mentioned in the instrument, on a complaint which does not connect the complainant with the parties to it.—*Pape v. Kaough*, 55 N. E. 775, 23 Ind. App. 525.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. §§ 91-100;
19 CENT. DIG. Equity, § 259.
See, also, 34 Cyc. pp. 950-952.

§ 27. Persons as to whom instruments may be reformed.

Parties defendant, see post, § 33.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. §§ 101-116.
See, also, 34 Cyc. pp. 953-962; note, 51 Am. Rep. 458; note, 77 Am. St. Rep. 804.

§ 28. — In general.

Evidence, see post, § 43.
Pleading, see post, § 36.

[a] (Sup. 1843)

A mortgage to indemnify a surety, by mistake, did not include one tract of land intended by the parties to be embraced therein. Judgments by creditors of the mortgagor were recovered against him. The surety paid the debts on which he was liable, against which the whole amount of the land intended to be included in the mortgage was not sufficient to indemnify him, and the mortgagor and debtor was insolvent. *Held*, that equity would correct the mistake in the mortgage, and give the mortgage priority to the judgment liens on the land so omitted by mistake.—*White v. Wilson*, 6 Blackf. 448, 39 Am. Dec. 437.

[b] (Sup. 1865)

In all cases of mistakes in written instruments, courts of equity will interfere as between the original parties, or those claiming under them in privity, such as personal representatives, heirs, devisees, legatees, assignees, voluntary grantee, judgment creditors, or purchasers from them with notice of the facts.—*Sample v. Rowe*, 24 Ind. 208.

[c] In the deed of a married woman, a mistake in a mere matter of description may be corrected in a proper proceeding.—(Sup. 1878) *Hamar v. Medsker*, 60 Ind. 413; (1878) *Carper v. Munger*, 62 Ind. 481; (1878) *Wilson v. Stewart*, 63 Ind. 294; (1881) *Styers v. Robbins*, 76 Ind. 547; (1882) *Hewitt v. Powers*, 84 Ind. 295.

[d] (Sup. 1881)

One who has acquired a judgment against a vendor of land, and levied execution thereunder on the land, does not acquire rights superior to the equity of the vendee to have the conveyance made to him by his vendor correct-

ed so as to properly describe the property.—*Morrison v. Collier*, 79 Ind. 417.

[e] (Sup. 1881)

C.'s former husband executed a mortgage on the land in question to secure payment of the price, and he having died, leaving his wife and two children surviving him, the mortgage was foreclosed and the property sold. One of the children died intestate and without issue, and, C. having married her codefendant before the expiration of the period of redemption, they borrowed money of plaintiff to redeem the land, and agreed to give him a mortgage on the same land to secure its payment, and, in pursuance of such agreement, executed the mortgage in suit, which, by mistake, described the land as the grantor's interest in fee simple therein. *Held*, that since C. had an interest in the land which she could mortgage, the mortgage was properly reformed as to her.—*Eichbrecht v. Angerman*, 80 Ind. 208.

A mortgage executed by a married woman and her husband may be corrected and foreclosed against her.—*Id.*

[f] (Sup. 1881)

As between the mortgagee and the heirs and administrator of the mortgagor, a mortgage may be reformed upon parol evidence of mistakes therein.—*Morris v. Stern*, 80 Ind. 227.

[g] (Sup. 1881)

Equity will correct a quitclaim deed for a mistake therein as against a feme covert either during or after coverture.—*Dunn v. Tousey*, 80 Ind. 288.

[h] (Sup. 1883)

Equity will, as against a subsequent purchaser or mortgagee with notice, correct a mistake in the description of the premises in a mortgage.—*Pence v. Armstrong*, 95 Ind. 191.

[i] (Sup. 1885)

Judgment creditors being in no sense purchasers, a prior deed may be reformed and equities enforced as between grantor and grantee, notwithstanding the existence of a judgment against the grantor.—*Boyd v. Anderson*, 102 Ind. 217, 1 N. E. 724.

In a suit by a bona fide purchaser to reform a deed, the defense that the mistake in the description was a mistake of law and not of fact was personal to the grantor, which he was entitled to waive, and which having been waived, could not be complained of by his judgment creditors.—*Id.*

[j] (Sup. 1891)

Defendant purchased certain land as a mill site, took possession and proceeded to erect a mill at the expense of several thousand dollars, before receiving a conveyance of the premises, which, when received, by mistake failed to include the mill site. Plaintiff afterwards purchased the same land from defendant's vendor, with full notice of defendant's purchase and improvements under claim of ownership. *Held* that, as against plaintiff, defendant was

entitled to a correction of the mistake.—*Smith v. Schweigerer*, 129 Ind. 363, 28 N. E. 696.

Mistakes in the description of land may be corrected against the party who buys with full knowledge of another's prior purchase of land from the same grantor.—*Id.*

[k] (Sup. 1896)

A mortgage executed by a married woman and her husband to secure his debt, but by mistake describing the wrong land, will not be reformed at the instance of the mortgagee, so as to describe land which was the separate property of the wife when the mortgage was made.—*Merchants' & Laborers' Building Ass'n v. Scanlan*, 144 Ind. 11, 42 N. E. 1008.

[l] (Sup. 1896)

A mutual mistake in a mortgage may not only be corrected against the mortgagor, but against subsequent purchasers with notice of the fact, and against judgment creditors of the mortgagor or such purchaser with notice.—*Citizens' Nat. Bank v. Judy*, 43 N. E. 259, 146 Ind. 322.

[m] (App. 1909)

Reformation of instrument entitling party to interest in land may be made as against a subsequent purchaser with notice of a mistake therein.—*Remm v. Landon*, 43 Ind. App. 91, 86 N. E. 973.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. §§ 101-111, 114-116.

See, also, 34 Cyc. p. 953.

§ 29. — Bona fide purchasers.

Evidence, see post, § 43.

Laches, see post, § 32.

Pleading, see post, § 36.

[a] (Sup. 1871)

The fact that a subsequent mortgagee examined the record of a prior mortgage and believed that it did not embrace the property mortgaged to him, and therefore took his mortgage, is no defense to an action by the prior mortgagee to have his mortgage performed.—*Bowen v. Wood*, 35 Ind. 263.

[b] (Sup. 1874)

A mortgagee cannot have his mortgage reformed and corrected on the ground of a mistake in describing the real estate, so as to make the mortgage cover another and different tract of land than that described therein, as against a judgment creditor who has purchased in good faith, for a valuable consideration, judgments rendered against the mortgagor after the execution of the mortgage.—*Flanders v. O'Brien*, 46 Ind. 284.

[c] (Sup. 1876)

A mortgagee may have his mortgage reformed by the correction of a mistake in the description of the real estate intended to be covered, as against a junior mortgagee whose mortgage was taken without notice of such mis-

take as a security for an antecedent debt, without the surrender of any old security, and without any new consideration, but merely to secure a new note given for the amount of old ones taken up.—*Busenbarke v. Ramey*, 53 Ind. 499.

[d] (Sup. 1878)

A mortgagee cannot have his mortgage reformed and corrected, as against the purchaser in good faith, for a valuable consideration, of a judgment which was a lien upon the land which was intended to be, but by mistake was not, embraced in the mortgage; the purchaser of the judgment having no notice of the mistake at the time of his purchase.—*Wainwright v. Flanders*, 64 Ind. 306.

[e] (Sup. 1879)

Plaintiff suing on a note and to foreclose a mortgage securing it, making a subsequent purchaser of the mortgaged lands a defendant, and whose complaint alleges a mistake in omitting from the note the agreed rate of interest expressed in the mortgage, which was of record when the lands were conveyed to defendant, is entitled to have the note reformed by including such rate.—*Leedy v. Nash*, 67 Ind. 311.

[f] (Sup. 1882)

A mistake in the description of land in a mortgage cannot be corrected to their prejudice after the rights of bona fide third parties have intervened.—*Hewitt v. Powers*, 84 Ind. 295.

On complaint to reform a mortgage and to foreclose, a subsequent purchaser answered that he had become bail for the mortgagor under the belief that the latter's land was unincumbered, save as appeared from plaintiff's mortgage; that plaintiff knew of the mistake, but neglected to have it corrected, and that subsequently defendant purchased the land at a sale by an assignee in bankruptcy of the mortgagor. *Held*, that equity would not reform the mortgage, as such action would destroy defendant's sole security.—*Id.*

[g] (Sup. 1882)

A mistake in the description of mortgaged premises cannot be corrected against a bona fide purchaser at a sheriff's sale, who has acquired title without notice of the mistake.—*Vittito v. Hamilton*, 86 Ind. 137.

[h] (Sup. 1883)

A mortgage which fails to describe the land intended to be mortgaged cannot be reformed and foreclosed against a subsequent bona fide purchaser.—*Pence v. Armstrong*, 95 Ind. 191.

A mortgage which contains a defective description may be reformed and foreclosed against a subsequent purchaser for value without actual notice, as the description may be rendered certain by averments, and such descriptions are not void, but are sufficient to put the persons on inquiry, and to charge them with notice.—*Id.*

[i] (Sup. 1902)

An erroneous description of real estate in a mortgage, that is full and consistently complete

within itself, and clearly and correctly identifies another body of land, will not be reformed to embrace an entirely different tract, to the prejudice of a subsequent mortgagee, who accepted his mortgage in ignorance of the mistake, and in bona fide reliance upon the appearance of the public record.—*Rinehardt v. Reifers*, 64 N. E. 459, 158 Ind. 675.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. §§ 106, 112, 113.

See, also, 34 Cyc. pp. 956-958.

II. PROCEEDINGS AND RELIEF.

Joinder of legal and equitable causes, see ACTION, § 46.

Lis pendens, see LIS PENDENS, §§ 13, 24.

Necessity of concluding plea with prayer for reformation of instrument, see PLEADING, § 97.

Reply asking reformation as departure from complaint on contract, see PLEADING, § 180.

§ 30. Form of remedy.

[a] (Sup. 1903)

Under Burns' Rev. St. 1901, § 281, authorizing plaintiff in all actions to join such other matters in his complaint as may be necessary to a complete remedy, where complainant sued for the value of natural gas delivered under a contract, and claimed that, by reason of a mutual mistake of the parties and of the scrivener who wrote the contract, it did not limit plaintiff's obligation in furnishing gas to three particular furnaces operated by defendant, according to the agreement, and asked a reformation of the contract, the suit was properly brought in equity, which court could award whatever relief the proof showed plaintiff entitled to, though it proved to be but a money judgment.—*Palmer Steel & Iron Co. v. Heat, Light & Power Co.*, 66 N. E. 690, 160 Ind. 232.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. §§ 117, 118; 7 CENT. DIG. Bills & N. § 1294.

See, also, 34 Cyc. p. 962.

§ 31. Jurisdiction and venue.

Jurisdiction as dependent on situs of property, see COURTS, § 18.

[a] (Sup. 1866)

Since the adoption of the Code, abolishing all distinctions between actions at law and in equity, there can be no question of the right of a party, in a suit for breach of a written contract, to have a mistake in the instrument corrected.—*Rhode v. Green*, 26 Ind. 83.

[b] (Sup. 1884)

A suit to reform a deed is in personam, and may be brought where the person resides, though the land lies in another state or county.—*Bethell v. Bethell*, 92 Ind. 318.

A covenant of seisin being a personal one, a deed may be reformed as to that, though the land is situated in another state.—*Id.*

[c] (Sup. 1884)

An action to reform a deed may be instituted against the grantors in a county where they reside, though the land is situated in another state.—*Gordon v. Goodman*, 98 Ind. 269.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. § 118.

See, also, 34 Cyc. pp. 963-964.

§ 32. Limitations and laches.

Application of general statutes of limitation, see LIMITATION OF ACTIONS, § 19.

Laches in general, see EQUITY, §§ 71, 83.

Pleading limitations, see LIMITATION OF ACTIONS, § 182.

[a] (Sup. 1896)

As against innocent purchasers at first mortgage sale, it is too late for a second mortgagee, 5 years after the sale and 15 years after taking of his mortgage, to seek for relief by correction of the record of the second mortgage, which gives his name incorrectly.—*Baughner v. Woollen*, 45 N. E. 94, 147 Ind. 308.

[b] (App. 1902)

Where, in a suit to reform a deed because of error in the description of the land intended to be conveyed, and to recover the land erroneously included, no rights of third parties have intervened because of delay in bringing suit, and defendant has suffered no injury, nor been led to incur any expense or enter into any burdensome arrangements, it cannot be said that there has been any laches precluding relief.—*Earl v. Van Natta*, 64 N. E. 901, 29 Ind. App. 532.

[c] (App. 1910)

Where a purchaser took possession of land under a contract of sale, containing a covenant for reconveyance, if a factory was not constructed on the land purchased, a delay of nine years by the vendor will not defeat his right to have a misdescription of the property in the contract corrected, in a suit to compel a reconveyance, since such delay was favorable to the purchaser by giving him more time to comply with the contract.—*Doty v. Sandusky Portland Cement Co. of Ohio*, 91 N. E. 569.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. §§ 119-

121; 19 CENT. DIG. Equity, § 206.

See, also, 34 Cyc. pp. 964-967.

§ 33. Parties.

Persons as to whom instruments may be reformed, see ante, §§ 27-29.

Persons entitled to reformation, see ante, § 26.

[a] (Sup. 1873)

Where a deed by mistake incorrectly described the property intended to be conveyed, and the deed as executed is correctly copied of record by the recorder, he is not a necessary

party to an action for its reformation.—*King v. Bales*, 44 Ind. 219.

[b] (Sup. 1874)

Where the defendant had made a contract with a firm generally to pay all its debts, and plaintiffs, as creditors of the firm, have brought an action on notes made by the firm and on a contract, to compel payment of the notes, without making the members of the firm parties, and the defendant by answer alleged a mistake in the contract and sought reformation thereof, *held*, that there could be no reformation, the firm not being made parties to the action.—*Durham v. Bischof*, 47 Ind. 211.

[c] (Sup. 1879)

A grantor whose deed was so imperfect as to pass no title died intestate. The grantees died intestate, leaving no personal property. The grantor's administrator sued the grantee's heirs to foreclose a vendor's lien on the land supposed to have been conveyed by the deed, and to reform the deed. *Held*, that the grantor's widow and heirs must be made parties defendant, but that the grantee's administrator need not be.—*Overly v. Tipton*, 68 Ind. 410.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. §§ 122-139.

See, also, 34 Cyc. pp. 967-970.

§ 35. Pleading.

Allegations in foreclosure suits, see MORTGAGES, § 454.

Cross-complaint in foreclosure suit, see MORTGAGES, § 455.

Filing written instruments with pleading, see PLEADING, § 308.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. §§ 141-153.

See, also, 34 Cyc. pp. 970-979.

§ 36. — Bill, complaint, or petition.

[a] (Sup. 1871)

A pleading which seeks the construction or reformation of a contract must state the contract in full, with all its material exhibits.—*Plowman v. Shidler*, 36 Ind. 484.

[b] (Sup. 1873)

The complaint in an action to reform and enforce a contract alleged that the defendant undertook to reduce the contract to writing, that he fraudulently wrote it differently from the contract really made, that he read it as it should have been written, and that plaintiff, as a result of such deception by the defendant, signed the contract. *Held*, that the complaint was sufficient on demurrer.—*New v. Wambach*, 42 Ind. 456.

A paragraph of a complaint to reform a contract and enforce it, alleging that defendant wrote the contract and by mistake it was written differently from what it was agreed it should be, was good on demurrer.—*Id.*

[c] (Sup. 1874)

A complaint to correct a written contract on the ground of mistake, and to enforce it, which avers in a very general and indefinite way that by the mistake, inadvertence, or neglect of the scrivener, and without any fault of plaintiff, the contract does not fully set forth the agreement of the parties, without showing in what respect or particular it fails to set forth the agreement, what words are omitted that it was agreed should be inserted, and what words are inserted contrary to the intent of the parties, is bad.—*Baldwin v. Kerlin*, 46 Ind. 426.

[d] (Sup. 1877)

A complaint to reform a deed on the ground of mistake in omitting words of inheritance held bad, for not alleging that the grantor and grantee were ignorant thereof.—*Nicholson v. Caress*, 59 Ind. 39.

[e] (Sup. 1878)

A. quitclaimed to B., and received payment, at a certain price per acre, for his interest in a tract of land held by him and others in common; both parties acting on the belief that such interest amounted to three-twentieths of said tract, whereas it actually amounted to one-fifth. Five years afterwards A. brought suit against B. to reform the deed and for general relief. Held that, though the complaint was vague and uncertain, it was sufficient to entitle A. to relief.—*Fly v. Brooks*, 64 Ind. 50.

[f] (Sup. 1878)

A complaint to reform and foreclose a mortgage for mistake should allege that a subsequent purchaser of the land had actual notice thereof.—*Easter v. Severin*, 64 Ind. 375.

In an action against a mortgagor and a subsequent purchaser to foreclose a duly recorded mortgage on real estate, described therein as "three town lots, * * * being all the town lots owned by the" mortgagor in a certain town, the complaint, without alleging any mistake in the drawing of the mortgage, alleged that the intention of the parties was to mortgage a certain tract adjoining such town, and that, as the purchaser well knew, such tract was all the land owned by the mortgagor in or about such town. Held insufficient on demurrer.—Id.

[g] (Sup. 1879)

In a complaint by the grantee of lands for the reformation of a deed, duly recorded, it was alleged that, through a mistake on the part of the grantor and the draftsman, a piece of land which the grantor did not own had been conveyed to the plaintiff, and that the piece intended to be conveyed was about to be sold on an execution against the grantor. Held, that the complaint was defective in not alleging that the misdescription was the result of a mutual mistake on the part of the plaintiff, as well as by the grantor and the draftsman.—*Schoonover v. Dougherty*, 65 Ind. 463.

[h] (Sup. 1879)

In an action on the covenants of a deed, an answer alleging that the deed, by the mistake of the scrivener, was made to contain other land than that intended to be conveyed, etc., without alleging how the scrivener fell into the mistake, or whether the mistake was mutual, was insufficient.—*Dowell v. Caffron*, 68 Ind. 196.

[i] (Sup. 1879)

A complaint to reform a deed is demurrable, if a copy of the deed is not made a part of it.—*Overly v. Tipton*, 68 Ind. 410.

[j] (Sup. 1881)

A complaint to correct a mistake in a writing should allege a demand and refusal.—*Axtel v. Chase*, 77 Ind. 74.

[k] (Sup. 1881)

A complaint to reform a mortgage, which shows that by mistake of the scrivener a term in the description of the land and the year in the date were written different from the term and date intended by the mortgagors, a husband and wife, contains a cause of action against the widow and heirs of the husband for reformation.—*Jones v. Sweet*, 77 Ind. 187.

[l] (Sup. 1881)

Where a complaint in an action to reform and foreclose a mortgage describes particularly 27 acres of land in a certain fractional section and avers that the parties to the mortgage intended and agreed to insert the particular description in the mortgage but that by mistake only a vague general description was inserted, and that 26 acres of the land was subsequently purchased by one who bought with full knowledge of the land embraced in the mortgage and subject to such mortgage, such complaint is good against a demurrer by such purchaser for want of facts.—*Craven v. Butterfield*, 80 Ind. 503.

[m] (Sup. 1882)

In a suit to reform a deed, so as to include in it a reservation of a right of way, a description of the way in the complaint as being 10 feet in width on the south line of the tract conveyed, and extending from the east to the west line, is sufficient.—*Schautz v. Keener*, 87 Ind. 258.

[n] (Sup. 1882)

Where a complaint by a grantor avers mistake in both parties to a deed, and that deed was made and accepted by mistake as a deed for the land intended to be conveyed, the objection cannot be made that the complaint fails to allege that the mistake was mutual.—*Lucas v. Labertue*, 88 Ind. 277.

[o] (Sup. 1885)

A complaint, the evident object of which, as shown by its averments, is for the reformation of a deed as to the description of the premises, is not bad on demurrer because of the lack of a prayer for reformation.—*Dehority v. Wright*, 101 Ind. 382.

[D] (Sup. 1888)

A complaint to reform a mortgage sufficiently shows mutual mistake by averring that the mortgagors agreed to convey the whole of a tract of land, and both parties intended, at the time of the transaction, that the entire tract should be included, but by mistake of the scrivener the description was so written as to cover only the undivided one-third.—*Keister v. Myers*, 115 Ind. 312, 17 N. E. 161.

[Q] (Sup. 1886)

A complaint in an action for the reformation of a mortgage and for foreclosure, alleging the property to be part of the S. W. $\frac{1}{4}$ of section 31, town 5 N., range 1 E., beginning 72 poles west of the N. E. corner of "said quarter section," and stating that by mistake the mortgage described the land as 72 poles west of the N. E. corner of "said section," sufficiently describes the land and the mistake sought to be corrected.—*Walls v. State ex rel. Mallott*, 140 Ind. 16, 38 N. E. 177.

A complaint in a suit to reform a mortgage on the ground of mistake in description should set out the land mortgaged, and the mistake which occurred, and the prayer for relief should be for the reformation of the instrument, in accordance with the correction of the mistake.—*Id.*

In an action to reform a deed by correcting a mistake, the complaint must show a demand and refusal to make the correction.—*Id.*

[R] (Sup. 1896)

In an action to reform a written instrument, the plaintiff must set forth the terms of the original agreement and also the agreement as reduced to writing, and point out with clearness wherein there was a mistake.—*Citizens' Nat. Bank v. Judy*, 43 N. E. 259, 146 Ind. 322.

[S] (App. 1902)

In a suit to reform a deed because by mistake the description did not cover the land intended to be conveyed, the complaint alleged that on a certain date the grantor contracted, for a certain sum, to convey certain premises to the grantee, and that subsequently he executed and delivered a certain deed. *Held*, that the antecedent contract was sufficiently pleaded.—*Earl v. Van Natta*, 64 N. E. 901, 29 Ind. App. 532.

[T] (App. 1902)

A bill for reformation of a contract, alleging what the real agreement was, and that, by mutual mistake and inadvertence of the parties and the scrivener, the contract was executed, sufficiently shows how the mistake occurred.—*Smelser v. Pugh*, 64 N. E. 943, 29 Ind. App. 614.

[U] (App. 1903)

A complaint in an action to reform a contract, which contains a clear statement of the contract as actually made and intended by the parties, and of the agreement actually reduced

to writing and signed by them, and pointing out material differences between the two, and alleges that the written contract was executed by mistake, states a cause of action.—*Webb v. Hammond*, 68 N. E. 916, 31 Ind. App. 613.

[V] (App. 1905)

A bill for the reformation of a written instrument must show that there was a mutual mistake, the agreement actually made, and the agreement which the parties intended to make.—*Johnson v. Sherwood*, 73 N. E. 180, 34 Ind. App. 490.

Complainant, who had purchased land of defendant, sued to cancel a note and mortgage given for the purchase price, on the ground of a breach of warranty, because of the existence of a way over the land; and defendant's counterclaim sought to reform the deed and mortgage so that the description would show the easement to be over the land, and the counterclaim charged that the parties were clearly acquainted with the location, and the fact that there was an easement over the land contemplated, and that it was agreed that the conveyance should be "subject to the easement," but that the agreement, as reduced to writing, located the easement on other property. *Held*, that the allegations of the bill were sufficient to show a mutual mistake, warranting reformation.—*Id.*

Where a mortgagee sought to reform a mortgage note, his pleading, alleging that he had confidence in the attorney who drew the note, but that the attorney, in order to deceive him, employed in drawing the note a printed form containing a clause allowing "payees' attorneys' fees," but added to the clause, "if suit be brought on said note, at such rate for * * * fees as shall be allowed by the court," and that such conduct deceived the mortgagee, was sufficient to charge the attorney with fraud and deception.—*Id.*

[W] (App. 1908)

A complaint for the reformation of a deed must show: (1) A previous contract between the parties to the deed, founded upon a valuable consideration, requiring the execution of a deed of the kind, character, and terms the plaintiff claims should have been made; (2) the execution of a deed substantially different in character and terms from the one the contract of the parties called for; (3) that in executing such deed all the parties thereto meant and intended thereby to execute a deed in character and terms called for by the contract between them; (4) a mistake common to all of the parties to the deed either as to the legal effects of the instrument they had executed, or a mistake of some facts with reference to the form, terms, or conditions contained in the instrument.—*Radebaugh v. Scanlan*, 41 Ind. App. 109, 82 N. E. 544.

In view of the meaning of the words "sold," "attempt," and "convey," a complaint to correct a deed of R. and wife to G., from the body of which her name was omitted, contains, as

required by Burns' Ann. St. 1901, §§ 341, 379, such allegations that a person of common understanding would know from them that the pleader intended to charge that R. and wife had contracted, for a valuable consideration, to transfer to G. all their title and estate in the property, and that they signed the deed meaning and intending thereby to effectually convey their title and estate in the property to G., and so is sufficient; it alleging that R. owned the land, and on a certain day he and his wife sold and attempted to convey it to G., that the deed was duly signed and acknowledged by them, but that by the mutual mistake of the parties and the notary the notary failed to insert the name of the wife in the body of the deed.—Id.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. §§ 141-146.

See, also, 34 Cyc. pp. 970-977.

§ 37. — Cross-bill, cross-complaint, or counterclaim for reformation.

[a] (Sup. 1873)

The terms of a written instrument sued on cannot be reformed or changed on the ground of mistake at the instance of the defendant, except by alleging the mistake, and asking affirmative relief by a cross-bill.—King v. Enterprise Ins. Co., 45 Ind. 43.

[b] (Sup. 1874)

Defendant made a contract with a firm generally to pay all its debts, and the plaintiffs as creditors of the firm brought an action on notes made by the firm, and on the contract, to compel payment of the notes without making the members of the firm parties, and the defendant by answer alleged a mistake in the contract and sought reformation thereof. *Held*, that the answer should have been in the nature of a cross-complaint, to which the firm should have been made defendants.—Durham v. Bischof, 47 Ind. 211.

[c] (Sup. 1877)

A cross-complaint for the reformation of a deed, on the ground that the word "heirs" was omitted by mistake, and it therefore contained no words of inheritance, was insufficient, which contained no averment to the effect that at the time of the execution and delivery of the deed the grantor and grantee were ignorant of the precise contents of such deed, or of the omission of the word "heirs."—Nicholson v. Caress, 59 Ind. 39.

[d] (Sup. 1881)

A mortgagee, defendant in partition proceedings, may proceed by counterclaim to procure reformation of his mortgage and a foreclosure.—Conyers v. Mericles, 75 Ind. 443.

[e] (App. 1902)

Where a cross-complaint to reform a contract because of mistake alleged what the contract actually was and what was mutually agreed between the parties and stated that by the mutual mistake and inadvertence of the

parties and the scrivener the contract sued on by plaintiff was executed, the cross-complaint was not demurrable for failure to allege how the mistake occurred.—Smelser v. Pugh, 64 N. E. 943, 29 Ind. App. 614.

[f] (App. 1909)

In an action for breach of covenant in a deed arising out of a mistake in the description of the land conveyed, that the complaint was answered by general denial only did not prevent a reformation of the deed to defeat the claim for damages.—Tennyson v. Fleener, 90 N. E. 91.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. § 147.

See, also, 34 Cyc. p. 977.

§ 38. — Plea or answer, and subsequent pleadings.

Departure, see PLEADING, § 180.

[a] (Sup. 1868)

If plaintiff desires a reformation of the instrument on which he sues, he should ask for it in his complaint, and not in his reply.—Cox v. Aetna Ins. Co., 29 Ind. 586.

[b] (Sup. 1879)

In an action by an indorsee to reform a promissory note, which recited that it was given in part for the purchase money of land, the complaint alleged a mistake in the description of the land. Defendant in his answer admitted "the execution of the note mentioned in such complaint," but stated "that the same was executed for the real estate therein described, and for no other consideration whatever," and denied "every allegation in said complaint not specifically admitted herein," etc. *Held*, on demurrer, that the alleged mistake and indorsement are neither admitted nor denied by the answer, and the answer is good.—McIntosh v. Robison, 68 Ind. 120.

[c] (Sup. 1881)

To reform an instrument in reply that had been affirmed and declared on in the complaint would be a departure from the cause of action.—Wood v. Deutchman, 75 Ind. 148.

[d] The fact that a note sued on is not due is a matter in abatement; and, if this can be made apparent only by facts involving a reformation of the note sued on, the answer must contain a prayer for reformation.—(App. 1892) Norris v. Scott, 6 Ind. App. 18, 32 N. E. 103, 865; (1893) Scott v. Norris, 6 Ind. App. 102, 32 N. E. 332, 33 N. E. 227.

[e] (App. 1893)

The fact that, if reformation were decreed, the plea in abatement would be useless, as the note itself would show that it was not due, furnishes no objection to this manner of pleading, on the ground that it would compel a party to cut up his defenses; for, as the decree would furnish the proof necessary to make out the plea in abatement, the entire case would be

tried and disposed of on the one pleading.—*Scott v. Norris*, 6 Ind. App. 102, 32 N. E. 332, 33 N. E. 227.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. §§ 148-150.

See, also, 34 Cyc. pp. 977, 978.

§ 39. — Demurrer.

[a] (App. 1902)

Burns' Rev. St. 1901, § 280, provides that a written instrument may be corrected in any action, when essential to a complete remedy. In an action to reform a deed because of mistake in the description of the land intended to be conveyed, and to recover the land erroneously included, defendant, on demurrer, contended that the reformation of the deed was the principal issue made by the pleadings. *Held*, that as the complaint was sufficient both for reformation and possession, and the statute permits the issues to be tendered in the same action, there was no necessity on demurrer to determine whether one issue or the other would control, save in so far as delay in bringing the action was concerned.—*Earl v. Van Natta*, 64 N. E. 901, 29 Ind. App. 532.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. § 151.

See, also, 34 Cyc. p. 978.

§ 41. — Issues, proof, and variance.

[a] (Sup. 1885)

In a suit for reformation of a deed, plaintiff was required to recover, if at all, on the theory made by her complaint.—*Holderman v. Miller*, 1 N. E. 719, 102 Ind. 356.

[b] (App. 1903)

In a suit to reform a written contract the contract must be proven either by being introduced in evidence or otherwise, and where there is no evidence of its contents there is a failure of proof.—*Webb v. Hammond*, 68 N. E. 916, 31 Ind. App. 613.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. § 153.

See, also, 34 Cyc. p. 979.

§ 42. Evidence.

Competency of testimony as to matters occurring prior to the death of a person executing the instrument, see WITNESSES, § 167.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. §§ 154-193; 12 CENT. DIG. Corp. § 1870.

See, also, 34 Cyc. pp. 979-990.

§ 43. — Presumptions and burden of proof.

[a] (Sup. 1878)

In a suit to reform a mortgage, brought against the mortgagor and a subsequent purchaser of the land, the contrary not being alleged, it is to be presumed that the purchaser

is a purchaser for a valuable consideration.—*Easter v. Severin*, 64 Ind. 375.

[b] (Sup. 1887)

Where, in a suit to reform a deed for mistake, it did not appear when plaintiff became aware of the mistake and no rights of third persons had intervened, and defendant's position was not changed, the burden was on him to show that there had been such acquiescence after knowledge of the mistake as would render it inequitable to afford plaintiff relief which he would otherwise be entitled to; less than 20 years having elapsed.—*Vinton v. Builders' & Manufacturers' Ass'n*, 9 N. E. 177, 109 Ind. 351.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. § 152.

See, also, 34 Cyc. p. 979.

§ 44. — Admissibility.

Parol evidence to show mistake, see EVIDENCE, § 415.

[a] (Sup. 1857)

When a title bond, and a deed subsequently, were given for a part of a lot of land, and a deed to another party of the residue of the lot, and the description in the title bond, and the second deed differ, the title bond and the testimony of the conveyancer and the grantor may be used as evidence to show a mistake in the description, in a bill in equity brought to rectify the alleged mistake.—*Hileman v. Wright*, 9 Ind. 126.

[b] (Sup. 1859)

A deed drawn by mistake for a different interest than that intended to be conveyed may be corrected, if the mistake be clearly proved, and this though it be a deed of covenant.—*Andrews v. Andrews*, 12 Ind. 348.

[c] (Sup. 1872)

In an action to reform an instrument, oral evidence is competent to establish a mistake.—*Free v. Meikel*, 39 Ind. 318.

[d] (App. 1903)

Parol evidence is admissible in suits for reformation of a deed to establish the fact of the mistake, in what it consists, and how the writing should be corrected to conform to the agreement made.—*Wieneke v. Deputy*, 68 N. E. 921, 31 Ind. App. 621.

[e] (App. 1906)

Where, in an action on a contract, defendant claimed that through fraud or mistake the contract as written was not the contract agreed on, and prayed for a reformation, parol evidence was admissible to show the contract actually made.—*Nichols & Shepard Co. v. Berning*, 76 N. E. 776, 37 Ind. App. 109.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. §§ 155, 156; 1 CENT. DIG. Ack. § 230; 12 CENT. DIG. Corp. § 1870.

See, also, 34 Cyc. pp. 980, 981.

§ 45. — Weight and sufficiency.

[a] (Sup. 1837)

A court of chancery will not correct alleged mistakes in a conveyance, unless they are admitted by the defendant, or conclusively proved.—*Gray v. Woods*, 4 Blackf. 432.

[b] (Sup. 1855)

To justify the reformation of an instrument on the ground of mistake, the evidence must be clear and satisfactory.—*Linn v. Barkely*, 7 Ind. 69.

[c] (Sup. 1857)

To justify the reformation of a deed on the ground of mistake, the evidence must be clear and satisfactory.—*Hilleman v. Wright*, 9 Ind. 126.

[d] (Sup. 1894)

The notary who drew the deed of a gravel pit to a gravel-road company testified that the parties told him to insert a clause providing for a reversion when the company should cease to exist, but that he omitted it. The grantor testified that he agreed to the reversion, and that the president of the company told the notary to so write the deed; that he signed without looking it over, supposing it to be so written; that he had no intention of conveying, nor the president of receiving, the absolute title. One who had represented the company when the deed was drawn testified that he was present, and heard all about the terms of the purchase, but did not remember any agreement for reversion. *Held*, that the evidence supported a reformation.—*Board of Com'rs of Hamilton County v. Owens*, 138 Ind. 183, 37 N. E. 602.

[e] (Sup. 1897)

In an action to reform a lease, it appeared that defendant took the place of a former tenant, for an unexpired term, at \$2,400 per year, under an agreement for a lease for an additional term at a fair rental; that a competitor of defendant desired to obtain a lease from plaintiff, and offered more rent and a bonus; that plaintiff's husband, acting for her, proposed to defendant a five years' extension at \$3,000 per year and \$500 bonus; that, after discussion, the former drew the lease in question, which was for a term of seven years, at a rental of \$2,000 per year for the first two years, and \$3,000 per year for the next five years; that, after a type-written copy was made, plaintiff signed and acknowledged them in duplicate, and had the original recorded; that, when the lease was executed and delivered, defendant paid the \$500 bonus; and that, when the first month's rent became due, defendant drew a check for \$166.66 to pay it, while plaintiff's husband, who was over 70 years old, drew a receipt for \$200. *Held*, that the evidence was insufficient to show that the lease was executed by plaintiff under a mistake.—*Habbe v. Viele*, 148 Ind. 116, 45 N. E. 783, 47 N. E. 1.

[f] (App. 1903)

In ejectment, evidence examined, and *held* sufficient to sustain a finding that there was a mutual mistake in the description in the deed under which defendant claimed.—*Wieneke v. Deputy*, 68 N. E. 921, 31 Ind. App. 621.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. §§ 157-193.

See, also, 34 Cyc. pp. 984-990.

§ 46. Trial or hearing.

Statutory new trial, see NEW TRIAL, § 178.

[a] (Sup. 1877)

In an action to reform a deed reciting "in consideration of one dollar and natural love and affection," etc., the jury returned with their verdict for plaintiff answers to interrogatories finding that plaintiff under such deed had entered into the possession of the land and made valuable improvements thereon; that the consideration for such conveyance was natural love and affection and the sum of \$1; and that such sum had been paid. *Held*, that defendant was not entitled to judgment notwithstanding the general verdict.—*Mason v. Moulden*, 58 Ind. 1.

[b] (Sup. 1881)

In an action to reform and foreclose a mortgage, in which a general verdict was found for plaintiff and in which the jury also found specially that the mortgagor was at the time of making the mortgage the owner of the land particularly described in the complaint, and intended that the mortgage should include such land, that there was no mistake in drawing the mortgage, that all parties to the mortgage were satisfied therewith at the time, that the mortgagor only owned 28 acres in the section mentioned in the mortgage though 27 acres were described therein, and that a subsequent purchaser had full knowledge that the land bought by him from the mortgagor was covered by such mortgage. *Held*, that such purchaser was not entitled to judgment notwithstanding the general verdict; the special findings not being wholly inconsistent with the general verdict.—*Craven v. Butterfield*, 80 Ind. 503.

[c] (Sup. 1892)

The complaint alleged a mistake in a deed by which too much land was conveyed, and sought to have it reformed, and to quiet appellees' title in the surplus. The trial court found that a certain tract of 80 acres was conveyed out of a larger tract to J.; that J. had the tract surveyed in a different shape from that described in his deed, excluding 10.77 acres conveyed to him, and including other 10.77 acres of the larger tract; that he conveyed the tract to appellant under the same description as that stated in the deed to him; that appellant bought an additional 5.66 acres from appellees adjoining the 80-acre tract; that, there being some question as to appellant's title, appellees made

a quitclaim deed of the 85.66 acres to him in accordance with the erroneous survey; that appellant thereafter claimed the 10.77 acres conveyed to him by J. not included in the quitclaim deed, whereupon this action was brought to reform the latter and to recover the 10.77 acres erroneously included therein; that the appellees acted in good faith in the entire transaction, but appellant knew of the discrepancies between the deeds and survey and purposely refrained from mentioning them. *Held*, that on no theory can the court's conclusions of law be sustained that the appellees are not entitled to a reformation of the quitclaim deed, but that they are the equitable owners of the 10.77 acres erroneously included in the deed, and are entitled to recover 5.11 acres of the 80 acres.—*Popijoy v. Miller*, 32 N. E. 713, 133 Ind. 19.

[d] (Sup. 1896)

A special finding, in a suit to reform a mortgage so as to include therein land omitted by mutual mistake, that the parties to the mortgage intended to include therein 565 acres in two sections and 40 acres in another section, is partly outside the issues,—the complaint having alleged nothing as to the 40 acres, and only that the parties intended to include in the mortgage 325 acres in the other two sections,—and to that extent is a nullity.—*Citizens' Nat. Bank v. Judy*, 146 Ind. 322, 43 N. E. 259.

[e] (App. 1902)

Special findings, in answer to interrogatories, that a release of the south half of a quarter section of land, "except twenty acres in the southeast corner thereof," had been read three times in presence of the releasee; that he went with the releasor to have the release recorded; that the recorder entered upon the margin of the original lease a release thereof, "except ten acres around each of two oil wells"; and that, after the same was read to them, releasee stated that he was satisfied with it,—are not irreconcilable with a general finding that the releasee was entitled to a reformation of the release, there being no special findings upon the issue of his right to reformation.—*Boyd v. Schott*, 63 N. E. 871, 29 Ind. App. 74.

[f] (App. 1905)

In an action to reform a note for fraud in failing to include attorney's fees, a failure to find fraud will not warrant a decree of reformation.—*Johnson v. Sherwood*, 34 Ind. App. 490, 73 N. E. 180.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. § 194.

See, also, 34 Cyc. pp. 991-993.

§ 47. Relief awarded.

[a] (Sup. 1861)

A. and B. were, respectively, the owners of adjoining tracts of land, which they held from a common grantor, C. Suit by A. against B. to recover possession of a part of the land, claimed to be embraced in C.'s deed to A., and

which B. was alleged to occupy without right. B. filed a counterclaim, making the heirs of C. parties, alleging a mistake in the description contained in his deed, and asking to have the same corrected, so as to include the land in controversy, or that a proper rebatement might be made from the purchase money yet owing by him to the representatives of C. On the trial D., who was the husband of one of the heirs of C., and with his said wife, was made a party to the counterclaim, was offered by A. as a witness to prove that there was no mistake in the deed of B., but that the same embraced all the land purchased by him. *Held*, that if B. really bought the land in controversy, under such circumstances as would entitle him to have the mistake in the deed corrected as against A. and those claiming under him, and as against the heirs of C., he would be entitled to such relief in this suit, and the heirs of C. might be properly made parties for that purpose; but if it should be found that he was not entitled to such relief as against A. and those claiming under him, although he might be entitled to relief by way of rebatement of the purchase money, as against the heirs of C., it may be doubted whether the latter relief could be obtained in this suit.—*Charles v. Cones*, 16 Ind. 492.

[b] (Sup. 1863)

Under 2 Gav. & H. Rev. St. p. 98, providing that the mistakes in written instruments may be corrected in any other action, a mistake in a note as to the amount may be reformed, and judgment rendered for the amount due, in one and the same action.—*Rigsbee v. Trees*, 21 Ind. 227.

[c] (Sup. 1871)

Although a plaintiff cannot have specific performance of a written contract with a variation upon parol evidence, yet the written contract may be reformed upon parol evidence, and specifically enforced as reformed, and, under the Code (2 Gav. & H. St. p. 98, § 71), it may be reformed and enforced in the same action.—*Monroe v. Skelton*, 36 Ind. 302.

[d] (Sup. 1873)

A decree of reformation of a deed should provide that the grantor or a commissioner appointed by the court shall execute a proper deed.—*King v. Bales*, 44 Ind. 219.

[e] (Sup. 1874)

The courts cannot require a recorder of deeds, who has correctly copied a deed as made and delivered, upon the record, to alter the record to correspond to an alteration adjudged in an action to reform the deed for mistake. The proper course is to adjudge that a new and correct deed be executed by the grantor (or by a commissioner), and the new deed may be recorded, and referred to by a note upon the margin of the record of the old one.—*Toops v. Snyder*, 47 Ind. 91.

[f] (Sup. 1881)

A complaint to correct a supposed mistake in the description in a mortgage, and to foreclose the same, will not be held bad on demurrer, merely because its allegations as to the mistake are not sufficient to entitle plaintiff to reformation.—*Parker v. Teas*, 79 Ind. 235.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. §§ 195–198.

See, also, 34 Cyc. pp. 993–996.

§ 48. Judgment or decree and enforcement thereof.

[a] (Sup. 1874)

As between parties to the record, a decree of the court ordering the reformation of a deed

is binding, and they are required to take notice thereof, although the deed has not in fact been corrected in accordance with the decree.—*Toops v. Snyder*, 47 Ind. 91.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. § 199.

See, also, 34 Cyc. p. 997.

§ 49. Appeal.

Appellate jurisdiction as between particular courts, see **COURTS**, § 220 (10).

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Ref. of Inst. § 200.

See, also, 34 Cyc. p. 998.

REFORMATORIES.

Scope-Note.

[INCLUDES institutions for promoting reformation of offenders, more particularly of juvenile delinquents, whether founded or maintained by private means or in part or wholly by government; establishment, maintenance, regulation, and management of such institutions; and rights, powers, duties, and liabilities of managers and other officers, etc., thereof.

[EXCLUDES powers of incorporated cities, towns, etc., in respect of establishment, maintenance, etc., of reformatories (see *Municipal Corporations*); and reformatories regarded as charitable institutions (see *Charities*). For complete list of matters excluded, see cross-references, post.]

Analysis.

- § 2. Establishment and maintenance of public reformatories.
- 4. Qualifications and admission of inmates.
- 6. — Juvenile delinquents.
- 8. Reduction of term of commitment of inmate for good conduct.

Cross-References.

See—

ASYLUMS.

Commitment of juvenile delinquents and vagrants. **INFANTS**, § 16.

CONVICTS.

Custody of children. **INFANTS**, § 19.

PRISONS.

RESCUE.

Subjects and titles of acts relating to state reformatories. **STATUTES**, § 119.

§ 2. Establishment and maintenance of public reformatories.

[a] (Sup. 1873)

In the act of the general assembly, entitled "An act to establish a house of refuge for the correction and reformation of juvenile offenders," the section providing that certain real estate should be sold and the proceeds applied toward the purchase of other grounds and the erection of suitable buildings for the institution, is not objectionable, on the ground that it violates the constitutional requirement that "every act shall embrace but one subject, and matters properly connected therewith, which subject

shall be expressed in the title."—*McCaslin v. State ex rel. Evans*, 44 Ind. 151.

[b] (Sup. 1875)

The provision of Act March 3, 1855, for the erection of a house of refuge for the correction and reformation of juvenile offenders, expressly authorizing donations of money, in aid of such institution, was not repealed by Act March 8, 1867 (Acts 1867, p. 137), "to establish a house of refuge," etc., which act neither expressly gives nor denies authority to receive such donations.—*State v. Johnson*, 52 Ind. 197.

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[c] (Sup. 1888)

Under Const. § 2, art. 9, authorizing the legislature to provide "for the establishment of houses of refuge for the correction and reformation of juvenile offenders," the legislature can pass an act establishing a reform school, and regulating commitments thereto, after judicial investigation.—*Jarrard v. State*, 116 Ind. 98, 17 N. E. 912.

Act Feb. 23, 1883 (Acts 1883, p. 19), entitled "An act designating a name by which the House of Refuge for the correction and reformation of juvenile offenders shall hereafter be known; providing for the appointment of commissioners, and their compensation, and prescribing their powers and duties; regulating the commitments thereto; and for the more efficient and uniform government of said institution; authorizing the Governor to commute the sentences of boys under twenty-one years; declaring how the expenses of maintaining the institution shall be paid; repealing all laws in conflict with this act, and declaring an emergency," provides a method for ascertaining by a judicial investigation in a court of general superior jurisdiction whether there is cause for taking bad boys from the control of parents and placing them in charge of the officers of the commonwealth, and it cannot therefore be justly said that it arbitrarily takes children from their parents.—*Id.*

FOR CASES FROM OTHER STATES.

SEE 42 CENT. DIG. Reformatories, §§ 1, 2.
See, also, 34 Cyc. p. 1004; note, 120 Am. St. Rep. 952.

§ 4. Qualifications and admission of inmates.

FOR CASES FROM OTHER STATES.

SEE 42 CENT. DIG. Reformatories, §§ 4, 5.
See, also, 34 Cyc. p. 1005; note, 16 L. R. A. 691.

§ 6. — Juvenile delinquents.

Laws relating to as denial of due process of law, see CONSTITUTIONAL LAW, § 255.

[a] (Sup. 1875)

The board of commissioners of the house of refuge for the correction and reformation of juvenile offenders, with the approval of the Governor, have power to make rules and regulations in regard to the admission of offenders, so as to require a letter of application giving proper information in regard to the infant whose admission is asked, and also an examination by a respectable medical practitioner as to the physical and mental condition of such person; and the superintendent may refuse to receive an offender until such rules are complied with.—*Ainsworth v. State*, 49 Ind. 562.

FOR CASES FROM OTHER STATES.

SEE 42 CENT. DIG. Reformatories, § 5.
See, also, 34 Cyc. p. 1005.

§ 8. Reduction of term of commitment of inmate for good conduct.

[a] (Sup. 1908)

Burns' Rev. St. 1901, § 1906b, provides that certain criminals shall be sentenced to the custody of the board of managers of the Indiana Reformatory for a term not less than the minimum time required by the statutes as a punishment for the offense, and not more than the maximum time, subject to the rules and regulations established by the board of managers, which board is authorized to terminate such imprisonment when the rules and requirements of the reformatory have been performed. *Held*, that a sentence under such section was for the maximum time prescribed by the statute, which term might be shortened by the good behavior of the person convicted, at the discretion of the board of managers.—*Terry v. Byers*, 68 N. E. 596, 161 Ind. 360.

The discretion of the board of managers of a reformatory to terminate an imprisonment, as authorized by the indeterminate sentence law (Burns' Rev. St. 1901, § 1906b), is not subject to the supervision or control of the courts.—*Id.*

The word "may," as used in Burns' Rev. St. 1901, § 1906b, providing that a person over 16 and less than 30 years of age, found guilty of any crime except treason or murder in the first or second degree, etc., shall be sentenced to the custody of the board of managers of the Indiana reformatory for a term of not less than the minimum time prescribed by the statute as a punishment for such offense and not more than the maximum time, and that the board "may" terminate such imprisonment when the rules and requirements of the reformatory have been obeyed and performed according to the provisions of the act, must be understood in its usual acceptation as granting to the board permission, liberty, or discretion to terminate such imprisonment, and not as imposing on the board a duty to be performed in all cases whether the board believes the person in prison entitled to his discharge or otherwise.—*Id.*

FOR CASES FROM OTHER STATES.

See, 34 Cyc. p. 1010.

REFRESHING MEMORY.

See WITNESSES, §§ 253-257, 398.

REFUNDING.

See—

Bond or other indemnity by legatee or distributee to executor or administrator. EXECUTORS AND ADMINISTRATORS, § 290.

Legacy or distributive share of estate of decedent. EXECUTORS AND ADMINISTRATORS, § 818.

License fee, or tax on liquor traffic. INTOXICATING LIQUORS, § 96.

Municipal indebtedness, issue of bonds therefor. MUNICIPAL CORPORATIONS, § 913.

Payments of claims against estate of decedent.

EXECUTORS AND ADMINISTRATORS, § 287.

Purchase money to purchaser of invalid tax title. TAXATION, § 821.

Under conditional sale. SALES, § 479.

Taxes paid—

MUNICIPAL CORPORATIONS, § 977.

TAXATION, § 535.

REFUSAL

See—

Corporation or officers to act as condition precedent to action or defense by stockholders on behalf of corporation. CORPORATIONS, § 206.

Demand as element of conversion. TROVER AND CONVERSION, § 9.

REFUSE.

See—

Depositing refuse in navigable waters. NAVIGABLE WATERS, § 25.

Municipal regulations as to removal and disposition of refuse. MUNICIPAL CORPORATIONS, § 607.

REGISTERED LETTERS.

See POST OFFICE, § 17.

REGISTERS OF DEEDS.

Scope-Note.

[INCLUDES public officers authorized to keep records of instruments in writing; their appointment, qualification and tenure of office, and their rights, powers, duties, and liabilities in general.

[EXCLUDES the recording of instruments and effect thereof (see *Records*). For complete list of matters excluded, see cross-references, post.]

Analysis.

- § 2. Appointment, election, qualification, and tenure.
- § 3. Compensation and fees.
- § 4. Powers and functions.
- § 5. Duties and performance thereof in general.
- § 6. Liabilities for negligence or misconduct.
- § 7. Liabilities on official bonds.

Cross-References.

See—

Liability of county for expense of recorder's office. COUNTIES, § 133.

RECORDS.

§ 2. Appointment, election, qualification, and tenure.

Liabilities on bonds, see post, § 7.

[a] (*Sup.* 1835)

St. 1832, p. 263, provided that, when the office of recorder became "vacant by death, resignation, removal, or otherwise," the county commissioners should fill the vacancy by appointment. The commissioners made such an appointment, stating that there was a vacancy "in consequence of the removal of J. H., the late incumbent." *Held*, that the commissioners did not create a vacancy, but merely declared a vacancy to exist, so their action was within their authority.—*Hedley v. Board of Com'rs of Franklin County*, 4 Blackf. 116.

[b] (*Sup.* 1847)

The offices of county recorder and county commissioner are "lucrative offices" within the

constitution, prohibiting the holding of two lucrative offices at the same time, and a county recorder, by accepting the office of county commissioner, vacates his office of recorder.—*Dailley v. State ex rel. Huffer*, 8 Blackf. 329.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Reg. of Deeds, §§ 3-6.

See, also, 34 Cyc. pp. 1018, 1019.

§ 3. Compensation and fees.

Payment of fees for recording or filing instruments, see RECORDS, § 5.

Statement of claim against county, see COUNTIES, § 201.

[a] (*Sup.* 1855)

County recorders, having completed the general index of deeds and mortgages as required by statute, are not entitled to compensation for keeping it up afterwards, though the

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duty of keeping up the general index was added to their duties by the legislature without any additional fee.—*Turpen v. Board of Com'rs of Tipton County*, 7 Ind. 172.

[b] (Sup. 1857)

The commissioners are not bound by any fixed rule of computation in determining the recorder's compensation for making an index of the records of deeds and mortgages and on appeal the jury acting under the same statutory requirement are equally unrestricted.—*Board of Com'rs of La Grange County v. Kromer*, 8 Ind. 440.

On appeal by the county recorder from an order of the county commissioners refusing to allow his claim for indexing deeds and mortgages, the court properly refused to charge the jury that, in computing the amount to which plaintiff was entitled for indexing, 3 figures must be taken as 1 word, and 15 cents allowed for each 100 words, since 1 Rev. St. pp. 427, 428, §§ 1, 2, 4, leaves it to the county commissioners to allow the recorder such compensation "as shall be deemed reasonable and just" for such services.—*Id.*

[c] (Sup. 1861)

Under Act Feb. 14, 1855, requiring the recorders of each county, where the same has not been done, to make out a complete general and double index of all deeds, etc., in his office, and directing the board of county commissioners to allow as compensation 15 cents for each 100 words therein contained, and providing further that after the completion of such indexes it shall be the duty of the recorder to keep up such index, as deeds and mortgages shall, from time to time, be recorded without any compensation except the fees allowed by law for recording such deeds and mortgages, the indexing of such deeds as were filed for record after the passage of the act must be considered as part of the recording, and the fee therefor as included in the fee for the record.—*Board of Com'rs of Wabash County v. Sheets*, 17 Ind. 22.

Act Feb. 14, 1855, required the recorders of each county to make out a complete index of all the records of deeds, etc., in his office, and directed the board of commissioners to allow a certain compensation therefor. It provided further that after the completion of such index it should be the duty of the recorder to keep it up, as deeds and mortgages should, from time to time, be recorded without any compensation beyond the fees allowed by law for recording. *Held*, that the recorder could not recover a distinct compensation for indexing deeds filed for record thereafter, as being a service for which no compensation is provided by law, under the provisions of Act March 2, 1835, fixing the fees of county recorders, and providing that for all services not specifically designated in this act the recorder shall be allowed the same fees allowed by law for similar services.—*Id.*

[d] (Sup. 1866)

The recorder is not entitled to any allowance from the county for keeping up the entry book. The entry required by law upon that book is a part of the labor of recording the instrument, and is compensated by the fee allowed for that service.—*Hand v. Board of Com'rs of Tippecanoe County*, 26 Ind. 179.

[e] (Sup. 1883)

Rev. St. 1881, §§ 5938, 5939, require each recorder in the state to make out, where the same has not been done, a complete index of all the records of deeds to real estate; section 5941 provides that the county board shall allow the recorder for making such indexes a certain fee. *Held*, that where a recorder of deeds fails to keep up the indexes his successor is bound to do so, and is entitled to the compensation provided for by the last section.—*Garrett v. Board of Com'rs of Boone County*, 92 Ind. 518.

[f] (Sup. 1896)

The fee collectible by a recorder for recording a mortgage, where the collector was elected, after the taking effect of the salary act of 1891, is \$1.—*State ex rel. McCay v. Krost*, 39 N. E. 46, 140 Ind. 41.

The fact that Act March 9, 1891, provides a salary for the recorder of every county but Shelby, does not invalidate the section of the act providing that the recorders of all the counties in the state shall be entitled to a fee of one dollar for recording a mortgage.—*Id.*

[g] (App. 1898)

Under Horner's Rev. St. 1897, § 5941, providing that the board doing county business shall allow a certain sum to the recorder indexing the deed and mortgage records, such board contracting for such work can make no greater compensation than so allowed.—*Hubler v. Board of Com'rs*, 49 N. E. 832, 19 Ind. App. 464.

[h] (Sup. 1901)

The fee and salary act of March 11, 1895, § 117 (Acts 1895, p. 319; Burns' Rev. St. 1901, § 6523; Horner's Rev. St. 1901, § 7451), providing that the recorder shall receive certain fees for recording certain designated instruments, and shall receive 10 cents per 100 words for recording all other instruments, but that no charge shall be less than 50 cents, and providing in another section that the act shall repeal all acts in conflict therewith, repeals Burns' Rev. St. 1901, § 7258 (Horner's Rev. St. 1901, § 5296), providing that the recorder shall only receive 25 cents for recording the notice of a mechanic's lien, though section 118 of the fee and salary act requires the recorder performing any service not specifically mentioned in the act, for which he was entitled to charge a fee under the law in effect at the passage thereof, to charge such fee for the benefit of the county.—*State ex rel. Lyons v. Phillips*, 62 N. E. 12, 157 Ind. 481.

FOR CASES FROM OTHER STATES.

SEE 42 CENT. DIG. REG. OF DEEDS § 8.
See, also, 34 Cyc. pp. 1024-1025.

§ 4. Powers and functions.

[a] (Sup. 1867)

The act of March 6, 1865, p. 101, which prohibits county recorders and other officers from practicing law, does not violate Const. art. 7, § 21, declaring that every person of good moral character shall be entitled to practice law, as county officers take their offices cum onere.—*McCracken v. State*, 27 Ind. 491.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Reg. of Deeds, §§ 7, 9-11.

§ 5. Duties and performance thereof in general.

[a] (Sup. 1885)

Where a mortgage is left for record with the recorder, and is entered by him in the entry book, as required by statute, it must be deemed to be recorded from the date of its reception as noted on the entry book, and no injury can result to any one from a failure of the recorder to actually record the instrument.—*Kessler v. State ex rel. Wilson*, 24 Ind. 313.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Reg. of Deeds, §§ 9-11.
See, also, 34 Cyc. pp. 1020, 1021.

§ 6. Liabilities for negligence or misconduct.

Liability on bond, see post, § 7.

Limitation of action against county recorder for mistake in record of mortgage, see LIMITATION OF ACTIONS, §§ 57, 104.

[a] (Sup. 1883)

As a recorder of deeds is not required to certify abstracts of title, he is liable for a false certificate merely as for a breach of contract, and not in his official capacity.—*Mechanics' Bldg. Ass'n v. Whitacre*, 92 Ind. 547.

A recorder entered the record of payment on the margin of the wrong mortgage, and plaintiff, being misled thereby, made a loan to the mortgagor, and took, as security, a mortgage on the lands, which, by the record, appeared unincumbered. *Held*, that the recorder was liable for the resulting damage.—*Id.*

[b] (Sup. 1884)

In an action against a recorder for damages occasioned by his failure to properly index a certain mortgage, a complaint alleging that prior to the purchase of the land subject to a certain mortgage plaintiff caused the indexes of all the records of mortgages in the recorder's office to be examined and read for the purpose of ascertaining if any mortgage had prior to that time been recorded on the mortgage records of the county against the land, and on such examination it was found that there was no index of any mortgage recorded, etc., such allegations were sufficiently broad to let in evidence as to the examination of any and all mortgage indexes, and that was sufficiently specific.—*Reeder v. State ex rel. Harlan*, 98 Ind. 114.

The recording acts requiring mortgages to be indexed immediately after being recorded, the recorder and the sureties on his bond are liable for damages sustained by reason of his neglect to index a mortgage until after the volume in which it is recorded is completely filled.—*Id.*

A recorder of deeds who purposely gives false information concerning the records is liable to an action.—*Id.*

[c] (Sup. 1889)

A recorder is liable for only nominal damages for a mistake in recording a deed containing a recital of an assumption by the grantee of a prior mortgage given by the grantor, for which error the amount assumed appears on the record to be less than the sum named in the deed, unless the grantor is unable to collect the full amount assumed from his grantee, and thereby suffers an actual loss.—*State ex rel. Lowery v. Davis*, 117 Ind. 307, 20 N. E. 159.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Reg. of Deeds, §§ 12-14.
See, also, 34 Cyc. pp. 1021, 1022; note, 95 Am. St. Rep. 85.

§ 7. Liabilities on official bonds.

Determination of constitutional questions in action on bond, see CONSTITUTIONAL LAW, § 46.

[a] (Sup. 1861)

In an action against a recorder and his sureties on his official bond, where the breach alleged was that the recorder failed to keep up and continue the index to deeds recorded by him during his continuance in office, the board is entitled to recover only such reasonable sum as they may have paid his successor to index the deeds recorded during his term.—*State ex rel. Board of Com'rs of Washington County v. Atkisson*, 17 Ind. 26.

A recorder and his sureties were sued for his alleged breaches of duty (1) in failing to index 20,000 deeds in his office at the time of his entry; (2) in failing to index 10,000 deeds recorded by him during his term of office. *Held*, that on the first charge only nominal damages could be recovered, since for doing such indexing he would have been entitled to extra compensation.—*Id.*

[b] (Sup. 1884)

A deed in which the grantee agreed to pay \$500 as part of a mortgage debt was recorded, by a mistake of the recorder, with an agreement to pay only \$200. *Held*, that the recorder was liable on his official bond for damages sustained by the grantor.—*State ex rel. Lowry v. Davis*, 96 Ind. 539.

[c] (Sup. 1884)

Where a recorder executed a bond to secure the faithful performance of his duties as such, one of such duties was to give correct and reliable information as to matters within his knowledge to all persons interested concerning the condition of the records in his office; and, if such recorder designedly and purposely misled plain-

tiff's attorney to her injury as charged, it was a breach of his official duty, and gave plaintiff a cause to complain.—*Reeder v. State ex rel. Harlan*, 98 Ind. 114.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Reg. of Deeds, §§ 15, 16.

See, also, 34 Cyc. pp. 1023, 1024.

REGISTERS OF LAND OFFICE.

Deposition of, to show title to public lands.
PUBLIC LANDS, § 41.

REGISTRATION.

See—

Assignments for benefit of creditors. ASSIGNMENTS FOR BENEFIT OF CREDITORS, §§ 163–170.

Claim or statement of mechanic's lien. MECHANICS' LIENS, §§ 128–130, 132, 155.

Contracts of sale. VENDOR AND PURCHASER, § 26.

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To purchasers at execution. EXECUTION, § 315.

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This Digest is compiled on the Key-Number System. For explanation, see page iii.

RELEASE.

Scope-Note.

[INCLUDES relinquishment of a right or claim to the person against whom it is to be exercised or enforced, express or implied, by agreement or act of the parties; nature, requisites, sufficiency, and effect as satisfaction of such agreements and acts and of instruments of release in writing, under seal or not under seal; evidence relating thereto; right to rescind release; and pleading release and proof thereof as a defense.

[EXCLUDES discharge by operation of insolvent or bankrupt laws (see *Insolvency; Bankruptcy*), by compromise or other settlement (see *Compromise and Settlement*), composition (see *Compositions with Creditors*), or accord and satisfaction (see *Accord and Satisfaction*); releases by particular classes of persons (see *Infants; Insane Persons*; and other specific heads); release of persons in particular representative or fiduciary relations (see *Guardian and Ward; Executors and Administrators; Attorney and Client; Trusts*; and other specific heads); release of particular rights and interests in real property (see *Dower; Mortgages; Mechanics' Liens*; and other specific heads); conveyances by way of release (see *Deeds*); release from particular kinds of liability (see *Bills and Notes; Principal and Surety; Guaranty*; and other specific heads); and compelling cancellation or surrender of release (see *Cancellation of Instruments*). For complete list of matters excluded, see cross-references, post.]

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I. REQUISITES AND VALIDITY.**§ 2. Subject-matter.**

[a] (Sup. 1908)

The validity and effect of a release of a cause of action does not depend on the validity of the cause of action.—*Cleveland, C., C. & St. L. Ry. Co. v. Hilligoss*, 171 Ind. 417, 86 N. E. 485, 131 Am. St. Rep. 258.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Release, §§ 2, 3.

See, also, 34 Cyc. p. 1042.

§ 4. Capacity and authority to release.

Authority of agent, see **PRINCIPAL AND AGENT**, § 111.

Power of partner to bind firm, see **PARTNERSHIP**, §§ 148, 287.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Release, § 1.

§ 5. Agreements to release.

[a] (Sup. 1884)

An agreement to release a railroad company from all claims for injury to stock on consideration of the company building a cattle pass does not operate as a release until the pass is built.—*Terre Haute & I. R. Co. v. Flanigan*, 94 Ind. 336.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Release, § 4.

See, also, 34 Cyc. p. 1044.

§ 6. Form and contents of instruments in general.

[a] (Sup. 1845)

In a debt on a delivery bond, a plea relying upon a parol agreement by the plaintiff, dispensing with defendant's performance of the condition of the bond, is bad.—*Woodruff v. Dobbins*, 7 Blackf. 582.

[b] (Sup. 1853)

The release of a parol contract need not be under seal.—*Develin v. Riggsbee*, 4 Ind. 464.

[c] (Sup. 1855)

A mere parol agreement is not sufficient, of itself, to release an instrument under seal; but an executed parol agreement may have that effect, as it is not the agreement alone that is relied on, but the agreement coupled with acts done under it.—*Dickerson v. Board of Com'rs of Ripley County*, 6 Ind. 128, 63 Am. Dec. 373.

[d] (Sup. 1856)

Though a mere release, if on consideration, is valid without seal, yet, if it is intended to operate as a grant of an easement in land, a seal is requisite to its validity.—*Leviston v. Junction R. Co.*, 7 Ind. 597.

[e] (Sup. 1879)

A cause of action for libel may be released by parol.—*Gabe v. McGinnis*, 68 Ind. 538.

[f] (App. 1906)

A contract providing that in consideration of regular wages during disability, necessary nurse hire, and all doctor's bills, resulting from present disability, and employment when recovered, plaintiff released defendant from liability for the injury, signed and acknowledged by plaintiff alone, on being accepted and acted on by defendant, constituted a contract binding on both parties, though it did not, in terms, contain a promise by defendant to pay the consideration specified.—*American Quarries Co. v. Lay*, 73 N. E. 608, 37 Ind. App. 386.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Release, §§ 12-14, 16.

See, also, 34 Cyc. pp. 1045-1047.

§ 7. Covenant not to sue as release.

Construction and operation, see post, § 37.

[a] A covenant not to sue generally, without any limitation of time, operates as a release of the debt.—(Sup. 1823) *Reed v. Shaw*, 1 Blackf. 245; (1852) *Harvey v. Harvey*, 3 Ind. 473.

[b] A covenant not to sue within a limited time is neither a release, nor can it be pleaded in bar of an action, but is a distinct agreement, for the violation of which an action may be maintained.—(Sup. 1828) *Berry v. Bates*, 2

Blackf. 118; (1839) *Mendenhall v. Lenwell*, 5 Blackf. 125, 33 Am. Dec. 458; (1842) *Lowe v. Blair*, 6 Blackf. 282; (1854) *Thalman v. Barbour*, 5 Ind. 178.

[c] (Sup. 1887)

A covenant not to collect does not discharge the debt, but simply vests in the debtor the right to recover damages for the breach of the agreement.—*Vogel v. Harris*, 14 N. E. 385, 112 Ind. 494.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Release, § 7.

See, also, 34 Cyc. p. 1042; note, 36 Am. St. Rep. 145.

§ 10. Delivery.

[a] (Sup. 1856)

A receipt, not delivered to the person in whose favor it is executed, nor received nor recognized by him in any way, has no binding force against any person.—*Burtch v. Thorn*, 7 Ind. 508.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Release, § 17.

See, also, 34 Cyc. p. 1047.

§ 11. Consideration.

Admissibility of evidence, see post, § 56.

Parol or extrinsic evidence to show nature of consideration, see EVIDENCE, § 419.

Parol or extrinsic evidence to show want or failure of consideration, see EVIDENCE, § 432.

Pleading, see post, §§ 46, 52, 53.

Restoration of consideration on avoidance of release, see post, § 24.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Release, §§ 18-20.

See, also, 34 Cyc. pp. 1048-1054; note, 34 L. R. A. 788; note, 107 Am. St. Rep. 615.

§ 12. — Necessity and nature.

[a] (Sup. 1879)

A parol release is insufficient where there is no consideration to support it.—*Carter v. Zenblin*, 68 Ind. 436.

[b] (Sup. 1889)

It is not a sufficient defense to an action on a promissory note that the note was given in payment for land, that defendant had sold the land to one who assumed the note, and that the plaintiff had agreed to release the defendant, and look only to the assumer.—*Pope v. Vajen*, 121 Ind. 317, 22 N. E. 308, 6 L. R. A. 688.

[c] (App. 1893)

A contract releasing one from an obligation must be supported by a valuable consideration.—*Morrison v. Kendall*, 33 N. E. 370, 6 Ind. App. 212.

[d] (Sup. 1908)

One releasing a person from liability for injuries cannot complain of the inadequacy of the consideration, and whatever consideration he accepts in satisfaction is adequate.—*Cleveland, C.,*

O. & St. L. Ry. Co. v. Hilligoss, 171 Ind. 417, 86 N. E. 485, 131 Am. St. Rep. 258.

[e] (App. 1910)

A railroad employé, sustaining a personal injury, interviewed the general claim agent, who proposed to give him a specified sum and a life job in consideration of a release. The employé understood that the release, voucher, and a letter to the superintendent with a request to employ him would be sent to him. The voucher and release, reciting as the consideration the specified sum, were sent to him, and, without signing the release, he wrote to the claim agent calling his attention to the absence of the letter to the superintendent. The claim agent replied that he had not promised the employé a position, as he had no authority to make such a promise, and that the employé could not expect to be placed at work until he executed the release. The employé then went to the superintendent, who told the employé to sign the release and get his money, and that he would then get work. *Held*, that the release was executed in consideration of a specified sum and the agreement to employ the employé for life.—*Illinois Cent. R. Co. v. Fairchild*, 91 N. E. 836.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Release, §§ 18-20.

See, also, 34 Cyc. pp. 1048, 1049.

§ 13. — Sufficiency in general.

[a] (Sup. 1849)

The consideration of a sealed instrument may be shown to the same extent as in the case of instruments not sealed. Where one had converted to his own use 1,260 canal land certificates of another, it was *held* that a release to him by the owner, on his returning 960 of the certificates, was not a bar to an action of trover for the residue.—*Fitzgerald v. Smith*, 1 Ind. 310, *Smith*, 162.

A release, given in consideration of the return of a portion of property tortiously converted, is no bar to an action of trover for the remainder.—*Id.*

[b] (Sup. 1860)

As an inducement to a sale by a son of land charged with the support of his father, the latter agreed, in writing, to accept a specific sum, which the purchaser of the land agreed, in writing, with the son, to pay. *Held*, that although this last agreement was not, in terms, a contract with the father, yet it was for his benefit, and could have been enforced by him, and constituted a good consideration for the release of the contract for maintenance.—*Woodberry v. Duvall*, 15 Ind. 160.

[c] (Sup. 1873)

A part payment is not sufficient consideration for a promise to release the party making it as to the remainder.—*Fensler v. Prather*, 43 Ind. 119.

[d] (Sup. 1886)

A release of one of two makers on a promissory note in consideration of his transferring

the property for which the note was given to the other maker is binding.—*Hunt v. Dederick*, 105 Ind. 555, 5 N. E. 710.

[e] (Sup. 1886)

It is a sufficient consideration of a release of a claim against a bankrupt that he undertakes to pay a stated amount to the other creditors and procure a dismissal of the proceedings in bankruptcy.—*Scott v. Scott*, 105 Ind. 584, 5 N. E. 397.

[f] (App. 1892)

A parol promise to re-employ him is a sufficient consideration for a release, executed by an employee, of a claim for personal injuries.—*Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. Rep. 289.

[g] (App. 1901)

Where defendant in an action on a partnership account answered that he had sold his interest to his partner on consideration that the partner assume the indebtedness, and that as a further consideration the plaintiffs had agreed to release defendant, and, accept the partner in his stead, such agreement for release was based on a sufficient consideration, which may consist of something merely detrimental to the promisee.—*Jones v. Austin*, 59 N. E. 1082, 26 Ind. App. 399.

[h] (App. 1906)

An agreement to discharge a debt on payment of a part of the amount due is without consideration, and the balance may be recovered.—*Zuelly v. Casper*, 76 N. E. 646, 37 Ind. App. 186.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Release, §§ 21-27, 29.

See, also, 34 Cyc. pp. 1050-1053.

§ 16. Mistake.

[a] (App. 1898)

A railroad employé claiming damages for personal injuries submitted to the company a proposition of settlement, one stipulation being that he was to "remain in the service of the company as long as he desired, providing his work was satisfactory." He subsequently signed a release which the company's claim agent presented to him, in which it was agreed to re-employ him "for such time only as may be satisfactory to said company." Held that, in the absence of fraud or mistake, he was presumed to have known the contents of the instrument, and to have consented to such variation from the terms proposed.—*Phares v. Lake Shore & M. S. Ry. Co.*, 50 N. E. 306, 20 Ind. App. 54.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Release, § 31.

See, also, 34 Cyc. pp. 1055-1058.

§ 17. Fraud and misrepresentation.

Pleading, see post, § 52.

[a] (Sup. 1878)

A release executed by an old and feeble man obtained by one having influence and con-

trol over him by fraudulently misrepresenting the character of the instrument is voidable.—*Wray v. Chandler*, 64 Ind. 146.

[b] (App. 1908)

Plaintiff, after the death of her husband, who was a member of a railroad's relief department, applied to draw his wages, which she was not permitted to do until she was appointed administratrix. She then went to the office of the relief department to draw the benefit to which she was entitled under regulations, declaring that participation therein should relieve the railroad company from all liability for damages resulting from decedent's death. She first signed a release in her individual name, and when she was required also to sign as administratrix inquired "Why," and was informed by the agent in charge that it was a mere matter of form that she was required to sign both as widow and as administratrix, and that everything was "all right." She then signed as administratrix after informing the agent that she did not know what they would want to do in the future with reference to decedent's death. Plaintiff was a woman of ordinary sagacity and ability, and was able to read and learn that the legal effect of the paper was to release the railroad company from liability for her husband's death. Held, that the statement of the agent did not amount to legal fraud justifying a vacation of the release in so far as it barred the widow's right as administratrix to sue for her husband's death.—*Gipe v. Pittsburgh, C., C. & St. L. Ry. Co.*, 41 Ind. App. 156, 82 N. E. 471.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Release, § 32.

See, also, 34 Cyc. pp. 1060-1064, note, 5 L. R. A. (N. S.) 663.

§ 20. Legality of consideration.

[a] (App. 1894)

The membership of railroad servants in a relief fund association being voluntary, the stipulation, in the application for membership, that acceptance of benefits for an injury shall release all claims for damages against the railroad, is not void as an attempt on the part of the railroad to contract against its liabilities for negligence.—*Leas v. Pennsylvania Co.*, 10 Ind. App. 47, 37 N. E. 423.

The agreement for release is not bad merely because it may enable the railroad to settle some claims more cheaply than it otherwise could.—Id.

Where a railroad relief association, composed of associated companies and their employees, is in charge of the companies, who guaranty the obligations, supply facilities for the business, pay the operating expenses, take charge of, and are responsible for, the funds, make up all deficits in the benefit fund, and supply surgical attendance for injuries received in their service, an employee's agreement, in his voluntary application for membership, that

acceptance of benefits for an injury shall release any claim of damages therefor against the railroad, is based on a valid consideration.—Id.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Release, §§ 34–36.

See, also, 34 Cyc. p. 1075.

§ 21. Ratification.

Pleading, see post, § 53.

[a] (APP. 1894)

Where an obligee in a bond releases the obligor from his obligation in one particular, by an agreement to that effect, and the obligor acts on the faith of such release, the obligee is estopped from afterwards insisting on the terms of the bond, though the agreement of release was without consideration.—*Jaqua v. She-walter*, 10 Ind. App. 234, 36 N. E. 173, 37 N. E. 1072.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Release, §§ 37, 38.

See, also, 34 Cyc. pp. 1065, 1066.

§ 22. Estoppel or waiver of objections.

Estoppel as affected by asserting right under release, see ESTOPPEL, § 67.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Release, §§ 37, 38.

See, also, 34 Cyc. pp. 1065, 1066.

§ 23. Effect of invalidity.

[a] (APP. 1907)

A settlement with a woman injured by the negligence of a street car company shortly after the accident and when she was delirious and hysterical, and which she repudiated by promptly disavowing the release and offering to return the consideration, will not prevent a recovery for damages.—*Indianapolis Traction & Terminal Co. v. Formes*, 40 Ind. App. 202, 80 N. E. 872.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Release, §§ 39, 40.

See, also, 34 Cyc. p. 1075.

§ 24. Right to contest validity.

Pleading, see post, § 52.

[a] (SUP. 1890)

The consideration for a release, as pleaded, having been fully restored, defendant cannot complain that there was an additional consideration besides that relied on in its answer, which has not been restored.—*Louisville, N. A. & C. Ry. Co. v. Faylor*, 126 Ind. 126, 25 N. E. 869.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Release, §§ 41–43.

See, also, 34 Cyc. p. 1075.

II. CONSTRUCTION AND OPERATION.

§ 25. General rules of construction.

[a] (SUP. 1837)

A release should be construed from the standpoint of the parties at the time of its ex-

ecution, and extrinsic evidence is admissible to show the surrounding circumstances. The particular purpose for which it was executed should be kept in view, and, where only general words are used, they are to be construed most strongly against the party executing the release.—*Rowe v. Rand*, 111 Ind. 206, 12 N. E. 377.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Release, §§ 47, 48.

See, also, 34 Cyc. pp. 1075–1077.

§ 26. Parties.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Release, §§ 53–71; 40

CENT. DIG. Princ. & S. § 134.

See, also, 34 Cyc. pp. 1079–1090.

§ 27. — In general.

[a] (SUP. 1856)

A release of all demands by a daughter, who has been seduced, to the seducer, cannot be set up in bar to an action by the mother for the injury arising to her by the seduction.—*Gimbel v. Smidth*, 7 Ind. 627.

[b] (APP. 1905)

That a sum is paid in gross to several persons in satisfaction of their individual claims arising from personal injuries sustained in the same accident does not necessarily make the contract under which the sum is paid joint, for the payees may make their own division.—*Hoeger v. Citizens' St. R. Co.*, 76 N. E. 328, 36 Ind. App. 662.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Release, §§ 53–56; 40

CENT. DIG. Princ. & S. § 134.

See, also, 34 Cyc. pp. 1079, 1081, 1086.

§ 28. — Joint debtors.

Pleading, see post, § 45.

Release of cosurety, see EXECUTORS AND ADMINISTRATORS, § 531.

[a] (SUP. 1857)

Release of one joint contractor releases the other.—*Kirby v. Cannon*, 9 Ind. 371.

To the plea of infancy, the plaintiff, instead of entering nol. pros., may reply a confirmation of the contract after arrival at majority, whereby the liability of the infant had become fixed as a joint contractor, and then a release by the infant would release both.—Id.

[b] (SUP. 1833)

The unconditional release of one or more of joint obligors releases them all.—*Walls v. Baird*, 91 Ind. 429.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Release, §§ 57–62.

See, also, 34 Cyc. pp. 1081–1084.

§ 29. — Joint wrongdoers.

[a] (SUP. 1890)

Where a person injured by a collision between trains of two different companies re-

leases one of the companies from liability therefor, he does not thereby release the other company, in the absence of any showing that the released company was in any way liable for the injury, or that the injured person ever claimed that it was.—*Kentucky & I. Bridge Co. v. Hall*, 125 Ind. 220, 25 N. E. 219.

[b] (App. 1895)

The release of one joint tort-feasor does not discharge the other, unless it appears that the release was in full satisfaction of all the injury sustained by reason of the wrongful act.—*City of Valparaiso v. Moffitt*, 39 N. E. 909, 12 Ind. App. 250, 54 Am. St. Rep. 522.

A city which pollutes the water of a natural stream by discharging drainage therein, to the injury of one through whose lands the stream flows, and an owner of gas works who also discharges noxious matter from the works into the stream, although not joint tortfeasors, are jointly and severally liable in damages; and a release of such owner will not release the city from liability for damages, unless executed in full satisfaction of all the injury sustained by reason of the nuisance.—*Id.*

[c] (Sup. 1908)

For a single injury there can be but one recompense, and one who is injured by two or more uniting in the commission of wrong, or who is injured by the separate and independent acts of different persons, and who accepts from one of them compensation therefor, cannot recover compensation from any of the others.—*Cleveland, C. & St. L. Ry. Co. v. Hilligoss*, 171 Ind. 417, 86 N. E. 485, 131 Am. St. Rep. 258.

A release unsupported by a consideration of one joint tort-feasor does not operate to release another wrongdoer but a contract which purports to be a satisfaction and release of one wrongdoer jointly liable with another and which shows that the injured person has for a consideration surrendered his claim against one wrongdoer, cannot recover compensation from another wrongdoer jointly liable.—*Id.*

While one who compromises a claim does not necessarily admit that the claim was well founded, the one who receives the consideration is precluded from denying that it was well founded, and, when a pretended claim for a tort has been settled and satisfaction has been rendered the claimant by one so connected with the wrong as to be reasonably subject to an action and possible liability as a joint tort-feasor, the satisfaction will release all who may be liable, though the one released was not liable.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Release, §§ 64-70; 10 CENT. DIG. Compromise, § 51.

See, also, 34 Cyc. pp. 1086-1090; note, 58 L. R. A. 293; notes, 11 Am. St. Rep. 906, 92 Am. St. Rep. 872, 111 Am. St. Rep. 282.

§ 31. General release.

[a] (Sup. 1842)

An absolute release "of all demands whatever," executed by the plaintiff to the principal obligor of a replevin bond on which the suit was brought, is a discharge of the bond.—*Thomas v. Wilson*, 6 Blackf. 203.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Release, §§ 74-77.

See, also, 34 Cyc. p. 1090.

§ 32. Release of right in or claim to specific property.

[a] (App. 1892)

A father devised his real estate to his son, provided he would pay the father and mother, or, on the death of either, the survivor, a certain amount yearly, and give them "board and house room" as long as they lived. After the father's death, the mother executed to the son a quit-claim deed of the land, thereby releasing all claims held by her under the will. In consideration of this deed, the son executed to his mother a written contract, by which he agreed to pay her a less amount yearly than the will allowed her, and board her as long as she lived, she agreeing to release the land from any lien thereon for the purchase money named in the contract, and that the contract should be no lien on the same. The son then gave her his note for the amount due her under the will and contract. *Held*, in an action to enforce the claim on the note against the son's estate, that there was no release of the lien for the amount due when the contract was made, and covered by the note.—*Henas v. Henas*, 5 Ind. App. 100, 31 N. E. 832.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Release, § 80.

See, also, 34 Cyc. p. 1090.

§ 34. Release of damages for injury to the person.

[a] (App. 1905)

Plaintiff, his wife, and minor children were injured in a collision with a street car. He and his wife executed an instrument whereby, in consideration of a specified sum paid by the company, they released the separate claims arising from the injuries received by them and their children, and signed a receipt acknowledging the payment of the stipulated sum. *Held*, that the release barred an action by plaintiff for the injuries received by him, in the absence of a showing of grounds warranting a rescission of the release, irrespective of the rights of the wife and minor children to repudiate it.—*Hoeger v. Citizens' St. R. Co.*, 76 N. E. 328, 38 Ind. App. 662.

[b] (App. 1905)

Where, in consideration of wages "during disability," necessary nurse hire and doctor's bills resulting from present disability, and employment when recovered, plaintiff released defendant from liability for an injury sustained, which consisted of a broken leg, making plain-

tiff a cripple, the term "during disability" was not limited to the time that a nurse and doctor were required.—*American Quarries Co. v. Lay*, 73 N. E. 608, 37 Ind. App. 386.

FOR CASES FROM OTHER STATES.

SEE 42 CENT. DIG. Release, § 82.

See, also, 34 Cyc. p. 1092.

§ 37. Covenant not to sue.

[a] A covenant not to sue one of several joint obligors does not release the others.—(Sup. 1869) *Aylesworth v. Brown*, 31 Ind. 270; (1881) *Mullendore v. Wertz*, 75 Ind. 431, 39 Am. Rep. 155.

FOR CASES FROM OTHER STATES.

SEE 42 CENT. DIG. Release, §§ 63, 71.

See, also, 34 Cyc. pp. 1084, 1090; note, 36 Am. St. Rep. 145.

III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 44. Pleading release as defense.

Matters of fact or conclusions, see PLEADING, § 8.

Pleading conclusions of law, see PLEADING, § 8.

FOR CASES FROM OTHER STATES.

SEE 42 CENT. DIG. Release, §§ 86-89.

See, also, 34 Cyc. pp. 1094-1096.

§ 45. — Necessity.

[a] (Sup. 1881)

An action by the joint obligees on a bond against the joint obligors will not be dismissed upon the filing by one of the obligees of a motion to dismiss as to himself, and a release by him of one of the obligors, and the other obligors, to avail themselves thereof, must set up the release by answer.—*Wall v. Galvin*, 80 Ind. 447.

FOR CASES FROM OTHER STATES.

SEE 42 CENT. DIG. Release, § 87.

See, also, 34 Cyc. pp. 1094-1096.

§ 46. — Plea or answer in general.

[a] (Sup. 1845)

In debt on a writing obligatory, a plea of release should allege that the release was under seal.—*Griggs v. Voorhies*, 7 Blackf. 561.

[b] (Sup. 1880)

In pleading a release in writing, the release or a copy of it should be filed.—*Hosier v. Ellison*, 14 Ind. 523.

In setting up a verbal release, the pleader must set out its terms and consideration, that the court may judge of its validity.—*Id.*

[c] (Sup. 1877)

To a complaint for services rendered by plaintiff for the defendant during plaintiff's minority, an answer averring that they were rendered while defendant was plaintiff's guardian, and that defendant fully settled with plaintiff,

receiving his receipt in full, and was discharged from the guardianship by the proper court on filing his final report, which was approved more than three years before suit brought by plaintiff, is insufficient in the absence of a direct averment that such settlement embraced the matter in controversy.—*Volles v. Beard*, 58 Ind. 510.

[d] (Sup. 1886)

An answer, setting up a release of the claim sued on in consideration of defendant's agreement to pay his other creditors a certain per cent. of their claims, and to have his bankruptcy proceedings dismissed, and alleging the dismissal of the bankruptcy proceedings, and that he settled with the other creditors, is demurrable, as it does not show what per cent. was to be paid to the other creditors, and that that per cent. was paid them.—*Scott v. Scott*, 105 Ind. 584, 5 N. E. 897.

[e] (Sup. 1890)

In an action against the acceptor of a draft, an answer alleging that defendant was an accommodation acceptor and that the payee had released him from liability, without alleging any consideration for such release, does not state a good defense.—*Franklin Bank v. Severin*, 124 Ind. 317, 24 N. E. 977.

[f] (Sup. 1908)

An answer in an action against a railway company for injuries to a street car conductor in a collision with his car at a grade crossing, which alleges that the accident resulted from the joint negligence of the street railway company and the steam railway company, and that plaintiff for a valuable consideration released the street railway company from liability, and which sets forth the release, which recites that plaintiff, in consideration of the agreement of the street railway company to re-employ him released the street railway company from all liability, is sufficient to bar the action as against the objection that it fails to aver a claim by plaintiff for damages against the street railway company as a basis for the release, for plaintiff by retaining the consideration will not be permitted to show that he had no claim against the street railway company.—*Cleveland, C., C. & St. L. Ry. Co. v. Hilligoss*, 171 Ind. 417, 86 N. E. 485, 131 Am. St. Rep. 258.

An answer in an action against a steam railway company for injuries to a street car conductor in a collision with his car at a grade crossing, which alleges that the accident resulted from the joint negligence of the street railway company and the steam railway company, and that plaintiff for a valuable consideration released the street railway company from liability and which sets forth the release which recites that plaintiff in consideration of the agreement of the street railway company to re-employ him released the street railway company from all liability, shows at least the semblance of a right of action in favor of plaintiff against

the street railway company, and bars the action as against a demurrer.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Release, §§ 86, 88.

§ 49. Pleading in avoidance of defense.

Necessity for verification, see PLEADING, § 291.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Release, §§ 90-92.

See, also, 34 Cyc. p. 1097.

§ 51. — Mode and form in general.

[a] (Sup. 1822)

To an action of debt defendant pleaded a release, which he alleged had been lost and destroyed by accident. Plaintiff replied by denying this averment, and protested that he had not released. *Held*, that the replication was good without being sworn to.—*Clark v. Faulkner*, 1 Blackf. 218.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Release, § 91.

See, also, 34 Cyc. p. 1097.

§ 52. — Allegations of mistake, fraud, duress, or other matters avoiding release.

[a] (Sup. 1879)

Where a paragraph of answer sets up a release, and a reply is made thereto that the release was given without consideration, a demurrer to such reply is properly overruled.—*Harrison v. Boone*, 69 Ind. 300.

[b] (Sup. 1881)

An answer to a suit for conversion, that the property had been assigned and delivered to defendants in the lifetime of the decedent, and that he had executed releases to them, is not met by a reply that the releases were without consideration.—*Gerard v. Jones*, 78 Ind. 378.

[c] (Sup. 1883)

In an action on a note, the answer alleged that the defendant, being insolvent and largely indebted to a third person, had delivered to such person certain bonds which were sold and applied on the indebtedness; that such creditor had paid the plaintiff a certain sum in full satisfaction of the defendant's liability on the note sued on; and that plaintiff thereupon released the defendant from all liability. *Held*, that a reply alleging that such release was obtained by fraudulent representations, by reason of which there was a failure of consideration for the release, was good against demurrer.—*Wells v. Morrison*, 91 Ind. 51.

[d] (Sup. 1886)

An answer set up a release of the claim sued upon in consideration of defendant's agreement to pay his other creditors "a certain per cent." of their claims, and to have his bankruptcy proceedings, then pending, dismissed, and alleging the dismissal of the bankruptcy proceedings, and that he "settled with" the other creditors. *Held*, that a reply to such answer,

setting up that the release was executed upon defendant's representations that it was necessary in order to procure a dismissal of the bankruptcy proceedings, and with the agreement that the debt should not be released, is a sufficient reply to the answer.—*Scott v. Scott*, 105 Ind. 584, 5 N. E. 397.

[e] (Sup. 1885)

A reply in an action for personal injuries, alleging that a release set up by defendant was without consideration, and that the consideration expressed therein consisted of moneys voluntarily allowed by defendant to plaintiff, is not bad in not averring a return of, or offer to return, the moneys constituting such consideration.—*Stewart v. Chicago & E. I. R. Co.*, 141 Ind. 55, 40 N. E. 67.

[f] (App. 1906)

A pleading based on the theory that an oral agreement releasing a street car company from liability for injuries received in a collision with a car was incorrectly reduced to writing by the company and signed by the person injured without reading it, which does not allege any mental incapacity on his part, nor aver that the contents of the agreement were incorrectly read to him, nor state any excuse for his not having read it or that he was prevented from doing so, fails to show that the agreement should be rescinded.—*Hoeger v. Citizens' St. R. Co.*, 76 N. E. 323, 36 Ind. App. 662.

Where, in an action for personal injuries, the answer set up in defense a release executed by plaintiff and others, whereby they released their claims for the injuries for a consideration paid, a reply which did not allege that either of the parties to the release had rescinded it, nor show any ground for its rescission, was bad.—*Id.*

[g] (App. 1906)

The exhibit filed with an answer in a personal injury action was a copy of a check and a voucher showing that it was on account of damages and reciting: "The indorsement of this voucher by the payee constitutes a release in full." The reply averred that the plaintiff did not enter into any contract or indorse the check or voucher, or authorize any one to do so for her. *Held*, that the agreement relied on by defendant could not become effective until the check and voucher were indorsed by the plaintiff or some one authorized by her, and the reply sufficiently pleaded that that was not done as against a demurrer.—*Indiana Union Traction Co. v. McKinney*, 78 N. E. 203, 39 Ind. App. 86.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Release, § 92.

See, also, 34 Cyc. p. 1097.

§ 53. Issues, proof, and variance.

[a] (Sup. 1857)

Where, in an action by a surety against the principals in a promissory note, to recover money paid to their use, one of the defendants

pleads a release by the surety, a release importing a consideration must be set forth.—*Cameron v. Warbritton*, 9 Ind. 351.

[b] (Sup. 1894)

In partition by the children of decedent's first wife against the second wife and her children of land left by decedent, an intestate, defendants answered that in a settlement between plaintiffs and decedent he had conveyed to them certain lands in discharge of all other interest in the estate, and that the second wife had joined in the conveyance of her one-third interest therein. Plaintiffs replied, admitting the agreement and deed, but alleged that the second wife had exercised undue influence over decedent, and that by such deed they received but a small part of the estate. *Held* to present an issue which should be determined on the evidence.—*Brown v. Brown*, 139 Ind. 653, 39 N. E. 152.

[c] (App. 1908)

Defendant pleaded a release by plaintiff, to which plaintiff replied by a plea of non est factum, claiming that he had never executed it. No issue was raised as to fraud in obtaining the release, or that it was voidable, but there was a sufficient showing as to consideration. *Held*, that there could be no issue on the question of ratification, and where the jury found that the alleged release was never executed, failure to consider any ratification of the alleged contract of release in instructions given was not error.—*Hammond, W. & E. C. Electric Ry. Co. v. Antonia*, 41 Ind. App. 335, 83 N. E. 760.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Release, § 93.

See, also, 34 Cyc. p. 1099.

§ 54. Evidence.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Release, §§ 94-108.

See, also, 34 Cyc. pp. 1099-1103.

§ 56. — Admissibility.

Opinion evidence, see EVIDENCE, § 471.

Parol or extrinsic evidence to show nature of consideration, see EVIDENCE, § 419.

Parol or extrinsic evidence to show want or failure of consideration, see EVIDENCE, § 432.

[a] (App. 1892)

In an action on a promise to give plaintiff employment, which, with a payment of \$100, formed the consideration for plaintiff's release of a claim for personal injuries, the fact that the written release executed by him recites only the money consideration does not prevent recovery on the parol contract for employment.—*Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 32 N. E. 802, 51 Am. St. Rep. 289.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Release, §§ 101-105.

See, also, 34 Cyc. p. 1101.

RELEVANCY.

See—

Allegations in pleading. PLEADING, § 22.

Evidence—

CRIMINAL LAW, §§ 337-368.

EVIDENCE, §§ 99-117.

Newly discovered evidence, as affecting right to new trial. NEW TRIAL, § 103.

RELEVY.

Property taken on execution, see EXECUTION, § 205.

RELIANCE.

See—

Adverse party as element of estoppel. ESTOPPEL, § 55.

False pretenses as element of offense. FALSE PRETENSES, § 31.

Fraudulent representation as element of fraud—FRAUD, §§ 19-23, 46, 56.

SALES, § 38.

Promise of pecuniary aid as constituting seduction. SEDUCTION, § 5.

Statements of seller as element of warranty. SALES, § 262.

RELICTION.

See WATERS AND WATER COURSES, § 93.

RELIEF.

See—

EQUITY, §§ 423-425, 427.

Failure to file claim against estate of decedent. EXECUTORS AND ADMINISTRATORS, § 233.

Prayer for, in pleading—

EQUITY, § 138.

FRAUDULENT CONVEYANCES, § 265

MORTGAGES, § 453.

PLEADING, § 72.

RELIEF ASSOCIATION OR DEPARTMENT.

See—

Employés, effect on liability of employer for death of employé. DEATH, § 25.

For injury to employé. MASTER AND SERVANT, § 100.

RELIGION.

See—

Communications to clergyman as privileged. WITNESSES, § 215.

Constitutional guaranty of religious liberty. CONSTITUTIONAL LAW, § 84.

Exemption of property used for religious purposes from general taxation. TAXATION, § 244.

Gifts for promotion of religion. CHARITIES, § 13.

RELIGIOUS SOCIETIES.

Scope-Note.

[INCLUDES bodies, incorporated or unincorporated, formed for purposes of religious worship, instruction, etc.

[EXCLUDES charitable societies (see *Charities*), and matters relating to corporations or to unincorporated associations in general (see *Corporations; Associations*). For complete list of matters excluded, see cross-references, post.]

Analysis.

- § 1. Nature and status in general.
- § 3. Statutory provisions.
- § 5. Constitutions and rules.
- § 7. Membership in general.
- § 9. Officers and committees of church or society.
- § 10. Powers of church or society in general.
- § 11. Superior, associated, or representative bodies and officers.
- § 12. Ecclesiastical tribunals.
- § 14. Judicial supervision in general.
- § 15. Property and funds.
- § 18. — Title and rights acquired, and control and use of property or fund.
- § 19. — Mortgage or pledge.
- § 20. — Sale and conveyance.
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- § 22. — Effect of change of doctrine or discipline.
- § 23. — Effect of division of church or society.
- § 24. — Jurisdiction of courts to determine rights of property.
- § 25. — Actions to determine rights to property and funds.
- § 27. Ministers.
- § 28. Religious services and ordinances.
- § 29. Contracts and indebtedness.
- § 31. Actions by or against societies.
- § 34. Consolidation.

Cross-References.

See—

Designation in wills. **WILLS**, § 517.
 Disturbance of public worship. **DISTURBANCE OF PUBLIC ASSEMBLAGE**.
 Exemption from assessment for public improvements. **MUNICIPAL CORPORATIONS**, § 434.
 From general taxation. **TAXATION**, § 244.
 Gifts, bequests, and devises to religious bodies for charitable uses. **CHARITIES**.
 Injuries in operation of railroad to building used for public worship. **RAILROADS**, § 222.

Privileged communications between members of church. **LIBEL AND SLANDER**, § 36.
 To ministers. **WITNESSES**, § 215.
 Subscriptions to. **SUBSCRIPTIONS**, §§ 2, 5, 15, 18, 21.
 Trusts conferred on bishop. **TRUSTS**, § 169.
 Use of schoolhouse by religious organization. **SCHOOLS AND SCHOOL DISTRICTS**, § 72.
 Vendor's lien on property in possession of bishop. **VENDOR AND PURCHASER**, § 249.

§ 1. Nature and status in general.

[a] (App. 1909)

Religious societies whose trustees are incorporated present a threefold aspect: First,

the congregation, who usually meet together for the purpose of religious worship; second, the church, strictly so-called, an ecclesiastical body composed of those persons entitled to full church

This Digest is compiled on the Key-Number System. For explanation, see page iii.

[§ Ind. Dig.—Page 834]

privileges; and, third, the legal corporate body composed of the board of trustees, each of them acting separately.—*Gray v. Good*, 89 N. E. 498.

[b] (Sup. 1910)

The name "Presbyterianism" indicates primarily a system of church government through chosen representatives, consisting of the church session as the governing body in each congregation, and a presbytery consisting of all the ministers, in number not less than five, and one ruling elder from each congregation, within a certain district, and a synod embracing at least three presbyteries, and consisting of ministers and ruling elders from the local churches, and the General Assembly, which is a representative body composed of ministers and ruling elders selected by each of the presbyteries, and the name also indicates a doctrine commonly known as "Calvinism."—*Ramsey v. Hicks*, 91 N. E. 344.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Relig. Soc. § 1.

See, also, 34 Cyc. pp. 1115-1121.

§ 3. Statutory provisions.

Laws affecting charter of, as impairing obligation of contract, see CONSTITUTIONAL LAW, § 125.

FOR CASES FROM OTHER STATES.

SEE 42 CENT. DIG. Relig. Soc. §§ 2, 4.

See, also, 34 Cyc. p. 1116.

§ 5. Constitutions and rules.

[a] (Sup. 1856)

A religious society has a right to prescribe such rules as they may think proper for preserving order, when met for public worship, and may use necessary force to remove a person willfully violating such rules.—*McLain v. Matlock*, 7 Ind. 525, 65 Am. Dec. 746.

[b] (Sup. 1891)

In determining whether an amendment of a church constitution received the votes of two-thirds of the members, the number of votes cast at the election, and not the number of members in the church, is to be considered as constituting the legal voters of the church.—*Lamb v. Cain*, 129 Ind. 486, 29 N. E. 13, 14 L. R. A. 518.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Relig. Soc. §§ 15, 16.

See, also, 34 Cyc. p. 1119.

§ 7. Membership in general.

[a] (Sup. 1891)

The general conference of a church appointed a commission to amend the church constitution, and to revise the confession of faith, and directed that the report of such commission be submitted to the people of the church, and, if the result showed that two-thirds of the number of votes cast were given for the approval of the proposed constitution and revision,

that the bishop publish such result in the official organs of the church; whereupon the constitution and confession of faith so adopted should become the organic law and fundamental belief of the church. These directions were followed, and the amended constitution and revised confession were declared adopted by the next general conference, as having received the necessary two-thirds vote. *Held*, that those who adhere to the amended constitution and revised confession of faith constitute the church, and those who refuse to do so must be regarded as seceders.—*Lamb v. Cain*, 129 Ind. 486, 29 N. E. 13, 14 L. R. A. 518.

[b] (Sup. 1896)

The federal Constitution forbidding Congress to make any law respecting an establishment of religion or prohibiting the free exercise thereof, and the state constitution declaring the freedom of all men to worship God according to the dictates of their own consciences, do not give a church member the right to repudiate the faith and doctrine on which the church was founded, and at the same time insist on his right to exercise and enjoy the benefits and privileges of a member of such church, contrary to the rules and laws on which the church is established.—*Smith v. Pedigo*, 145 Ind. 361, 33 N. E. 777, 44 N. E. 363, 19 L. R. A. 433, 32 L. R. A. 838.

[c] (App. 1908)

Adherence to the doctrines of a religious corporation, of which morality is always one, is a condition of membership.—*Yanthis v. Kemp*, 43 Ind. App. 203, 85 N. E. 976, 86 N. E. 451.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Relig. Soc. §§ 18-31.

See, also, 34 Cyc. pp. 1121-1126; note, 69 L. R. A. 255; note, 50 Am. Rep. 313; note, 109 Am. St. Rep. 372.

§ 9. Officers and committees of church or society.

Parol evidence of election of trustees, see CRIMINAL LAW, § 400.

Relevancy of evidence to show who is trustee, see EVIDENCE, § 103.

[a] (Sup. 1878)

Under 1 Rev. St. 1876, p. 838, § 9, relating to societies and lodges, and providing that trustees thereof shall be deemed a body politic and corporate, under such name and style as the society may elect, the trustees of a church are the corporation.—*Board of Trustees of Methodist Episcopal Church of Kendallville v. Shulze*, 61 Ind. 511.

[b] (Sup. 1884)

As the power of church trustees to contract is dependent on Rev. St. 1881, § 3824, evidence of a custom of a particular church that they could not make a certain contract is not admissible in a suit against them.—*McCrary v. McFarland*, 93 Ind. 466.

[c] (Sup. 1834)

Land was conveyed to certain persons as trustees, to be used as a cemetery for a church congregation. Two years later a special act was passed, at the instance of the trustees and the church, incorporating the trustees, and authorizing them to provide for the election of their successors. The trustees provided by a by-law that their successors should be elected by the trustees of the church, and they were so elected for many years. *Held*, that the church could not claim that the trustees of the cemetery had no authority to elect their successors.—*Wall Street Methodist Episcopal Church v. Johnson*, 140 Ind. 445, 39 N. E. 251.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Relig. Soc. §§ 47-74.

See, also, 34 Cyc. pp. 1131-1136.

§ 10. Powers of church or society in general.

[a] (Sup. 1896)

A rule of decorum of a Baptist church, authorizing a majority of the members to determine all questions coming before the church except the reception of church members, which shall be unanimous, does not give the majority a right to change the faith of the church, against the objection or protest of the minority.—*Smith v. Pedigo*, 145 Ind. 361, 33 N. E. 777, 44 N. E. 363, 19 L. R. A. 433, 32 L. R. A. 538.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Relig. Soc. §§ 75-78.

See, also, 34 Cyc. pp. 1138, 1139.

§ 11. Superior, associated, or representative bodies and officers.

[a] (Sup. 1901)

The supreme tribunal of a religious denomination will be enjoined from expelling a member of a local congregation for alleged spiritual offenses, when it appears that such tribunal has not been organized in conformity with an organic law of the church.—*Hatfield v. De Long*, 59 N. E. 483, 156 Ind. 207, 51 L. R. A. 751, 83 Am. St. Rep. 194.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Relig. Soc. §§ 80-86.

See, also, 34 Cyc. pp. 1140-1142; note, 32 L. R. A. 92.

§ 12. Ecclesiastical tribunals.

[a] Where a civil right depends on some matter pertaining to ecclesiastical affairs, the civil tribunal tries the civil right and nothing more, taking the ecclesiastical decisions, out of which the civil right has arisen, as it finds them, and accepting those decisions as matters adjudicated by another jurisdiction.—(Sup. 1883) *White Lick Quarterly Meeting of Friends by Hadley v. White Lick Quarterly Meeting of Friends by Mendenhall*, 89 Ind. 136; (1891) *Lamb v. Cain*, 29 N. E. 13, 129 Ind. 486, 14 L. R. A. 518.

[b] (Sup. 1883)

The civil courts act on the theory that the ecclesiastical courts are the best judges of merely ecclesiastical questions, and of all matters which concern the doctrines and discipline of the respective religious denominations to which they belong.—*White Lick Quarterly Meeting of Friends by Hadley v. White Lick Quarterly Meeting of Friends by Mendenhall*, 89 Ind. 136.

When a person becomes a member of a church, he becomes so on the condition of submission to its ecclesiastical jurisdiction, and, however much he may be dissatisfied with the exercise of that jurisdiction, he has no right to invoke the supervisory power of a civil court so long as none of his civil rights are invaded.—*Id.*

[c] (Sup. 1884)

No action lies by a Catholic priest against his bishop for removing him from his office.—*O'Donovan v. Chatard*, 97 Ind. 421, 49 Am. Rep. 462.

[d] (Sup. 1891)

The general conference of a church appointed a commission to amend the church constitution, and to revise the confession of faith, and directed that the report of such commission be submitted to the people of the church, and, if the result showed that two-thirds of the number of votes cast were given for the approval of the proposed constitution and revision, that the bishop publish such result in the official organs of the church; whereupon the constitution and confession of faith so adopted should become the organic law and fundamental belief of the church. These directions were followed, and the amended constitution and revised confession were declared adopted by the next general conference, as having received the necessary two-thirds vote. *Held*, that the question was for the church authorities alone, whether such action conflicted with those provisions of the former constitution forbidding any change whatever in the confession of faith, and permitting alterations of the constitution only on request of two-thirds of the whole church, but giving no directions as to the time and manner of making such requests; and the civil courts, having no ecclesiastical jurisdiction, cannot question the decision of the general conference.—*Lamb v. Cain*, 129 Ind. 486, 29 N. E. 13, 14 L. R. A. 518.

[e] (App. 1903)

Under the constitution of a church providing that no one who participated in the trial by which a local society expelled a member shall sit as a member of the appellate tribunal, a member of the local society who attended throughout the trial but abstained from voting because she did not want to vote, and a member who was present at the meeting, though not at the commencement thereof, and merely held up his hand in response to a request by the expelled member for all persons who did not vote to indicate it, are ineligible for the appellate

tribunal.—*Hatfield v. De Long*, 67 N. E. 551, 31 Ind. App. 210.

[f] (*Sup.* 1906)

The members of a church having divided into two factions on account of a difference in religious belief and faith, each claiming that its faith is that on which the church was founded, the action of the majority faction, in deciding in its own favor and expelling the members of the other faction, is not conclusive; but, if such majority faction had in fact departed from the faith, its action was not that of the church, but was nugatory.—*Smith v. Pedigo*, 145 Ind. 361, 33 N. E. 777, 44 N. E. 363, 19 L. R. A. 433, 32 L. R. A. 838.

Though an association of Baptist churches has nothing but advisory powers in matters relating to an individual church, yet, where both factions submit their claim to it on their own statement and version of the controversy, seeking its recognition, the decision of the association is entitled to very great weight as to which faction is the real and true church; and, while not conclusive on courts, its decision, composed, as it is, of delegates from all the churches in the association, a majority of whom in council have decided the same way, would be a safer guide for civil courts on questions of religious doctrine, faith, and practice than any judgment such courts might form contrary thereto.—*Id.*

[g] (*Sup.* 1910)

The validity of the union or merger of two churches is an ecclesiastical question over which civil courts have no jurisdiction, though control of particular property devoted to church use will pass as an incident to determination of the question, where a church judicatory has been provided for the settlement of such disputes.—*Ramsey v. Hicks*, 92 N. E. 164, denying rehearing 91 N. E. 344.

[h] (*Sup.* 1910)

Where church judicatories proceed palpably without jurisdiction, and their action is clearly ultra vires, neither the church membership nor the civil courts should respect their decisions, but when the matter in controversy is purely of ecclesiastical cognizance, and the church tribunal proceeds in manifest good faith under color of authority, its decision on the question of its own jurisdiction as well as on subsidiary questions is binding on the civil courts.—*Ramsey v. Hicks*, 91 N. E. 344, rehearing denied 92 N. E. 164.

It is the exclusive province of religious tribunals, when considering only ecclesiastical interests and questions, to construe their own statutes and ordinances, and to determine for themselves the regularity and validity of their proceedings, and it does not concern the civil authorities whether one accused of a spiritual offense is tried by an unconstitutional tribunal, or is denied merely religious rights without trial or without cause, since civil courts have no ecclesiastical jurisdiction.—*Id.*

The constitution of the Cumberland Presbyterian Church, making the General Assembly the highest court of the church, with power to decide all appeals respecting doctrine and discipline, and to receive under its jurisdiction other ecclesiastical bodies whose organization is conformed to the doctrine and order of the church, etc., confers on the General Assembly authority to decide all controversies respecting doctrine and discipline, and to decide that the Confession of Faith of the Presbyterian Church in the United States, as revised in 1903, is in substantial accord with its own doctrines, and such decision is binding on the membership of the church and on the civil courts.—*Id.*

A minority of a religious denomination dissenting from the official judgment of the highest church tribunal of the denomination, in which action, though protesting, they participated, is bound by the action unless it is clearly unconstitutional and ultra vires.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Relig. Soc. §§ 87-98.

See, also, 34 Cyc. pp. 1182-1190; notes, 15 L. R. A. 801, 49 L. R. A. 384.

§ 14. Judicial supervision in general.

Jurisdiction of courts to determine rights to property and funds, see post, § 24.

[a] (*Sup.* 1871)

Over a church organization as such the legal tribunals do not have or profess to have any jurisdiction whatever, except to protect the civil rights of all, and to preserve the public peace. All questions relating to the faith and practice of the church and its members belong to the church judicatories to which such members have voluntarily subjected themselves. But the civil courts will interfere with churches and religious associations, and determine upon questions of faith and practice of a church, where rights of property and civil rights are involved.—*Grimes' Ex'rs v. Harmon*, 35 Ind. 198, 9 Am. Rep. 690.

[b] (*Sup.* 1908)

Civil courts have no jurisdiction of and will not pass upon such ecclesiastical matters as expulsion from church membership, where no civil or temporal rights are involved, and no valuable right, such as is required to give secular courts jurisdiction to supervise and control church tribunals in such matters, is involved in mere church membership; hence mandamus will not lie to require the appointment of arbiters to determine a relator's right to reinstatement as a member of a church notwithstanding the petition alleges that relator's right, as a member of the congregation and church, is valuable.—*State ex rel. Hatfield v. Cummins*, 171 Ind. 112, 85 N. E. 359.

[c] (*App.* 1903)

Civil courts cannot determine questions of a purely ecclesiastical nature, and all such controversies should be settled, as far as possible,

by the organizations themselves, though, when such questions become facts on which property rights depend, the civil courts may decide them.—*Yanthis v. Kemp*, 43 Ind. App. 203, 85 N. E. 976, 86 N. E. 451.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Relig. Soc. §§ 100–102.

See, also, 34 Cyc. pp. 1182–1190; note, 4 L. R. A. (N. S.) 1154; notes, 68 Am. St. Rep. 864, 100 Am. St. Rep. 734.

§ 15. Property and funds.

Condition subsequent in deed to, see DEEDS, § 155.

Construction of deed to, as conveying fee simple, see DEEDS, § 124.

Estoppel of grantors to recover property of, see ESTOPPEL, § 55.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Relig. Soc. §§ 103–167.

See, also, 34 Cyc. pp. 1149–1174; note, 19 L. R. A. 262.

§ 18. — Title and rights acquired, and control and use of property or fund.

[a] (Sup. 1871)

A conveyance of a lot to a person named for the use of the Catholic congregation of the city of Aurora, called "St. Mary's," to have and to hold said premises, etc., for the use of said congregation or their assigns forever, conveys an indefeasible title in fee simple.—*Schipper v. St. Palais*, 37 Ind. 505.

[b] (App. 1908)

The property of a church is held in trust for the promulgation of the doctrines thereof, and the title to the church property is in the part of the congregation which is acting in harmony with its laws and principles, and a majority cannot ratify acts violative of the adopted faith of the church.—*Yanthis v. Kemp*, 43 Ind. App. 203, 85 N. E. 976, 86 N. E. 451.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Relig. Soc. §§ 111–120.

See, also, 34 Cyc. p. 1158.

§ 19. — Mortgage or pledge.

Want of title as defense to action of foreclosure, see MORTGAGES, § 415.

[a] (Sup. 1878)

Under 1 Rev. St. 1876, p. 839, § 13, relating to societies and lodges, and providing that trustees thereof, to more effectually carry out the object of their trust, may sell, loan, or otherwise dispose of their corporate property, etc., a mortgage executed by the trustees of a church is not void for want of power to execute it.—*Board of Trustees of Methodist Episcopal Church of Kendallville v. Shulze*, 61 Ind. 511.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Relig. Soc. §§ 130–143.

See, also, 34 Cyc. pp. 1160–1163.

§ 20. — Sale and conveyance.

[a] (Sup. 1892)

A church, claiming title to property under a contract of sale by a presbytery instead of by the local church, but which fails to make payment, so that the contract is treated as at an end by the seller, cannot set up as a defense against a subsequent purchaser from the presbytery its lack of authority to convey the property.—*Reese v. Caffee*, 32 N. E. 720, 133 Ind. 14.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Relig. Soc. §§ 130–143.

See, also, 34 Cyc. pp. 1160–1163; note, 2 L. R. A. (N. S.) 828.

§ 21. — Diversion.

[a] (Sup. 1869)

Land was granted to the use of trustees of a church, in consideration of the respect which the grantor had for Christianity, and in further consideration that the church might have a suitable place for the erection of a building, on the condition that a church should be erected on the land within a reasonable time, and forever thereafter be used as a house of worship. *Held*, that the members of the church could maintain an action to set aside a transfer of the property for secular purposes.—*Scott v. Stipe*, 12 Ind. 74.

[b] (Sup. 1910)

A deed conveying for a substantial money consideration land to the trustees of a congregation of a religious denomination, without condition or limitation, does not create any trust, express or implied, and the property may be diverted to a united church formed by a union between the religious denomination and another denomination.—*Ramsey v. Hicks*, 91 N. E. 344.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Relig. Soc. §§ 144, 145.

See, also, 34 Cyc. pp. 1164–1166.

§ 22. — Effect of change of doctrine or discipline.

[a] (Sup. 1896)

The articles of faith of a Baptist church declared a belief that Adam's posterity have neither will nor power to save themselves from their tempted and sinful state by their ability which they possess by nature; that sinners are justified by the righteousness of God, which is in Jesus Christ, imputed to them by divine and supernatural operation of the spirit of God; and that they are kept by the power of God through faith unto salvation. The articles further declared a belief "in the election of grace according as He has chosen us in Him before the foundation of the world that we should be holy and without blame before Him, in love, having predestinated us to the adoption of children by Jesus Christ, to crown us according to the good pleasure of His will." *Held*, on a subsequent division of the church into factions, that the belief of the minority faction that God had the

power to Christianize sinners without the aid of the Gospels or by any other means, such as preaching, etc., was the original belief and faith of the church as defined by the articles, and that the belief of the majority faction in the necessity of "means" for that purpose, such as the ministry and the Gospel, was a departure from the true faith.—*Smith v. Pedigo*, 145 Ind. 361, 33 N. E. 777, 44 N. E. 363, 19 L. R. A. 433, 32 L. R. A. 838.

Where property is conveyed to trustees for the use of a church having a well-known and established doctrine, faith, and practice, a majority of the members has not the power, by reason of a change of religious views, to carry the property thus dedicated to a new and different doctrine.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Relig. Soc. § 146.

See, also, 34 Cyc. p. 1164.

§ 23. — Effect of division of church or society.

[a] (Sup. 1833)

A legacy to a designated church or ecclesiastical organization, and claimed by each of two bodies bearing the name, one of which had seceded from the original organization, must be deemed to belong to the body remaining in the meeting house after the withdrawing members left it, especially where such body has been since continuously recognized by the yearly meeting as the true organization.—*White Lick Quarterly Meeting of Friends by Hadley v. White Lick Quarterly Meeting of Friends by Mendenhall*, 89 Ind. 136.

The title to the property of a divided church is in that part of the organization which is acting in harmony with its own law; and the ecclesiastical laws, usages, customs, principles, and practices which were accepted and adopted by the church before the division took place constitute the standard for determining which of the contesting parties is in the right.—*Id.*

[b] (Sup. 1896)

The majority of a church cannot, having abandoned the religious faith on which it was founded, hold the church property against the minority adhering to such faith.—*Smith v. Pedigo*, 145 Ind. 361, 33 N. E. 777, 44 N. E. 363, 19 L. R. A. 433, 32 L. R. A. 838.

The fact that the majority faction of a divided religious society has forcibly excluded the minority from the church building, and that the minority then organized separately, and held church services, claiming to be the true church, does not deprive the minority of any rights in the church property.—*Id.*

[c] (App. 1909)

If a majority of a Presbyterian congregation refuse to obey the rules of the presbytery over it, it would be in a state of rebellion against lawfully constituted authority, and, if expelled from the body of the church and a

minority were willing to submit to the presbytery's authority, such minority would be recognized by the civil authorities as the true congregation, with the right to hold and use church property.—*Ramsey v. Hicks*, 87 N. E. 1091.

Property conveyed to trustees for the use of a church by its denominational name creates a trust for the promulgation of the tenets and doctrines of that denomination, so that, on the congregation becoming divided, the title is in that part which is acting in harmony with the denominational laws, usages, customs, and principles.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Relig. Soc. §§ 147-153.

See, also, 34 Cyc. pp. 1167-1169.

§ 24. — Jurisdiction of courts to determine rights of property.

[a] (Sup. 1859)

Land was granted to the use of trustees of a church in consideration of the respect which the grantor had for Christianity and in further consideration that the church might have a suitable place for the erection of a building, on the condition that a church should be erected on the land within a reasonable time, and forever thereafter be used as a house of worship. *Held*, that the members of the church could enjoin a transfer of the property for secular purposes.—*Scott v. Stipe*, 12 Ind. 74.

[b] (Sup. 1864)

Where a lot is conveyed to trustees of a religious society, for the use of such society, according to the discipline, and the society erect a church building thereon, and the trustees lease the basement thereof, which was made for a prayer room, to a teacher of a common day school, with leave to him to change the internal arrangements of the room to adapt it to his business, such trustees may be enjoined, on the application of members of the society, from such leasing.—*Perry v. McEwen*, 22 Ind. 440.

[c] (Sup. 1882)

The decision by the presbytery of the Presbyterian Church that certain members of a local church have seceded, and that therefore the church property belongs to those remaining, though a minority, is binding upon the civil courts.—*Gaff v. Greer*, 88 Ind. 122, 45 Am. Rep. 449.

[d] (Sup. 1891)

Where a trust is created for the benefit of a church, for as long as worship may be held according to the rules and discipline from time to time adopted by the church at large at their general conferences, and afterwards the church's confession of faith is revised by order of a general conference, and the court is unable to discover any antagonism between the revised confession and that in use at the time of the creation of the trust, the courts cannot interfere on the ground that the trust is being used for purposes other than those designated in the

trust deed.—*Lamb v. Cain*, 129 Ind. 486, 29 N. E. 13, 14 L. R. A. 518.

[e] (Sup. 1896)

While the civil courts have no ecclesiastical jurisdiction whatever, yet they are charged with the duty and clothed with the jurisdiction of protecting property rights of religious societies and corporations; and thereby, of necessity, they may be compelled to decide questions of ecclesiastical law when that law becomes a fact on which property rights depend.—*Smith v. Pedigo*, 145 Ind. 361, 33 N. E. 777, 44 N. E. 363, 19 L. R. A. 433, 32 L. R. A. 838.

[f] (Sup. 1910)

Where civil courts have jurisdiction over the subject-matter, consisting of title to property claimed by two religious societies, and they invoke the judgment of the courts, the courts must enter on the consideration of a controversy which involves the domain of ecclesiastical jurisprudence.—*Ramsey v. Hicks*, 91 N. E. 344.

A deed to the trustees of a congregation of a religious denomination is a civil contract, and the civil courts must construe its terms and determine its legal effect, though to do so it must deal with ecclesiastical questions.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Relig. Soc. §§ 154-157.
See, also, 34 Cyc. p. 1170.

§ 25. — Actions to determine rights to property and funds.

[a] (Sup. 1848)

Where the contest was between two branches of the Baptist Church, and the question was which was the "regular Baptist Church," it was allowable for counsel to read in argument from the writings of a person of the Baptist denomination of good repute therein, where the extracts were merely argumentative, and contained no opinions or expositions which could be regarded as properly matters of evidence, subject to the instructions of the court as to the law of the case.—*Jones v. Doe ex dem. Trustees of Little Blue River Regular Baptist Church*, 1 Ind. 109, Smith, 47.

Extracts which contain opinions or expositions of learned or scientific witnesses upon the point in issue in the case, and which would be inadmissible as evidence, cannot be properly read in argument.—*Id.*

[b] (Sup. 1882)

An action to recover church property may be brought in the name of the trustees.—*Gaff v. Greer*, 88 Ind. 122, 45 Am. Rep. 449.

To entitle plaintiffs to sue as trustees to recover possession of church property, it is not necessary to determine by quo warranto whether plaintiffs or defendants are the legal trustees.—*Id.*

[c] (Sup. 1838)

Church officials may maintain injunction proceedings to protect property controlled by the

church.—*Dwenger v. Geary*, 14 N. E. 903, 113 Ind. 106.

[d] (App. 1908)

A complaint which shows the organization of a church, its rules, doctrines, etc., and which alleges that the minister thereof, employed by defendants as its trustees, had been guilty of immorality, of frequent intoxication, etc.; that defendants and other members, constituting a majority, approved of the conduct of the minister, that defendants thereby deposed themselves from office as trustees; that plaintiffs were lawfully elected trustees; and which prays for judgment against defendants for the possession of the church property and for money appropriated to defend the minister on bastardy charges—states a cause of action for possession of the property and the money claimed.—*Yanthis v. Kemp*, 43 Ind. App. 203, 85 N. E. 976, 86 N. E. 451.

Ejectment is a proper method by which to determine the right to possession of church property as between parties claiming to be trustees of the church.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Relig. Soc. §§ 154-167.
See, also, 34 Cyc. pp. 1170-1174; note, 3 L. R. A. (N. S.) 854.

§ 27. Ministers.

Limitation of action by minister to recover salary, see LIMITATION OF ACTIONS, § 155.
Mandamus to restore minister to clerical rights, see MANDAMUS, § 10.

[a] (Sup. 1881)

Where a Roman Catholic bishop appointed a priest to a certain church and gave him possession of certain church property as an incident to such appointment, the priest's occupancy, if it be regarded as a tenancy, was a tenancy at will and determinable by one month's written notice to quit delivered to the tenant.—*Chatard v. O'Donovan*, 80 Ind. 20, 41 Am. Rep. 782.

A Roman Catholic priest, in charge at the will of the bishop, and occupying a dwelling house belonging to the church, is a servant and not a tenant, and his right of occupancy ceases with his service.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Relig. Soc. §§ 180-193.
See, also, 34 Cyc. pp. 1142-1149; notes, 38 L. R. A. 687, 4 L. R. A. (N. S.) 713, 721; note, 3 Am. Dec. 120.

§ 28. Religious services and ordinances.

Disturbance of public worship, see DISTURBANCE OF PUBLIC ASSEMBLAGE.

Parol evidence to vary articles of faith of church, see EVIDENCE, § 385.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Relig. Soc. §§ 194, 195.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

§ 29. Contracts and indebtedness.

Contract for use of church property as within statute of frauds, see FRAUDS, STATUTE OF, § 58.

Mandamus to compel performance of, see MANDAMUS, § 138.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Relig. Soc. §§ 196-198.
See, also, 34 Cyc. p. 1139.

§ 31. Actions by or against societies.

Judicial supervision of societies, see ante, § 14.
Scope of issues raised by pleading, see PLEADING, § 372.

To determine property rights, see ante, § 25.

[a] (Sup. 1873)

A church organization can sue only in the name of "Wardens and Vestrymen of — Church —," or in the name of "Trustees of — Church —."—*Drumheller v. First Universalist Church of Pierceton*, 45 Ind. 275.

[b] (Sup. 1875)

In an action against a church for a debt alleged to have been contracted by its trustees, an answer that at the time the debt was contracted it had no elected board of trustees acting for it, and that no trustees had ever been elected or qualified, is bad, since trustees of a church may be appointed, as well as elected.—*Presbyterian Church of Roanoke v. Horton*, 50 Ind. 223.

[c] (Sup. 1876)

In an action against the trustees of a church on a written contract purporting to be the contract of the trustees of said church, and signed "M. T. Didlake, Sec'y," the complaint alleged that the contract was signed by defendants under the name and style of "M. T. Didlake, Sec'y," and that the said secretary was duly authorized by the corporation known as "The Trustees of," etc., and by the trustees of said corporation, to enter into said contract. *Held*, that it sufficiently appeared that the contract was the contract of said trustees, and that the secretary was authorized to sign it.—*Christian Church of Wolcott v. Johnson*, 53 Ind. 273.

[d] (Sup. 1885)

In a suit against the trustees of a church to foreclose a mechanic's lien for work done and materials furnished, the complaint charged, in effect, that the services were rendered under the order and at the request of the church assembled as a congregation, with the knowledge and implied consent of the defendants as its trustees. *Held* good, as enough was shown to create an implied obligation upon the church as an organization, and hence sufficient as against its trustees.—*Gortemiller v. Rosengarn*, 103 Ind. 414, 2 N. E. 829.

In a suit against the trustees of a church to foreclose a mechanic's lien for work done and materials furnished, the complaint charged, in effect, that the services were rendered under the order and at the request of the church assembled as a congregation, with the knowledge and im-

plied consent of the trustees. *Held*, that an answer avering as ground of defense that a majority of the congregation, including the trustees, appointed a committee to make the contract with plaintiff on condition that the services should be paid for by voluntary contributions in one year's time, of all of which plaintiff had knowledge, was bad on demurrer.—*Id.*

[e] (Sup. 1906)

In an action against the trustees of a church, a complaint alleging that the contract sued on was executed by three persons who had been appointed a committee to execute the contract on behalf of the church is not supported by proof of a subsequent ratification of the contract instead of prior authority.—*Ashley v. Henderson*, 76 N. E. 985, 166 Ind. 147.

Where a complaint alleges that three persons were appointed a committee by the board of trustees of a religious society to execute on its behalf the contract sued on, which was signed by them, in their individual capacities, and there was no evidence that they had authority to act, there is a fatal variance.—*Id.*

[f] (App. 1906)

A complaint which alleges that plaintiffs are the elected, qualified, and acting trustees of the "Christian Church, or Church of Christ," at F., and as such are the owners and entitled to the possession of real estate described, and that defendants, as trustees of the "Christian Church" at F., hold possession of such real estate without right, is not open to the objection that, because of the use of the word "or," it shows that plaintiffs are attempting to act as trustees of two churches, but it avers that they are trustees of a church of one name and that defendants are trustees of a church of another name.—*Bush v. Bullington*, 38 Ind. App. 587, 78 N. E. 640.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Relig. Soc. §§ 199-207.
See, also, 34 Cyc. pp. 1194-1197.

§ 34. Consolidation.**[a] (App. 1909)**

The Cumberland Presbyterian Church and the Presbyterian Church in the United States of America never having been united as churches, but the Cumberland organization having been created by members of the other church who had departed from it, the use of the word "reunion," in the question submitted to the presbyteries as to whether they approved of the "reunion" and union of the Presbyterian Church in the United States of America and the Cumberland Church on a specified basis, did not change the legal effect of the proposition, which was in effect a union of two independent churches.—*Ramsey v. Hicks*, 87 N. E. 1091.

Merger, as used in connection with the merger of two religious societies, means to swallow up; the absorption of a thing of lesser importance by a greater, whereby the lesser ceases to exist but the greater is not increased.—*Id.*

Between 1800 and 1810, certain Presbyterians, not believing in the doctrines of election, predestination, foreordination, etc., according to the Westminster Confession of Faith, were prohibited from preaching the gospel by the church, and, in 1810, people who did not hold to these beliefs formed a new church known as the Cumberland Presbyterian Church, and adopted a confession of faith which dissented from the Westminster Confession in many important particulars. In 1903, the Presbyterian Church reaffirmed the Westminster creed in its entirety, but, for the purpose of "disavowing certain inferences and to declare certain aspects of revealed truth, made certain additions to the faith, which, were supposed to make it conform more nearly to the belief of the Cumberlands, but which was not in fact equivalent thereto, after which a majority of the presbyteries of the Cumberland Presbyterian Church voted to merge its organization in that of the mother church, this vote, however, not being within the jurisdiction of the Cumberland presbyteries under its constitution. *Held*, that such attempted merger was ineffective to transfer the property of the Cumberland Presbyterian churches to the mother church, and divest the rights therein of those who still maintained the Cumberland organization and held to its Confession of Faith.—Id.

[b] (Sup. 1910)

The constitution of the Cumberland Presbyterian Church prescribing the jurisdiction of the church session, the presbytery and synod, and the General Assembly, and providing that the jurisdiction of such courts is limited by the express provisions of the constitution, and authorizing the General Assembly to receive under its jurisdiction other ecclesiastical bodies whose organization conforms to the doctrine and order of the church, and that on the recommendation of the General Assembly by a two-thirds vote the constitution and rules of discipline may be amended when a majority of the presbyteries approve thereof, authorizes the General Assembly with the approval of a majority of the presbyteries to consolidate with the Presbyterian Church in the United States without asking for the sanction of the membership of the Cumberland Church, and where such a union is formed

the property of the Cumberland Presbyterian Church becomes the property of the united body under the name of the Presbyterian Church in the United States.—*Ramsey v. Hicks*, 91 N. E. 344.

The union of the Cumberland Presbyterian Church and the Presbyterian Church in the United States is not beyond the power of the General Assembly of the Cumberland Church with the sanction of a majority of the presbyteries thereof, on the ground that the union is the equivalent of cessation of the organic functions of the church, since every congregation, presbytery and synod of the church, with changes of constituent membership and geographical boundaries, continues in existence.—Id.

Since the General Assembly of the Cumberland Presbyterian Church has jurisdiction under the constitution over the subject of making a union with another church, it has the power to decide on the proper mode of procedure, and to determine conclusively the regularity and the validity of the proceedings, and the fact that in the union it surrenders its name does not render the union invalid.—Id.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Relig. Soc. §§ 209-211.

See, also, 34 Cyc. p. 1191.

RELINQUISHMENT.

See—

ABANDONMENT.

RELEASE.

Right of set-off. SET-OFF AND COUNTERCLAIM. § 21.

Rights under deeds. DEEDS, §§ 178-182.

Widow's statutory allowance. EXECUTORS AND ADMINISTRATORS, §§ 183-190.

RELOCATION.

See—

County seat. COUNTIES, §§ 31-36.

Applicability of general law as affecting validity of special or local law. STATUTES. § 76.

Special or local laws relating to. STATUTES, §§ 93-95.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

REMAINDERS.

Scope-Note.

[INCLUDES nature and incidents of estates limited to take effect after the determination of preceding estates; rights, powers, and liabilities of remaindermen; and remedies relating thereto.

[EXCLUDES creation of such estates, and distinction between vested and contingent remainders (see *Decds; Wills*); and duties and liabilities of life tenants as to remaindermen (see *Life Estates*). For complete list of matters excluded, see cross-references, post.]

Analysis.

- § 1. Nature and incidents in general.
- § 2. Requisites and validity.
- § 4. — Contingent remainders.
- § 5. Acceleration of remainder.
- § 6. Acquisition of remainder by tenant of preceding estate.
- § 7. Acquisition of preceding estate by remainderman.
- § 9. — Merger.
- § 11. Rights and liabilities of remainderman as to property in general.
- § 12. Remainders in personal property.
- § 13. Rights and liabilities of remaindermen as to third persons.
- § 14. Sales and conveyances by remaindermen.
- § 16. Sale of property under order of court.
- § 17. Actions by or against remaindermen.

Cross-References.

See—

Construction of deeds. DEEDS, §§ 131-133.

Of wills. WILLS, § 622.

Devise by remainderman of interest. WILLS, § 7.

Life tenants as trustees for remaindermen. TRUSTS, § 76.

Duties and liabilities as to remaindermen. LIFE ESTATES.

Opening of vested remainder to let in after-born remaindermen. WILLS, § 635.

PARTITION, § 12.

REVERSIONS.

Right of remainderman to sue for waste.

WASTE, § 12.

Vested or contingent construction of will. WILLS, § 634.

Waste by life tenant. LIFE ESTATES, §§ 11, 13.

§ 1. Nature and incidents in general.

[a] (Sup. 1910)

At common law a remainder estate could be in abeyance, since it was consistent with the fee being always vested, or an intermediate freehold estate being in a third person, who might be sued for the property.—*Beatson v. Bowers*, 91 N. E. 922.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Remaind. § 1.

See, also, 16 Cyc. p. 648.

§ 2. Requisites and validity.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Remaind. § 2.

See, also, 16 Cyc. pp. 648-650.

§ 4. — Contingent remainders.

Conveyance of, see post, § 14.

[a] (App. 1908)

Burns' Ann. St. 1908, § 3994, abolishing estates tail, and providing that any estate which according to the common law would be adjudged a fee tail shall be adjudged a fee simple, and, if no remainder is limited thereon, it shall be a fee simple absolute, contemplates that a valid remainder may be limited after what would have been an estate tail at common law.—*Adams v. Merrill*, 85 N. E. 114.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Remaind. § 2.

§ 5. Acceleration of remainder.

By failure of devise of particular estate, see WILLS, § 853.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Remaind. § 4.

See, also, 16 Cyc. p. 651.

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§ 6. Acquisition of remainder by tenant of preceding estate.

Acquisition of outstanding title or claim by life tenant, see *LIFE ESTATES*, § 10.

By adverse possession, see *LIFE ESTATES*, § 8.

[a] (*Sup.* 1857)

Although a release to a mere stranger is wholly inoperative, a contingent remainder or executory devise, where the contingency is merely attached to the event, on which it is to vest, may be released to any party possessed of an interest in the land.—*Matlock v. Lee*, 9 Ind. 298.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Remaind. § 5.

See, also, 16 Cyc. p. 652.

§ 7. Acquisition of preceding estate by remainderman.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Remaind. § 6.

See, also, 16 Cyc. pp. 655-657.

§ 9. — Merger.

[a] (*Sup.* 1900)

Where a purchaser of property sold at a tax sale afterwards became the grantee of one who claimed a life interest in the property, the fee evidenced by the tax deed was not thereby lost or destroyed.—*Doren v. Lupton*, 56 N. E. 849, 154 Ind. 396.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Remaind. § 6.

See, also, 16 Cyc. p. 656.

§ 11. Rights and liabilities of remainderman as to property in general.

Liability of remainderman for improvements made by life tenant, see *LIFE ESTATES*, § 17.

Rights as to timber as against life tenant, see *LIFE ESTATES*, § 13.

Taxes, see *LIFE ESTATES*, § 18.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Remaind. § 8.

See, also, 16 Cyc. p. 651.

§ 12. Remainders in personal property.

Right of executor to possession as against remainderman on death of life tenant before settlement of testator's estate, see *EXECUTORS AND ADMINISTRATORS*, § 154.

[a] (*Sup.* 1874)

A remainder may be created in personal property.—*Owen v. Cooper*, 46 Ind. 524.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Remaind. § 3.

See, also, 16 Cyc. p. 650.

§ 13. Rights and liabilities of remaindermen as to third persons.

[a] (*App.* 1891)

A tenant for life of real estate leased it to plaintiff, and received a portion of the rent in cash and notes for the balance of the term,

and died pending the term. *Held*, that the remainderman, by acceptance of payment of one of the notes and permitting the tenant to remain in possession, created a new demise, and the lessee could maintain trespass for an entry subsequently made by the remainderman.—*Lowrey v. Reef*, 1 Ind. App. 244, 27 N. E. 626.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Remaind. § 9.

See, also, 16 Cyc. p. 651.

§ 14. Sales and conveyances by remaindermen.

Adequacy of consideration on sale of expectancy by remainderman, see *ASSIGNMENTS*, § 55.

[a] (*Sup.* 1894)

In determining the adequacy of the consideration for which a remainderman sold his expectancy, the incumbrance of the life estate cannot be considered.—*Chambers v. Chambers*, 139 Ind. 111, 38 N. E. 334.

[b] (*Sup.* 1907)

The conveyance of remainders may be impeached for fraud.—*McAdams v. Bailey*, 169 Ind. 518, 82 N. E. 1057, 13 L. R. A. (N. S.) 1003, 124 Am. St. Rep. 240.

In the absence of fraud, a sale of a contingent remainder in lands is enforceable.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Remaind. § 10.

See, also, 16 Cyc. pp. 652-654; note, 17 Am. St. Rep. 839.

§ 16. Sale of property under order of court.

[a] (*Sup.* 1877)

Testator devised to his daughter and her children certain realty subject to sale for the payment of his debts; on his death, the daughter leased a coal vein for 20 years for a sum sufficient to pay the debts, and paid them. Afterwards a decree in partition was rendered by consent of the parties whereby the daughter took a life estate in the whole, with remainder in fee to her two children, which remainder was afterwards conveyed by their guardian. *Held*, that their grantee took subject to the lease during the daughter's life, not exceeding the term of the lease.—*Schee v. McQuilken*, 59 Ind. 269.

[b] (*App.* 1901)

Under Rev. St. 1852, pp. 250, 251, the children of the husband by a prior wife cannot be estopped, by a proceeding to sell for his creditors the one-third interest given to the second wife subject to her life estate therein, from claiming the land on her death, they not having been owners of any interest therein at the time, but merely expectant heirs, and hence not entitled to object to the proceeding.—*Holliday v. Miller*, 62 N. E. 291, 28 Ind. App. 121.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Remaind. § 11.

See, also, 16 Cyc. p. 653.

§ 17. Actions by or against remaindermen.

Right of remainderman to sue for waste, see WASTE, § 12.

[a] (Sup. 1874)

A complaint by a party claiming an interest in the estate or the proceeds thereof as heir of one taking an interest in the estate after the termination of a life estate must show that the person in whom the life estate vested was dead before the commencement of the suit.—Owen v. Cooper, 46 Ind. 524.

[b] (Sup. 1882)

In an action by a remainderman against the life tenant for failure to pay the taxes on the estate, the burden of showing that the income of the estate was sufficient to pay them rests on plaintiff.—Clark v. Middlesworth, 82 Ind. 240.

[c] (Sup. 1892)

Rev. St. 1881, § 287, provides that a person seised of an estate in remainder may sue for an injury to the inheritance, notwithstanding an intervening estate for life or years. Section 909, relating to assessments of damages for land taken by a railroad company for a right of way, provides that any person having an interest in any land which has been so taken "may have the benefit of this writ," etc. Held that, in an action by a remainderman against a railroad company for damages in taking land for a right of way, the fact that a life estate existed did not prevent the running of the statute of limitations against the action.—Shortle v. Terre Haute & I. R. Co., 131 Ind. 338, 30 N. E. 1084.

[d] (Sup. 1893)

As to the one-third interest of a widow in lands sold to pay decedent's debts no title by adverse possession can be acquired, as against her children, since no right of action for its recovery can accrue to them during her life; Rev. St. 1881, § 2484, limiting the right of a widow of any decedent to convey real estate acquired by her first marriage during a second coverture, and providing that if, during a second marriage, a widow shall die, her interest in the real estate of her first husband shall go to her children by her first marriage.—Irey v. Mater, 134 Ind. 238, 33 N. E. 1018.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Remaind. §§ 12-17; 33 CENT. DIG. Lim. of Act. § 231.

See, also, 16 Cyc. pp. 657-661; note, 13 Am. St. Rep. 78.

REMAND.

See—

After change of venue. VENUE, § 81.

Cause by appellate court—

APPEAL AND ERROR, §§ 1106, 1186-1214.

CRIMINAL LAW, § 1192.

Prisoner on habeas corpus. HABEAS CORPUS, § 109.

REMEDIAL STATUTES.

See—

Construction. STATUTES, § 236.

Retroactive operation. STATUTES, § 264.

REMEDIES.

See—

ACTION.

Constitutional guaranty of right to justice and remedies for injuries. CONSTITUTIONAL LAW, §§ 321-329.

EQUITY.

REMEDY AT LAW.

See—

Effect on jurisdiction in equity—

CANCELLATION OF INSTRUMENTS, §§ 9-15.

CREDITORS' SUIT, §§ 3-6.

EQUITY, §§ 43-48.

EXECUTION, § 171.

FRAUDULENT CONVEYANCES, §§ 239, 241.

INJUNCTION, §§ 15-18.

JUDGMENT, § 408.

JUSTICES OF THE PEACE, § 128.

MUNICIPAL CORPORATIONS, § 323.

RAILROADS, § 73.

SPECIFIC PERFORMANCE, § 5.

TAXATION, § 608.

VENDOR AND PURCHASER, § 269.

REMEDY OVER.

See—

Against person primarily liable in general. INDEMNITY, §§ 13, 15.

By insurer against person causing loss. INSURANCE, §§ 605-607.

Surety against principal. PRINCIPAL AND SURETY, §§ 173-190½.

Contribution among codebtors—

CONTRIBUTION.

PARTNERSHIP, § 101.

PRINCIPAL AND SURETY, §§ 191-200.

Stockholders liable for corporate debts.

CORPORATIONS, § 279.

Substitution of third person paying debt to rights of creditor against debtor. SUBROGATION.

REMISSION.

See—

Debt. RELEASE.

Fines. FINES, § 18.

For contempt of court. CONTEMPT, § 82.

Judgment on forfeited recognizance. RECOGNIZANCES, § 8.

Part of claim as affecting right to costs. COSTS, § 23.

Of recovery—

APPEAL AND ERROR, § 1140.

DAMAGES, § 228.

Of recovery as condition of denying motion for new trial. NEW TRIAL, § 162.

REMITTITUR.

Cause by appellate court, see APPEAL AND ERROR, §§ 1186-1214.

REMONSTRANCE.

Against particular acts or proceedings.

See—

- Alteration of boundaries of municipal corporation. MUNICIPAL CORPORATIONS, § 34.
- Of highway. HIGHWAYS, § 72.
- Creation of indebtedness by municipality. MUNICIPAL CORPORATIONS, § 866.
- Establishment of drain. DRAINS, §§ 31, 33.
- Of highway. HIGHWAYS, § 32.
- Grant of liquor license. INTOXICATING LIQUORS, §§ 15, 68.
- Levy of tax in aid of railroad. MUNICIPAL CORPORATIONS, § 969.
- Of township tax. TOWNS, § 61.
- Proposed public improvement. MUNICIPAL CORPORATIONS, § 297.
- Removal of county seat. COUNTIES, § 34.
- Vacation of highway. HIGHWAYS, § 77.
- Of street. MUNICIPAL CORPORATIONS, § 657.

REMOTE CAUSE.

- Grounds and subjects of compensatory damages, see DAMAGES, §§ 17-19.

REMOTE GRANTEES.

- Estoppel by deed, see ESTOPPEL, § 30.

REMOTENESS.

See—

- EVIDENCE, § 145.
- Limitations in deed, will, or declaration of trust. PERPETUITIES.

REMOVAL.

See—

- Child from jurisdiction in actions for divorce. DIVORCE, § 300.
- Commissioners or viewers in proceedings to establish highway. HIGHWAYS, § 37.
- Corporate officers. CORPORATIONS, § 294.
- County commissioners from district. COUNTIES, § 43.
- County seat. COUNTIES, §§ 31-36.
- Applicability of general law as affecting validity of special or local law. STATUTES, § 76.
- Dams or other waterworks. WATERS AND WATER COURSES, § 174.
- Disability of insane person. INSANE PERSONS, § 20.
- Disqualification after election to office. OFFICERS, § 33.
- Domicile or place of residence as affecting right to exemptions. EXEMPTIONS, § 29.
- Executor or administrator. EXECUTORS AND ADMINISTRATORS, § 35.
- Pending action by or against. EXECUTORS AND ADMINISTRATORS, § 440.
- FENCES, §§ 26-28.
- FIXTURES, §§ 30-34.

- From state, ground for removal of executor. EXECUTORS AND ADMINISTRATORS, § 35.
 - Garbage, municipal regulations. MUNICIPAL CORPORATIONS, § 607.
 - Goods sold as acceptance by buyer. SALES, § 100.
 - Grade crossings. RAILROADS, § 99.
 - Guardian. GUARDIAN AND WARD, § 25.
 - As condition precedent to action on bond. GUARDIAN AND WARD, § 182.
 - Or committee of insane person. INSANE PERSONS, § 38.
 - Improvements on demised premises. LANDLORD AND TENANT, § 157.
 - Landmarks. BOUNDARIES, § 56.
 - Mortgaged property by mortgagor. CHATTEL MORTGAGES, §§ 218-232.
 - Next friend. INFANTS, § 82.
 - Nuisance by party injured. NUISANCE, § 20.
 - Obstruction from easement. EASEMENTS, § 60.
 - In navigable waters. NAVIGABLE WATERS, § 26.
 - Or encroachment on highway. HIGHWAYS, § 157.
 - Or encroachment on street. MUNICIPAL CORPORATIONS, § 696.
 - To flow of water. WATERS AND WATER COURSES, § 58.
 - Officer from state as creating vacancy in office. OFFICERS, § 55.
 - Passengers or intruders from passenger trains. CARRIERS, §§ 350-385.
 - Person violating rules of religious society. RELIGIOUS SOCIETIES, § 5.
 - Policemen. MUNICIPAL CORPORATIONS, § 185.
 - Priest from office. RELIGIOUS SOCIETIES, § 12.
 - Property from state as ground for writ of ne exeat. NE EXEAT, § 3.
 - Restraining. INJUNCTION, § 34.
 - Subject to landlord's lien. LANDLORD AND TENANT, § 251.
 - Railroad switch. RAILROADS, § 194.
 - Tracks from street. RAILROADS, § 77.
 - Schoolhouse site. SCHOOLS AND SCHOOL DISTRICTS, § 69.
 - Teacher. SCHOOLS AND SCHOOL DISTRICTS, §§ 140-142.
 - Trespassers or licensees from freight trains. RAILROADS, § 277.
 - Trustee. TRUSTS, §§ 164-167.
 - Wooden buildings for protection against fire. MUNICIPAL CORPORATIONS, § 603.
- Of public officers.**
- See—*
- County boards. COUNTIES, § 45.
 - Municipal officers. MUNICIPAL CORPORATIONS, §§ 153-159.
 - OFFICERS, §§ 7, 62, 74.
 - Poor law officers. PAUPERS, § 5.
 - RECEIVERS, § 62.
 - Restraining. INJUNCTION, § 81.
 - School officers. SCHOOLS AND SCHOOL DISTRICTS, §§ 48, 53.
 - Warden of northern Indiana state prison. PRISONS, § 7.

REMOVAL OF CAUSES.

Scope-Note.

[INCLUDES transfer of causes brought in state courts to courts of the United States; nature and scope of power to require such transfers in general; constitutional and statutory provisions relating thereto; grounds for such transfers; jurisdiction to make and proceedings to obtain removal of causes; effect of removal; and remand of or proceedings in cause after removal.

[EXCLUDES removal of causes from one court to another court of a state or of the United States (see *Courts*); and change of venue or of place of trial (see *Venue; Criminal Law*). For complete list of matters excluded, see cross-references, post.]

Analysis.

I. Power to Remove and Right of Removal in General.

- § 2. Constitutional and statutory provisions.
- § 4. Suits at law or in equity.
- § 10. Jurisdiction of state court.
- § 16. Nature of right of removal.
- § 17. Waiver of right.

II. Origin, Nature, and Subject of Controversy.

- § 18. Cases arising under Constitution of United States.
- § 19. Cases arising under laws of United States.
- § 21. Actions against or for acts of United States officers.

III. Citizenship or Alienage of Parties.

(A) DIVERSE CITIZENSHIP OR ALIENAGE IN GENERAL.

- § 27. Citizenship or residence of corporations.
- § 36. Improper or collusive joinder of parties.
- § 41. Controversies between a state or citizens thereof and foreign states, citizens, or subjects.
- § 44. Parties entitled to remove in general.

(B) SEPARABLE CONTROVERSIES.

- § 49. Joint or joint and several causes of action.
- § 61. Allegations in pleadings.

IV. Prejudice, Local Influence, or Denial of Civil Rights.

V. Amount or Value in Controversy.

- § 72. Requisite amount or value.
- § 74. Amount or value claimed or involved.
- § 75. Allegations and prayers in pleadings.

VI. Proceedings to Procure and Effect of Removal.

- § 78. Time of taking proceedings.
- § 79. — In general.
- § 80. — On ground of prejudice or local influence.
- § 83. Notice.
- § 84. — In general.
- § 86. Petition in state court.
- § 88. Bond.
- § 89. Filing petition and bond in state court, and proceedings thereon.
- § 90. Order for removal.
- § 94. Defects in proceedings, objections, amendments, and waiver.
- § 95. Transfer of jurisdiction and effect of removal in general.

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VI. Proceedings to Procure and Effect of Removal—Continued.

§ 96. Proceedings in state court after removal.

§ 97. — Validity and effect in general.

VII. Remand or Dismissal of Cause.

[No paragraphs or references in this Digest. But see 42 Cent. Dig. Rem. of C. §§ 213-236.]

VIII. Proceedings in Cause After Removal.

[No paragraphs or references in this Digest. But see 42 Cent. Dig. Rem. of C. §§ 237-253.]

*Cross-References.**See—*

Change of venue or place of trial. VENUE, §§ 33-84.

Transfer of causes from justices' courts to courts of record. JUSTICES OF THE PEACE, § 75.

From one justice's court to another. JUSTICES OF THE PEACE, § 73.

Transfer, etc.—(Cont'd).

From one state court to another. COURTS, §§ 220 (1-5), 482-488.

Transfer of criminal causes. CRIMINAL LAW, § 101.

From one court to another court of a state or of the United States. CRIMINAL LAW, § 101.

I. POWER TO REMOVE AND RIGHT OF REMOVAL IN GENERAL.**§ 2. Constitutional and statutory provisions.**

[a] (Sup. 1866)

The provision of the act of congress of March 3, 1863 (12 Stat. 756), authorizing actions for military arrests to be removed from state courts to the circuit courts of the United States, is constitutional. The subject-matter of such action is within the judicial power of the United States. Such a case is "a case arising under the laws of the United States," within the meaning of the constitutional definition of the judicial power.—*McCormick v. Mayfield*, 27 Ind. 143; *Same v. Humphrey*, Id. 144.

[b] (Sup. 1872)

Act Cong. March 2, 1867, is not unconstitutional in its application to cases where it is the plaintiff who applies for a removal. Commencing suit in a state court is not such a voluntary submission to state jurisdiction as can debar plaintiff from seeking the benefit of the national laws.—*Burson v. National Park Bank of New York*, 40 Ind. 173, 13 Am. Rep. 285.

[c] (Sup. 1872)

The right to have a cause transferred from a state court to the United States court is not controlled or abridged by the act of June 17, 1852 (1 Gav. & H. St. p. 272), authorizing the service of process on the agent of a foreign corporation.—*Western Union Telegraph Co. v. Dickinson*, 40 Ind. 444, 13 Am. Rep. 295.

[d] (Sup. 1876)

Act Cong. March 2, 1867, c. 196, amendatory of Act July 27, 1866, c. 288 "for the removal of causes in certain cases from state courts" (14 Stat. 558), was repealed by the Revised Statutes of the United States, approved June 22, 1874.—*Baltimore, P. & C. Ry. Co. v. New Albany & S. R. Co.*, 53 Ind. 597.

FOR CASES FROM OTHER STATES.

SEE 42 CENT. DIG. Rem. of C. §§ 2, 3.

See, also, 34 Cyc. p. 1215.

§ 4. Suits at law or in equity.

[a] (Sup. 1905)

An action for a writ of mandamus not in aid of a jurisdiction previously acquired is not a suit "of a civil nature at law or in equity," within Act Aug. 13, 1888, c. 866, § 2, 25 Stat. 434 (U. S. Comp. St. 1901, p. 509), authorizing the removal of any suit "of a civil nature at law or in equity" to the federal courts, on the ground of the diversity of citizenship of the parties.—*Western Union Telegraph Co. v. State ex rel. Hammond Elevator Co.*, 76 N. E. 100, 165 Ind. 492, 3 L. R. A. (N. S.) 153.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rem. of C. §§ 11-20.

See, also, 34 Cyc. p. 1219; note, 73 C. C. A. 183.

§ 10. Jurisdiction of state court.

[a] (App. 1908)

The right of removal of a cause of action from a state to a federal court is premised on the fact that the state court does have jurisdiction of the action, but by reason of a federal question being involved the party against whom such question is raised has the privilege, at his election, at the proper time, of having the cause removed.—*Pittsburgh, C. C. & St. L. Ry. Co. v. Wood*, 84 N. E. 1009.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rem. of C. § 23.

See, also, 34 Cyc. p. 1219.

§ 16. Nature of right of removal.

[a] (Sup. 1873)

A corporation organized under the laws of Missouri, being sued in Indiana, filed a petition and motion, before any issue of fact

had been formed, to transfer the cause to the United States circuit court, and fully complied with the laws of the United States governing such transfers. *Held*, that it was the right of defendant to have the cause so transferred.—*Atlas Mut. Ins. Co. v. Byrus*, 45 Ind. 133.

[b] (App. 1909)

A petition to remove a cause from the state to the federal court is similar to a motion and affidavit for change of venue, and is based upon the same reasoning.—*Hercules Torpedo Co. v. Smith*, 87 N. E. 254.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rem. of C. § 6.

See, also, 34 Cyc. p. 1216.

§ 17. Waiver of right.

[a] (Sup. 1860)

The appearance of defendants a part of whom have not been served with process, at the taking of depositions to be used in the case, was held not to be such an appearance as would defeat an application to remove the cause to the Circuit Court of the United States under the act of Congress of 1789.—*Scott v. Hull*, 14 Ind. 136.

[b] (Sup. 1908)

Where a state court has denied a motion for removal to the federal court, any error in such ruling is not waived by the moving party defending himself in the state court after the denial.—*Pennsylvania Co. v. Leeman*, 66 N. E. 48, 160 Ind. 16.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rem. of C. § 10.

See, also, 34 Cyc. p. 1218; note, 66 C. C. A. 612.

II. ORIGIN, NATURE, AND SUBJECT OF CONTROVERSY.

§ 18. Cases arising under Constitution of United States.

[a] (Sup. 1910)

A suit by a state to recover taxes on property omitted from taxation brought against non-residents is not removable to the federal court, under U. S. Comp. St. 1901, p. 509, the complaint not raising any question arising under the Constitution of the United States within such statute.—*Darnell v. State*, 90 N. E. 769.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rem. of C. § 36.

See, also, 34 Cyc. p. 1242.

§ 19. Cases arising under laws of United States.

[a] (Sup. 1910)

A suit by a state to recover taxes on property omitted from taxation brought against non-residents is not removable to the federal court

under U. S. Comp. St. 1901, p. 509, the complaint not raising any question arising under the laws, or treaties of the United States within such statute.—*Darnell v. State*, 90 N. E. 769.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rem. of C. §§ 37-46, 48, 52, 53.

See, also, 34 Cyc. p. 1240.

§ 21. Actions against or for acts of United States officers.

[a] (Sup. 1866)

In an action for assault and battery and false imprisonment, defendants appeared and filed a petition for the removal of the cause to the United States circuit court, under section 5 of the act of March 3, 1863. The petition alleged that plaintiff was a member of a military organization hostile to the United States, known as the "Sons of Liberty," the object of which was to aid the Rebels in arms in the Southern states to overthrow the government; that the general commanding, by appointment of the president, the military forces of the United States in the state of Indiana, issued an order for the arrest of plaintiff, and delivered the same to a subordinate officer to be executed; that the officer charged with the execution of said order was directed to call on the general commanding the militia forces of the state of Indiana for assistance in executing the same, who, in pursuance of such request, ordered defendants, who were members of said militia, to aid in the execution of said order, which they did, and that this was the arrest and imprisonment complained of, etc. *Held*, that the petition entitled defendants to have the case removed under the law.—*McCormick v. Mayfield*, 27 Ind. 143; *Same v. Humphrey*, Id. 144.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rem. of C. §§ 49-51.

See, also, 34 Cyc. p. 1248.

III. CITIZENSHIP OR ALIENAGE OF PARTIES.

(A) DIVERSE CITIZENSHIP OR ALIENAGE IN GENERAL.

§ 27. Citizenship or residence of corporations.

[a] (Sup. 1872)

Corporations are embraced in the constitutional and statutory regulations with reference to the removal of causes to the United States courts from the state courts on the ground of diverse citizenship.—*Western Union Tel. Co. v. Dickinson*, 40 Ind. 444, 13 Am. Rep. 295.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rem. of C. §§ 64-68.

See, also, 34 Cyc. p. 1261.

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§ 36. Improper or collusive joinder of parties.

[a] (Sup. 1906)

A statement in a petition for the removal of a cause to the federal court that certain resident defendants were fraudulently joined for the purpose of preventing a removal is of no importance, the plaintiff's motive being immaterial if he had a right to bring the joint action.—*Southern Ry. Co. v. Sittasen*, 166 Ind. 257, 76 N. E. 973.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rem. of C. § 79.

See, also, 34 Cyc. pp. 1255, 1256; note, 78 C. C. A. 362.

§ 41. Controversies between a state or citizens thereof and foreign states, citizens, or subjects.

[a] (Sup. 1905)

In an action in the name of the state, by the prosecuting attorney of a judicial circuit, against a railroad company, to recover penalties for the railroad's violation of Burns' Ann. St. 1901, §§ 5180, 5187, requiring the posting of trains in passenger depots in which there is a telegraph office, the state is the real party in interest, though one-half of the penalties recovered are payable to the prosecuting attorney.—*Southern Ry. Co. v. State*, 75 N. E. 272, 165 Ind. 613.

A state not being a citizen of any state, an action in which a state is the real party in interest cannot be removed from a state to a federal court solely on the ground of diverse citizenship.—*Id.*

[b] (Sup. 1910)

A suit by a state to recover taxes on property omitted from taxation brought against non-residents is not removable to the federal court, as there was no diversity of citizenship; a state not being a "citizen" within U. S. Comp. St. 1901, p. 509.—*Darnell v. State*, 90 N. E. 769.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rem. of C. §§ 82½-84.
See, also, 34 Cyc. pp. 1281, 1282.

§ 44. Parties entitled to remove in general.

[a] (Sup. 1965)

W., a citizen of Ohio, sued the city of Aurora in the circuit court of Dearborn county. After the filing of a counterclaim by defendant, plaintiff dismissed his suit, and then asked for and obtained an order transferring the action to the United States circuit court. *Held*, that as W. elected to bring his suit in the state court, he had no right under the act of congress to have it transferred.—*City of Aurora v. West*, 25 Ind. 148.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rem. of C. § 88.

See, also, 34 Cyc. p. 1279.

(B) SEPARABLE CONTROVERSIES.

§ 49. Joint or joint and several causes of action.

[a] (App. 1907)

Where plaintiff in a negligence action against a railroad and its employé, which action is both joint and separable, elects to make it joint, defendants cannot make it separable for the purpose of removal from a state to a federal court, although the purpose of suing defendants jointly was to prevent the removal, since the motive of a person asserting a right is immaterial.—*Louisville & N. R. Co. v. Gollibur*, 40 Ind. App. 480, 82 N. E. 492.

[b] (App. 1910)

Where, in an action by an administrator, a resident and citizen of the state, against two defendants, one being a domestic corporation and the other a nonresident, the complaint charged an act of negligence on the part of each defendant as a joint cause of action, there was no error in overruling a petition to remove the cause to the federal court, though the amount in controversy exceeded \$2,000.—*Central Union Telephone Co. v. Riggs*, 91 N. E. 834.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rem. of C. §§ 95-99.

See, also, 34 Cyc. p. 1264.

§ 61. Allegations in pleadings.

[a] (Sup. 1906)

On petition for the removal of a cause to the federal court, the question whether a joint right of action exists against resident and non-resident defendants is to be determined from the face of the complaint.—*Southern Ry. Co. v. Sittasen*, 166 Ind. 257, 76 N. E. 973.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rem. of C. § 113.

IV. PREJUDICE, LOCAL INFLUENCE, OR DENIAL OF CIVIL RIGHTS.

Time of taking proceedings, see post, § 80.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rem. of C. §§ 116-127.

See, also, 34 Cyc. pp. 1282, 1294-1298; note, 8 C. C. A. 95.

V. AMOUNT OR VALUE IN CONTROVERSY.

§ 72. Requisite amount or value.

[a] (Sup. 1874)

By the judiciary act of 1789 (1 Stat. 79, § 12), it is only where the amount in dispute exceeds the sum of \$500, exclusive of costs, that a cause can be transferred from a state court, on the petition of a party residing in another

state, to the circuit court of the United States.—*Western Union Tel. Co. v. Levi*, 47 Ind. 552.

FOR CASES FROM OTHER STATES,
See 34 Cyc. p. 1230.

§ 74. Amount or value claimed or involved.

[a] (App. 1903)

Where each of two paragraphs of a complaint seeks a recovery for the death of the same person, wrongfully caused by defendant's servants, and each relates to the same occurrence, and each seeks a recovery in the sum of \$2,000, the matter in dispute does not amount to \$4,000, so as to authorize a removal to the federal court.—*Baltimore & O. R. Co. v. Ryan*, 68 N. E. 923, 31 Ind. App. 597.

FOR CASES FROM OTHER STATES,
SEE 42 CENT. DIG. Rem. of C. §§ 130, 131, 134.

§ 75. Allegations and prayers in pleadings.

[a] (App. 1895)

A cause is not removable to a United States court for the reason that the prayer for relief asks for "\$2,000 and all other proper relief," when, under the pleadings, there was no other proper relief obtainable.—*Baltimore & O. R. Co. v. Worman*, 12 Ind. App. 494, 40 N. E. 751.

[b] (App. 1898)

In determining a party's right to remove to the federal court an action between citizens of different states under a federal statute allowing such removal when the amount in controversy is over \$2,000, the amount demanded in the complaint must be taken as the amount in controversy, though differing from the damages alleged, and though the prayer was amended before answer to prevent a removal.—*Lake Erie & W. R. Co. v. Juday*, 40 N. E. 843, 19 Ind. App. 436.

[c] (Sup. 1903)

Where each paragraph of a complaint in an action for personal injuries alleged that plaintiff was damaged in the sum of \$5,000, but each demanded judgment in a sum less than \$2,000, and there was nothing in the record, aside from the petition to remove the cause to the federal court, to show that the demand for damages under the complaint, either at the time of filing or subsequent thereto, was in excess of \$2,000, the petition to remove was properly denied.—*Springer v. Bricker*, 76 N. E. 114, 165 Ind. 532.

[d] (App. 1903)

Where a complaint in an action for death seeks damages in the sum of \$2,000, the amount in dispute is not modified by the formal prayer for "other and proper relief" so as to warrant removal to the federal court; there being no proper relief other than the pecuniary remedy demanded.—*Baltimore & O. R. Co. v. Ryan*, 68 N. E. 923, 31 Ind. App. 597.

Where, in an action for death by wrongful act, based on a statute authorizing recovery of just compensation, not to exceed \$5,000, the complainant sought damages in the sum of \$2,000, a contention that the amount legally in issue was \$5,000, and that a removal to the federal court was therefore authorized, was untenable.—*Id.*

FOR CASES FROM OTHER STATES,
SEE 42 CENT. DIG. Rem. of C. § 132.

VI. PROCEEDINGS TO PROCURE AND EFFECT OF REMOVAL.

State laws relating to procedure as rules of decision in federal court, see COURTS, § 374.

§ 78. Time of taking proceedings.

FOR CASES FROM OTHER STATES,
SEE 42 CENT. DIG. Rem. of C. §§ 135-160.
See, also, 34 Cyc. pp. 1273-1278, 1296.

§ 79. — In general.

[a] (Sup. 1872)

A trial in the state court, at which the jury has disagreed, does not preclude an application to remove the cause.—*Burson v. National Park Bank of New York*, 40 Ind. 173, 13 Am. Rep. 285.

[b] (Sup. 1881)

A petition for the removal of a cause under Rev. St. U. S. § 639, cl. 3, on the ground of prejudice or local influence, may be filed at any time before the trial or final hearing in the state court.—*Sharp v. Gletcher*, 74 Ind. 357.

[c] (Sup. 1882)

A petition for the removal of a case from a state to a federal court, under the act of 1875, must be filed at the term at which the case can be first tried and before the trial thereof.—*Continental Life Ins. Co. v. Kessler*, 84 Ind. 310.

[d] (Sup. 1903)

25 Stat. 433, 435, § 3 [U. S. Comp. St. 1901, p. 510], provides that, to entitle a defendant to a removal, he must file his petition at or before the time when he is required by the laws of the state, or the rule of the state court in which such suit is brought, to answer or plead. *Held*, that in view of the language of the statute, and evident congressional intent, as shown by prior legislation, a plea in abatement is an answer, within the statute.—*Pennsylvania Co. v. Leeman*, 66 N. E. 48, 160 Ind. 16.

25 Stat. 433, 435, § 3 [U. S. Comp. St. 1901, p. 510], enacts that, to entitle a defendant to a removal to a federal court, he must file his petition at or before the time when he is "required by the laws of the state, or the rule of the state court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff." *Burns' Rev. St. 1901*, provides that on the second and each succeeding day of the term the court shall call as

many of the causes which stand for trial at such term, for issues, as the business of the court will permit, and shall compel the parties to file their respective pleadings at such time as the court shall deem just, and that the pleadings shall be completed at an early day. Code, § 524, provides that every action shall stand for trial at the first term after it is commenced, when the summons has been served on the defendants 10 days, or publication has been made for 30 days, before the first day of the term; and a proviso authorizes the making of the cause returnable specially upon a day in term by indorsement upon the complaint, and that in that event, upon the completion of service, the action shall stand for trial at such term. Section 1375 of said statute authorizes the circuit court to adopt rules, etc. A defendant took a change of venue, and filed a dilatory plea. Trial was had thereon, and defendant was then ruled to answer an amended complaint. He then petitioned for a removal. *Held*, that the record being silent as to whether there was a general rule respecting the filing of answers, and it appearing that the Code contemplates the prompt making up of issues, it would be presumed that the time when appellant was required to answer the complaint had expired when it tendered its application for removal.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rem. of C. §§ 135, 136, 139-159; 14 CENT. DIG. Crim. Law, § 198.

See, also, 34 Cyc. pp. 1273, 1296, 1311.

§ 80. — On ground of prejudice or local influence.

[a] (Sup. 1881)

Act Cong. 1789, relative to removal of causes, requires the petition for removal to be filed at the time of entering appearance. Act 1867 requires the petition to be filed at any time before the final hearing or trial. Rev. St. 1873-4, p. 113, § 639, in case of diverse citizenship, requires the petition to be filed at the time of entering appearance, and, in case of local prejudice, requires it to be filed at any time before the trial and final hearing. Article 1875, relative to citizenship, provides that the petition may be filed before or at the time at which the cause could be first tried, and the Revision of 1878 repeats the provisions of the Revision of 1873-4. *Held* that, when the application for removal is grounded on local prejudice, it is sufficient if the petition be filed at any time before the trial or final hearing.—*Sharp v. Gletcher*, 74 Ind. 357.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rem. of C. § 160.
See, also, 34 Cyc. p. 1296.

§ 83. Notice.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rem. of C. § 164.
See, also, 34 Cyc. p. 1297.

§ 84. — In general.

[a] (Sup. 1881)

An application for the removal of a cause from a state to the federal court is *ex parte*, no notice is required, and no counter affidavits or pleadings are permitted.—*Sharp v. Gletcher*, 74 Ind. 357.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rem. of C. § 164.

§ 86. Petition in state court.

[a] (Sup. 1865)

In a suit against A. and B. for assault and battery and false imprisonment, B. appeared and filed an affidavit, stating that at the time of making the arrest complained of he was, and still is, the deputy of A., who was provost marshal for the Fourth congressional district of the state of Indiana, under the authority of the president of the United States. He also tendered a bond, conditioned that the defendants would file the process and proceedings against them in the circuit court of the United States for the district of Indiana, etc., and thereupon moved to have the cause transferred to that court. *Held*, that the affidavit was bad for not alleging that the arrest complained of was made by virtue or under color of authority derived from the president, or from some act of congress.—*Skeen v. Huntington*, 25 Ind. 510.

[b] (Sup. 1875)

To sustain federal jurisdiction over a removed cause on the ground of diverse citizenship, it must appear affirmatively from the petition for removal, or elsewhere in the record, that such diversity existed at the commencement of the suit, and not merely at the time of removal or subsequently.—*Indianapolis, B. & W. Ry. Co. v. Risley*, 50 Ind. 60.

[c] (Sup. 1900)

A petition for the removal of a cause to a federal court on the ground of diverse citizenship, alleging diverse "residence" of the parties "at the time of the filing of the complaint," instead of alleging diverse citizenship at the time of the commencement of the action, and also when the petition was filed, is insufficient where the citizenship is not shown by the pleadings.—*Green v. Heaston*, 56 N. E. 87, 154 Ind. 127.

[d] (Sup. 1906)

Where it is charged in a petition for the removal of a cause to the federal court that averments against resident defendants jointly sued were falsely and fraudulently made to prevent removal, the state court must accept the allegations as to fraud as true, and sustain the petition; the truth of the issue of fraud being triable in the federal court upon a motion to remand.—*Southern Ry. Co. v. Sittasen*, 166 Ind. 257, 76 N. E. 973.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rem. of C. §§ 132, 166-179.
See, also, 34 Cyc. pp. 1283-1290.

§ 88. Bond.

[a] (Sup. 1883)

A petition for removal is properly overruled where the undertaking is insufficient.—*Combs v. Nelson*, 91 Ind. 123.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rem. of C. §§ 184–188.

See, also, 34 Cyc. pp. 1291–1294; note, 23 Am. Rep. 143.

§ 89. Filing petition and bond in state court, and proceedings thereon.

[a] (Sup. 1872)

Where an order has been made by a state court for the removal of a cause to the United States court, and an appeal has been taken from that order to the supreme court, and the proper steps have been taken to stay proceedings as in other cases of appeal, further proceedings on the order or judgment for removal are at once suspended.—*Burson v. National Park Bank of New York*, 40 Ind. 173, 13 Am. Rep. 285.

[b] (Sup. 1875)

If the petition for the removal of a cause from a state court to the circuit court of the United States is sufficient, it is the duty of the state court to proceed no further in the cause, but at once to transfer the jurisdiction to the United States court. But if the petition is insufficient, the state court may properly disregard it, and refuse to remove the cause.—*Indianapolis, B. & W. Ry. Co. v. Risley*, 50 Ind. 60.

[c] (Sup. 1878)

The state court may pass on the sufficiency of the petition and bond for the removal of a cause to the federal court.—*McWhinney v. Brinker*, 64 Ind. 360.

It is competent for a state court to deny removal, if the petition and bond are insufficient.—*Id.*

[d] (Sup. 1883)

The question whether an application for removal of a cause to a federal court is sufficient under the statute is within the jurisdiction of the state court.—*Combs v. Nelson*, 91 Ind. 123.

[e] (App. 1900)

Burns' Rev. St. 1894, § 640 (Horner's Rev. St. 1897, § 628), provides that one may have an exception noted at the end of the decision, where the decision and the ground of objection are entered on the legal record. Section 662 (section 650) declares that the legal record comprises all proper entries made by the clerk, and all papers filed therein, except papers used as evidence, affidavits, and other papers, when they relate to collateral matters, which shall not be certified unless made a part of the record by exception or by order of court. *Held*, that the denial of an application to remove a cause to a federal court, not relating to the merits, could

not be reviewed on appeal, where the ruling and application were not in the record by bill of exceptions or order of court.—*American Carbon Co. v. Jackson*, 56 N. E. 862, 24 Ind. App. 390.

[f] (Sup. 1908)

Where, on appeal from an order denying a petition for removal, it appears that such petition was not made until after an amended complaint had been filed after answer, and the original complaint is not in the record, it will be presumed that there was no such difference between the complaints as would authorize a removal at such time.—*Pennsylvania Co. v. Leeman*, 66 N. E. 48, 160 Ind. 16.

[g] (Sup. 1905)

On a petition for removal of a cause to the federal court, the trial court, in determining whether the amount in controversy is sufficient, is required to look to the complaint, as well as to the averments of the petition.—*Springer v. Bricker*, 76 N. E. 114, 165 Ind. 532.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rem. of C. §§ 134, 162, 165, 189, 192–197, 200, 201, 207; 2 CENT. DIG. App. & E. § 724.

See, also, 34 Cyc. p. 1283.

§ 90. Order for removal.

Appealability, see **APPEAL AND ERROR, § 70.**

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rem. of C. §§ 198, 199.

See, also, 34 Cyc. p. 1298.

§ 94. Defects in proceedings, objections, amendments, and waiver.

Necessity of presenting objection in motion for new trial, for purpose of review, see **APPEAL AND ERROR, § 286.**

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rem. of C. §§ 178, 203.

See, also, 34 Cyc. p. 1290.

§ 95. Transfer of jurisdiction and effect of removal in general.

[a] (Sup. 1903)

Under 25 Stat. 433 [U. S. Comp. St. 1901, p. 510], relative to removal of causes, and providing that on a compliance with the statute "it shall be the duty of the state court to proceed no further," the filing of a proper application by one entitled to a removal *ipso facto* deprives the state court of any right to proceed.—*Pennsylvania Co. v. Leeman*, 66 N. E. 48, 160 Ind. 16.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rem. of C. §§ 204, 205.

See, also, 34 Cyc. pp. 1305, 1306.

§ 96. Proceedings in state court after removal.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rem. of C. §§ 206, 208-211.

See, also, 34 Cyc. pp. 1305-1309.

§ 97. — Validity and effect in general.

[a] (Super. 1874)

Under the act of congress for the removal of causes from state to United States courts, whenever an application for such removal is made, and it is shown to be one embraced by the act, and that the party seeking the removal has complied with the required conditions, it is the duty of the state court to proceed no further in the suit.—*Risley v. Indianapolis, B. & W. Ry. Co.*, Wils. 572.

[b] (Sup. 1881)

Where an application for the removal of a cause from a state to the federal court is regular, in respect to the petition and bond, the state court can do nothing but perfect the removal; and any further acts done by it in attempting to retain jurisdiction of the cause are void.—*Sharp v. Gutcher*, 74 Ind. 357.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rem. of C. §§ 206, 208-211.

See, also, 34 Cyc. p. 1305.

VII. REMAND OR DISMISSAL OF CAUSE.

FOR CASES FROM OTHER STATES,

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VIII. PROCEEDINGS IN CAUSE AFTER REMOVAL.

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See PLEADING, § 286.

REPLEVIN.

Scope-Note.

[INCLUDES actions for recovery of specific personal property by immediate delivery thereof, founded on right of possession, more particularly writs of replevin and statutory actions of claim and delivery, actions to recover chattels, bail, trover, etc.; nature and scope of the remedy in general; grounds of such actions and defenses thereto; by and against whom and as to what property they may be maintained; procedure therein; alternative or incidental recovery of damages; verdict and judgment and enforcement thereof; review of proceedings; costs in such actions; and liabilities on and enforcement of securities given in such actions.

[EXCLUDES actions founded on right of property (see *Detinue*); summary proceedings to determine and restore previous possession (see *Possessory Warrant*); and actions for damages, merely for injuring, taking, converting, or detaining personal property (see *Trespass; Trover and Conversion*). For complete list of matters excluded, see cross-references, post.]

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- § 2. Statutory provisions and remedies.
- § 3. Property subject to replevin
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- § 19. Venue.
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III. Proceedings for Taking and Redelivery of Property.

- § 26. Affidavit.
- § 27. — Necessity and purpose.
- § 28. — Requisites and sufficiency in general.
- § 30. — Description and value of property.
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- § 40. Taking property under requisition, writ, or order.
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- § 44. Custody and care of property.
- § 45. Delivery of property to plaintiff.
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This Digest is compiled on the Key-Number System. For explanation, see page iii.

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VII. Liabilities on Bonds and Undertakings—Continued.

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I. RIGHT OF ACTION AND DEFENSES.

- Right of landlord to replevin his share of crop before division, see LANDLORD AND TENANT, § 326.
- Right to determine injuries to real estate as affected by abolition of distinction as to forms of action, see ACTION, § 32.
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§ 1. Nature and scope of remedy.

Waiver of tort and suit in assumpsit, see ACTION, § 28.

[a] (Sup. 1873)

The action of replevin may be maintained in all cases where the action of trespass would lie prior to the adoption of the Code for taking away personal property.—Rowell v. Klein, 44 Ind. 290, 15 Am. Rep. 235.

[b] (Sup. 1877)

Replevin is a mere possessory action to recover the possession of property of which the plaintiff is deprived by a tort. Any person having the unlawful possession of personal property belonging to another is the proper party from whom to replevy the same, whether he claims it as owner, agent, administrator,

trustee, custodian, or in any other capacity.—Rose v. Cash, 58 Ind. 278.

[c] (Sup. 1888)

Replevin is strictly an action at law. The right of recovery must exist at the time the action is commenced. It cannot be created by bringing notes given for the purchase price on a sale of the goods into court as in an equitable suit for rescission and offering to surrender them up as the court may direct.—Thompson v. Peck, 18 N. E. 16, 115 Ind. 512, 1 L. R. A. 201.

[d] (App. 1893)

The action of replevin may now be maintained in all cases where the action of trespass would lie prior to the adoption of the Code for taking away personal property.—Ferguson v. Day, 33 N. E. 213, 6 Ind. App. 138.

[e] (App. 1907)

The gist of the action of replevin is defendant's unlawful detention of plaintiff's property.—Reardon v. Higgins, 39 Ind. App. 363, 79 N. E. 208.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. § 1.

See, also, 34 Cyc. pp. 1352–1355; note, 3 L. R. A. (N. S.) 138; note, 80 Am. St. Rep. 741.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

§ 2. Statutory provisions and remedies.

[a] (Sup. 1862)

The remedy for the trial of the right of property given in 2 Rev. St. c. 5, pp. 493-497, is merely cumulative, and does not forbid resort to the ordinary proceeding in the nature of replevin.—*Firestone v. Mishler*, 18 Ind. 439.

FOR CASES FROM OTHER STATES.

SEE 42 CENT. DIG. Replev. §§ 2, 3.

See, also, 34 Cyc. pp. 1356, 1357.

§ 3. Property subject to replevin.**FOR CASES FROM OTHER STATES.**

SEE 42 CENT. DIG. Replev. §§ 4-44.

See, also, 34 Cyc. pp. 1357-1385; note, 40 L. R. A. 507.

§ 4. — In general.

[a] (Sup. 1854)

The record book of a corporation which has been wrongfully detained may be recovered in an action of replevin.—*Southern Plank Road Co. v. Hixon*, 5 Ind. 165.

[b] (Sup. 1860)

Corn standing upon the stalk not severed from the land may be recovered under the statute for the recovery of personal property.—*Matlock v. Fry*, 15 Ind. 483.

[c] (Sup. 1861)

The possession of title deeds may be recovered in the action under the Code for the recovery of personal property.—*Wilson v. Rybolt*, 17 Ind. 391, 79 Am. Dec. 486.

[d] (Sup. 1868)

Plaintiff furnished H. with money with which to purchase furs under an agreement that H. was to deliver the furs to plaintiff on demand or return the money. Defendant sold furs to H. and also to plaintiff without receiving pay from either, and shipped them in one package to plaintiff C. O. D. Plaintiff refused to pay, and attempted to replevin the package. *Held*, that if the furs sold to H. belonged to him until delivery, and were intermingled with those ordered by plaintiff, but which belonged to defendant until they were delivered to plaintiff and paid for, plaintiff could not replevin the package.—*Minchrod v. Windoes*, 29 Ind. 288.

[e] (Sup. 1876)

The legislature did not, by the enactment of the Code abolishing the distinctions between actions at law and suits in equity, and between the forms of such actions and suits, thereby abolish the distinction existing between real and personal actions, so as to allow rights in or injuries to real property to be determined in an action for replevin.—*Ricketts v. Dorrel*, 55 Ind. 470.

Fence rails and stakes, though unlawfully taken and detained by a wrongdoer, when used by him in the construction of a fence upon his real estate, thereby become part of such real-

ty, and cannot be replevied by the owner as personal property.—*Id.*

An article severed from the realty by a wrongdoer may be replevied by the owner as long as its separate identity can be ascertained, since it is thereby made personal property.—*Id.*

[f] (Sup. 1890)

Under Rev. St. 1881, § 1285, which provides that the phrase "personal property" shall include goods, chattels, evidences of debt, and things in action, a note is "personal property," within the meaning of section 1206 concerning replevin.—*Bush v. Grooms*, 125 Ind. 14, 24 N. E. 81.

[g] (App. 1899)

It is not always necessary to plaintiff's success in replevin that the property shall be so situated that it may actually be taken and delivered to him.—*West v. Graff*, 55 N. E. 506, 23 Ind. App. 410.

[h] (App. 1903)

A certificate of bank stock is tangible personal property, which may be recovered in replevin.—*Opperman v. Citizens' Bank of Michigan City*, 85 N. E. 991.

FOR CASES FROM OTHER STATES.

SEE 42 CENT. DIG. Replev. §§ 4-19, 21-26.

See, also, 34 Cyc. pp. 1357-1364.

§ 5. — Property taken under execution, attachment, or other process.

Averment in affidavit, see post, § 31.

Avowry, see post, § 64.

Pleading, see post, § 63.

[a] (Sup. 1875)

Where an officer levies on personal property, which is owned in common by the debtor and a third party, he has the right to take the entire property into his possession, and the co-owner cannot maintain replevin for the property.—*Branch v. Wiseman*, 51 Ind. 1.

[b] (Sup. 1875)

It is a good defense to an action for the recovery of the possession of personal property, that it has been taken by the defendant by virtue of a writ of attachment in his hands as sheriff against the property of a person not a party, who is the owner.—*Wiler v. Manley*, 51 Ind. 169.

[c] (Sup. 1881)

A sheriff who has taken on execution the property of another than the execution defendant, and received from him a delivery bond without returning the property, is liable in replevin on a demand for the same.—*Louthain v. Fitzer*, 78 Ind. 449.

[d] (Sup. 1882)

Under 2 Rev. St. 1876, p. 88, § 128, providing that, when goods are wrongfully taken from the owner on execution, he may bring an

action for the possession thereof, where the sheriff, by direction of plaintiff, who was present, levied on goods which did not belong to the execution defendant, the owner may maintain replevin against both the sheriff and plaintiff, though neither of them had actual possession of the goods at the commencement of the suit.—*Hadley v. Hadley*, 82 Ind. 95.

[e] (Sup. 1835)

Under the provisions of the Code, the execution defendant cannot maintain an action for the recovery of the personal property held under the execution, except where the property is, by statute, exempt from execution.—*Louisville, E. & St. L. Ry. Co. v. Payne*, 2 N. E. 582, 103 Ind. 183.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 27-37.

See, also, 34 Cyc. pp. 1368-1378; note, 55 L. R. A. 280; note, 20 Am. Dec. 696.

§ 7. — Property taken for collection of tax or assessment.

See TAXATION, § 612.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 38-44.

See, also, 34 Cyc. pp. 1381-1384.

§ 8. Title and right to possession of plaintiff.

Allegations in pleading, see post, § 58.

Evidence, see post, §§ 71, 72.

Instructions, see post, § 91.

Pleading, see post, §§ 57, 63, 66, 69.

Presumptions and burden of proof, see post, § 70.

Verdict and findings, see post, § 93.

[a] (Sup. 1823)

Replevin lies by a person not having the actual possession of the goods when taken, provided he have at the time the general property and the right of immediate possession.—*Chinn v. Russell*, 2 Blackf. 172.

[b] (Sup. 1832)

If goods seized by the marshal of an incorporated town by virtue of a legal precept be unlawfully taken out of his possession, he can support an action of replevin for them against the wrongdoer.—*Fitch v. Dunn*, 3 Blackf. 142.

[c] To sustain an action of replevin the plaintiff must be entitled to the immediate possession.—(Sup. 1837) *Walpole v. Smith*, 4 Blackf. 304; (1855) *Noble v. Epperly*, 6 Ind. 414.

[d] (Sup. 1837)

A general or special property in goods, accompanied with possession, either actual or constructive, is sufficient to support replevin.—*Walpole v. Smith*, 4 Blackf. 304.

A constable, who has levied an execution on goods after the execution and levy have been set aside, has not such a property in the goods

as will sustain replevin against the creditor, to whom he had delivered the goods for safe-keeping.—Id.

[e] Plaintiff in replevin must recover on the strength of his own title or right of possession.—(Sup. 1848) *Simcoke v. Frederick*, 1 Ind. 54, Smith, 64; (1872) *Davis v. Warfield*, 38 Ind. 461.

[f] (Sup. 1848)

If the plaintiff in replevin show a prima facie right to the property, he must recover as against all who do not prove better title.—*Ingersoll v. Emmerson*, 1 Ind. 76, Smith, 77.

[g] To maintain replevin, the plaintiff must have the right of possession, as well as the right of property.—(Sup. 1849) *Bradley v. Michael*, 1 Ind. 551, Smith, 346; (App. 1891) *Whitehead v. Coyle*, 27 N. E. 716, 1 Ind. App. 450.

[h] (Sup. 1849)

In an action of replevin plaintiff must show that he is entitled to the right of possession.—*Bradley v. Michael*, 1 Ind. 551, Smith, 346.

[i] (Sup. 1863)

One entitled to the possession may maintain replevin against a person wrongfully taking away the property.—*Moorman v. Quick*, 20 Ind. 67.

[j] (Sup. 1864)

The levy of an execution gives to the officer, while the execution remains in his hands, such a special property in the goods levied upon as enables him to maintain replevin for them.—*Dunkin v. McKee*, 23 Ind. 447.

[k] (Sup. 1875)

In replevin, a qualified property in the defendant as bailee is sufficient to defeat the plaintiff who has the general property in the same thing, unless he has the immediate right of possession as against the defendant, though the plaintiff is the bailor.—*Branch v. Wiseman*, 51 Ind. 1.

[l] (Sup. 1877)

A part owner of a chattel as a tenant in common with other owners of the same chattel cannot merely on the ground of his partnership maintain replevin for the possession of the chattel so owned in common; but, if he alleges an unlawful detention, and his title to possession, he may prove such facts, even against his cotenants in the general ownership of the property.—*Deacon v. Powers*, 57 Ind. 489.

[m] A plaintiff in replevin must recover, if at all on the strength of his own title or right of possession.—(Sup. 1878) *Smith v. Peterson*, 63 Ind. 243; (1882) *Dixon v. Duke*, 85 Ind. 434; (App. 1891) *Miller v. Lively*, 27 N. E. 437, 1 Ind. App. 6.

[n] (Sup. 1878)

In an action to recover the possession of personal property, where the complaint alleges

title in plaintiff, it is a good defense to show that the title to the property is in a stranger to the record.—*Domestic Sewing Mach. Co. v. Arthurhultz*, 63 Ind. 322.

[o] (Sup. 1881)

Plaintiff, suing to recover personal property, can recover only on the strength of his own title; and his action must fail on its being shown that his title grew out of a fraudulent collusion between him and his vendor to defraud the latter's creditors.—*Lane v. Sparks*, 75 Ind. 278.

[p] (Sup. 1881)

If a claimant of personal property has no title, he cannot recover it from one in possession who claims it by virtue of a sheriff's sale, though the sale was irregular.—*Easter v. Fleming*, 78 Ind. 116.

[q] (Sup. 1881)

On breach of a contract to make a mortgage on personal property, replevin will not lie to recover the possession of the property.—*Baddeley v. Patterson*, 78 Ind. 157.

[r] (Sup. 1881)

The purchaser of land at a sheriff's sale allowed the tenant to remain in possession till after the crops were harvested. *Held*, that he could not maintain replevin therefor.—*Bowen v. Roach*, 78 Ind. 361.

[s] (Sup. 1885)

Since the pledgee has a right to the possession of the property pledged, he may maintain replevin against one who unlawfully detains it by virtue of a chattel mortgage executed subsequent to the pledge.—*Deeter v. Sellers*, 1 N. E. 854, 102 Ind. 458.

[t] (Sup. 1890)

As Rev. St. §§ 2512, 2518, give to the guardian of a minor the right to the custody of personal property owned by his ward, such a guardian may maintain replevin therefor. Sections 255–258, giving an infant the right to sue by next friend, do not control an action in which the guardian has himself the right to recover.—*Boruff v. Stipp*, 126 Ind. 32, 25 N. E. 865.

[u] (App. 1891)

In replevin, plaintiff may prove either general or special ownership in himself with right of possession.—*Buck v. Young*, 27 N. E. 1106, 1 Ind. App. 558.

[v] (App. 1891)

As Rev. St. 1881, §§ 2512, 2515, 2518, 2521, give to the guardian of a minor the right to the custody of the personal property owned by his ward, such guardian may maintain replevin to recover logs unlawfully taken from his ward's land by parties having a life estate therein.—*Meiser v. Smith*, 2 Ind. App. 37, 27 N. E. 871.

[w] (App. 1891)

Plaintiff purchased goods which had been levied upon to satisfy a judgment against the seller, with knowledge thereof. The property

subsequently being attached by the same officer at the suit of another creditor of the seller, plaintiff brought replevin against the officer. *Held*, that the action would not lie without first satisfying the judgment, and the action, not being authorized at its commencement, could not be sustained by the subsequent satisfaction of the judgment.—*Brown v. Loesch*, 3 Ind. App. 145, 29 N. E. 450.

[x] (App. 1893)

Where specific articles of partnership property are levied on and seized by a sheriff for the individual debts of one member of the firm, as the sole property of such member, in disregard of the interests of the partnership, the partner against whom the execution was levied, with the other partners, may jointly maintain replevin to recover possession of such property.—*Ferguson v. Day*, 6 Ind. App. 138, 33 N. E. 213.

[y] (App. 1904)

In order to maintain replevin, one must have title or right of possession.—*Morgan v. Jackson*, 69 N. E. 410, 32 Ind. App. 169.

[yy] (App. 1907)

Where a plaintiff in a replevin should have delivered a horse, to secure an equitable lien thereon, to defendant, the fact that defendants secured the horse from a livery stable keeper without plaintiff's knowledge or consent did not make plaintiff's possession of the horse unlawful.—*Reardon v. Higgins*, 39 Ind. App. 363, 79 N. E. 208.

[z] (App. 1907)

In replevin, the jury was properly charged that, if at the commencement of the action plaintiff was the owner of the property and entitled to possession at that time, the withholding and detention thereof by defendant was wrongful, and that plaintiff was entitled to recover, unless defendant obtained possession of the property rightfully, and no demand for its return had been made by plaintiff before suit brought.—*Indiana Union Traction Co. v. Bick*, 40 Ind. App. 451, 81 N. E. 617.

[zz] (App. 1908)

To replevin an insurance policy plaintiff should show a right of possession, and, if defendant's possession is unlawful, a demand therefor.—*Stewart v. Gwynn*, 41 Ind. App. 320, 82 N. E. 1000, 83 N. E. 753.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 45–68.

See, also, 34 Cyc. pp. 1385–1395; note, 80 Am. St. Rep. 741.

§ 9. Taking or detention by defendant.

Allegations in pleading, see post, § 60.

Damages for detention, see post, § 76.

Pleading, see post, §§ 57, 63, 67.

Verdict and findings, see post, § 93.

[a] (Sup. 1831)

The action of replevin is not limited to cases of distress, but lies in all cases of a tor-

tious and unlawful taking and detention of goods and chattels.—*Daggett v. Robins*, 2 Blackf. 415, 21 Am. Dec. 752.

[b] (Sup. 1850)

To sustain an action of replevin, it is necessary for the plaintiff to prove either an unlawful taking or an unlawful detainer.—*Baer v. Martin*, 2 Ind. 229.

[c] (App. 1908)

Where a creditor of a husband received as security therefor a certificate of bank stock owned by the wife, and the wife demanded the return of the certificate, the refusal of the creditor to surrender the same was an unlawful detainer, since the contract of suretyship by which he obtained the certificate was voidable under the statute.—*Opperman v. Citizens' Bank of Michigan City*, 85 N. E. 991.

Replevin lies by the owner of personal property against a person who has such property in his possession without right to retain it as against the owner.—Id.

FOR CASES FROM OTHER STATES.

SEE 42 CENT. DIG. Replev. §§ 69-82.

See, also, 34 Cyc. pp. 1395-1402.

§ 10. Possession of defendant.

In replevin by claimant of property levied on under execution against third person, see EXECUTION, § 186.

Instructions, see post, § 91.

Pleading, see post, §§ 63, 69.

[a] (Sup. 1877)

Any person having the unlawful possession of personal property belonging to another is the proper party from whom to replevy the same, whether he claims it as owner, agent, administrator, trustee, custodian, or in any other capacity.—*Rose v. Cash*, 58 Ind. 278.

[b] (Sup. 1879)

Where chattels covered by a chattel mortgage were levied on for sale on an execution against the mortgagor while they remained in his possession under the mortgage, the mortgagee could not replevy them from the officer.—*Olds v. Andrews*, 66 Ind. 147.

[c] (Sup. 1882)

An agent who for his principal wrongfully detains the goods of another is personally liable in an action of replevin.—*Berghoff v. McDonald*, 87 Ind. 549.

[d] (Sup. 1884)

Plaintiff in replevin, to whom the property had been delivered by virtue of his writ, but whose suit had been dismissed for insufficiency of the bond, and a judgment of return rendered, began another suit without returning the property. *Held*, that the property was constructively in defendant's possession, so as to authorize the bringing of the second suit.—*Teeple v. Dickey*, 94 Ind. 124.

[e] (Sup. 1884)

A mere paper levy for delinquent taxes is not a possession which will sustain replevin against the official making the levy.—*Standard Oil Co. v. Bretz*, 98 Ind. 231.

[f] (Sup. 1885)

Replevin does not lie against one who is neither actually nor constructively in possession of the property.—*Van Gorder v. Smith*, 99 Ind. 404.

[g] (App. 1892)

A person in possession of goods without right cannot avoid an action of replevin by transferring the possession to another, even though the transfer be made before the commencement of the suit.—*Helman v. Withers*, 3 Ind. App. 532, 30 N. E. 5, 50 Am. St. Rep. 295.

[h] (App. 1898)

A judgment for plaintiff in replevin is not warranted, where it does not appear that defendant is in possession of the goods or claiming title thereto.—*Peninsular Stove Co. v. Ellis*, 51 N. E. 105, 20 Ind. App. 491.

[i] (App. 1899)

Unless personal property is in a person's possession or under his control, an action for its possession will not lie against him.—*West v. Graff*, 55 N. E. 506, 23 Ind. App. 410.

[j] (Sup. 1900)

An injunction against a sheriff to prevent the sale of property, and not replevin, is the proper remedy of one holding the property under a bill of sale from the judgment debtor, when the property still remains in his possession, and he has given no receipt for it or other undertaking to the sheriff, and is not holding it as his agent, since replevin would not lie for the possession of personal property by one having such possession.—*Owens v. Gascho*, 56 N. E. 224, 154 Ind. 225.

FOR CASES FROM OTHER STATES.

SEE 42 CENT. DIG. Replev. §§ 69-82.

See, also, 34 Cyc. pp. 1396-1402; note, 80 Am. St. Rep. 741.

§ 11. Demand.

Allegations in pleading, see post, § 61.

Evidence, see post, § 71.

[a] In replevin it is not necessary that the plaintiff show demand made prior to the suing out of the writ, if the original taking was wrongful.—(Sup. 1846) *Lewis v. Masters*, 8 Blackf. 244; (1882) *Cunningham v. Baker*, 84 Ind. 597; (1884) *Hamilton v. Browning*, 94 Ind. 242; (1890) *Jones v. Smith*, 123 Ind. 585, 24 N. E. 368.

[b] (Sup. 1846)

It is not often that a demand is necessary to sustain an action of replevin for an unlawful detainer of goods.—*Lewis v. Masters*, 8 Blackf. 244.

Where the possession was rightful at its inception, plaintiff in replevin must make a demand before bringing his action.—*Id.*

[c] (Sup. 1848)

The delivery of the writ to the sheriff in an action of replevin is the commencement of the suit, so that when a demand is necessary before suit, it should be made before the writ is so delivered.—*Underwood v. Tatham*, 1 Ind. 276, Smith, 152.

[d] A bona fide purchaser of personal property from a wrongful taker is not liable in replevin by the lawful owner without demand first made.—(Sup. 1861) *Corner v. Comstock*, 17 Ind. 90; (App. 1895) *Ledbetter v. Embree*, 12 Ind. App. 617, 40 N. E. 928.

[e] (Sup. 1881)

No demand before suit brought is necessary to the maintenance of an action under Code, § 128, to recover the possession of personal property, where it is alleged and proved that the property was wrongfully taken and is unlawfully detained by the defendant.—*Robinson v. Shatzley*, 75 Ind. 461.

[f] (Sup. 1881)

In a suit for the recovery of certain property and damages for the detention thereof, where it appeared that defendants had wrongfully converted the property to their own use, a demand therefor before suit brought and proof of such demand was unnecessary.—*Cox v. Albert*, 78 Ind. 241.

[g] (Sup. 1882)

As against the title of a bona fide purchaser for value, a demand before suit must be shown by plaintiff in replevin.—*Torian v. McClure*, 83 Ind. 310.

[h] (Sup. 1882)

Where defendant, in replevin obtained possession of the goods by fraud, no demand by plaintiff is necessary.—*Parrish v. Thurston*, 87 Ind. 437.

[i] (Sup. 1883)

When one knowingly purchases property from another who is not the owner thereof, the owner may maintain replevin therefor without demand.—*Kuhns v. Gates*, 92 Ind. 66.

[j] (Sup. 1885)

A demand on an agent of defendant for property wrongfully in possession of such agent constitutes a sufficient demand of defendant.—*Deeter v. Sellers*, 1 N. E. 854, 102 Ind. 458.

In replevin to recover property wrongfully converted by the defendant, and of which he is in rightful possession, no demand is necessary.—*Id.*

[k] (Sup. 1889)

Plaintiff obtained a sheriff's deed of land, and afterwards a decree quieting his title, and a writ of possession based on such deed. After the execution of such deed, but before the

writ of possession was awarded, the original owner of the land, who remained in possession, leased it to one who, without the consent of the plaintiff, sowed and harvested a crop of wheat. *Held*, that the latter could maintain replevin for such wheat without having first made demand.—*Hall v. Durham*, 117 Ind. 429, 20 N. E. 282.

[l] (Sup. 1890)

It is only in cases where the property of one person is lawfully in the possession of another, and where a demand will render the possession unlawful, that a demand is necessary to the maintenance of an action of replevin.—*Haffner v. Barnard*, 24 N. E. 152, 123 Ind. 429.

[m] (App. 1891)

In an action of replevin to recover property which the defendant has obtained by replevying it from a third person, the question whether a demand was a necessary prerequisite to the defendant's action of replevin is immaterial.—*Walls v. Long*, 2 Ind. App. 202, 28 N. E. 101.

[n] (App. 1898)

Where the taking of personalty is unlawful, no demand need be made before bringing an action for its recovery.—*Ahlendorf v. Barkous*, 50 N. E. 887, 20 Ind. App. 656.

[o] (App. 1899)

A demand for goods, to render a subsequent sale thereof by the party from whom they were demanded such a wrongful disposal of them as to uphold replevin against him after he parted with possession, must be shown to have been made when he was in possession and control thereof.—*West v. Graff*, 55 N. E. 506, 23 Ind. App. 410.

FOR CASES FROM OTHER STATES.

SEE 42 CENT. DIG. Replev. §§ 85-97.

See, also, 34 Cyc. pp. 1404-1411.

§ 12. Defenses.

[a] A defendant in replevin may plead property in a third person.—(Sup. 1823) *Martin v. Ray*, 1 Blackf. 291; (1857) *Hall v. Henline*, 9 Ind. 256.

[b] (Sup. 1874)

An averment of property in defendant forms a good issue in replevin, whether it be an absolute property, or the qualified property of a bailee.—*Darter v. Brown*, 48 Ind. 395.

[c] (Sup. 1875)

In an action for the recovery of the possession of personal property, it is not a good answer that since the commencement of the action the plaintiff, by his use of the property, has realized more than the amount of his claim, and has sold the property for a certain sum, for which he has not accounted.—*Charles v. Malott*, 51 Ind. 350.

[d] (Sup. 1883)

In replevin of domestic animals, it is no defense that defendant had taken them while trespassing on his premises, unless he shows that he subsequently complied with the provisions of the estray laws after they were taken up.—*James v. Fowler*, 90 Ind. 563.

[e] (App. 1891)

A retaking of possession after the commencement of an action for the recovery of a horse was not a bar to the action.—*Frazier v. Goar*, 27 N. E. 442, 1 Ind. App. 38.

[f] (App. 1895)

In replevin by a purchaser of personal property at sheriff's sale, who was not the execution plaintiff, against one in possession and claiming to be the owner by purchase from the execution debtor, defendant cannot plead as a counterclaim facts showing that the sheriff's sale was void or voidable for irregularities.—*Shipman Coal Min. & Manufg Co. v. Pfeiffer*, 11 Ind. App. 445, 39 N. E. 291.

[g] (App. 1907)

A special right of possession is a good defense to an action of replevin.—*Reardon v. Higgins*, 39 Ind. App. 363, 79 N. E. 208.

The present right to possession being the question to be determined in replevin, defendant's counterclaim of an equitable lien, under an agreement of plaintiff to deliver the horse to him as security for money advanced, is good without regard to whether defendant wrongfully took possession of the horse.—*Id.*

[h] (App. 1909)

The right of plaintiff in replevin being based on a chattel mortgage, the overthrowing of the mortgage by rights existing in the mortgagor overthrew it for all the defendants.—*Bayse v. McKinney*, 43 Ind. App. 422, 87 N. E. 693.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 98-110.

See, also, 34 Cyc. pp. 1413-1419.

§ 15. Persons entitled to sue.

[a] Any person, except the execution defendant, may have replevin, under the statute, for his goods taken in execution.—(Sup. 1828) *Chinn v. Russell*, 2 Blackf. 172; (1829) *Louisville & P. Canal Co. v. Holborn*, Id. 267.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. § 114.

See, also, 34 Cyc. p. 1419.

§ 16. Persons against whom replevin may be brought.

[a] (Sup. 1862)

The plaintiff in a suit, who has assumed control thereof and has directed the officer as to its execution, is a proper party defendant in a suit to recover possession of property alleged to have been wrongfully levied on under said writ.—*Firestone v. Mishler*, 18 Ind. 439.

[b] (Sup. 1864)

On levy of an execution, an officer, while the execution remains in his hands, has such a special property in the goods levied upon as will enable him to defend the possession against one not an owner.—*Dunkin v. McKee*, 23 Ind. 447.

[c] (Sup. 1882)

An officer who has taken a bond for the delivery of property levied upon holds constructive possession of the property until it is shown to have passed out of his power and control, and both he and the execution plaintiff are liable to an action of replevin by the owner.—*Hadley v. Hadley*, 82 Ind. 75.

[d] (App. 1898)

There being no proof of his actual or constructive possession, replevin does not lie against a justice of the peace, who rendered judgment and issued execution, for the property seized thereunder.—*Fruits v. Elmore*, 8 Ind. App. 278, 34 N. E. 829.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 115-117.

See, also, 34 Cyc. p. 1420; note, 1 L. R. A. (N. S.) 474; note, 9 Am. Dec. 105; note, 25 Am. St. Rep. 256.

II. JURISDICTION, VENUE, AND PARTIES.

Jurisdiction of justices of the peace as dependent on amount in controversy, see JUSTICES OF THE PEACE, §§ 43, 44.

Jurisdiction of justices of the peace as dependent on nature of remedy or relief in general, see JUSTICES OF THE PEACE, § 46.

§ 19. Venue.

Necessity of proof, see post, § 69.

Pleading, see post, § 57.

Statement of ground in affidavit for change of venue, see VENUE, § 67.

Venue of actions in justices' courts, see JUSTICES OF THE PEACE, § 72.

[a] Acts 1861, p. 141, § 15, providing that suits for trespass to personal property may be brought either in the township where the defendant resides or where the trespass was committed, covers suits for the recovery of personal property, or for injury to it, and requires such suits to be brought in the township where the defendant resides, or where the property was taken or detained, if this township be in the county where the defendant resides.—(Sup. 1862) *Jocelyn v. Barrett*, 18 Ind. 128; (1881) *Copple v. Lee*, 78 Ind. 230.

[b] (Sup. 1863)

Where, of several defendants to an action of replevin, some reside in the county where it is brought and others reside out of it, and plaintiff dismisses as to the former, if it be shown that they were not necessary parties, but were made so for the fraudulent purpose of ob-

taining jurisdiction over the nonresidents in a court properly having no such jurisdiction, then the action will stand, after dismissal, as if it had been brought in a county in which none of defendants resided.—*Shryer v. Miner*, 20 Ind. 175.

[c] (Sup. 1863)

The wrongful taking or detention of personal property is a trespass in the general sense of the word, and, under section 15 of the justice's act, an action for such trespass, in the form of an action of replevin, may be brought either in the township where the defendant resides, or where the trespass was committed, and process served throughout the county.—*Cook's Adm'r v. Gibson*, 21 Ind. 303.

[d] (Sup. 1877)

An action of replevin may properly be brought in the county where the defendant has his usual place of residence.—*Hodson v. Warner*, 60 Ind. 214.

[e] (Sup. 1890)

Where, in an action to recover possession of goods, the goods were not in the county in which the suit was commenced, and defendant, a nonresident, had never been found therein, the circuit court of that county prima facie had no jurisdiction.—*Rauber v. Whitney*, 25 N. E. 186, 125 Ind. 216.

[f] (Sup. 1905)

Under Burns' Ann. St. 1901, § 314, providing that in all other cases the action shall be commenced in the county where one of the defendants has his usual place of residence, an action of replevin, in the absence of other provision for its venue, cannot be brought where the goods are situated or detained, unless that is the county where a defendant resides.—*Fry v. Shafor*, 74 N. E. 503, 164 Ind. 699.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 118½, 119.
See, also, 34 Cyc. pp. 1421-1423.

§ 20. Time to sue.

[a] (Sup. 1882)

A demand is as necessary as a prerequisite to an action of replevin as to one of trover, where the property claimed is in the hands of a purchaser in good faith for value and without notice of a defect of title; and the statute of limitations therefore runs from the time of demand.—*Torian v. McClure*, 83 Ind. 310.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. § 120.
See, also, 34 Cyc. p. 1423.

III. PROCEEDINGS FOR TAKING AND REDELIVERY OF PROPERTY.

Liability of justice of the peace for failure to attest entry of replevin bail, see JUSTICES OF THE PEACE, § 26.

§ 26. Affidavit.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 128-137.
See, also, 34 Cyc. pp. 1428-1438.

§ 27. — Necessity and purpose.

[a] (Sup. 1858)

2 Rev. St. p. 464, § 71, provides among other things that in a proceeding before a justice to recover personal property the affidavit of plaintiff must state "that the same has not been taken by virtue of any execution or other writ against him." Held, that said section is not affected by 2 Rev. St. p. 27, providing that, upon a claim and delivery of personal property, the claimant of such property, etc., must make an affidavit showing that the same has not been seized under execution, etc., against the property of plaintiff, or if so seized that it is by statute exempt from such a seizure, and therefore complaints before a justice are governed by said section 71.—*Green v. Aker*, 11 Ind. 223.

[b] (Sup. 1868)

No separate affidavit is necessary in replevin if the complaint recites the material facts of the case and is sworn to.—*Minchrod v. Windoes*, 29 Ind. 288.

[c] (Sup. 1870)

In replevin before a justice the complaint may be separate from the affidavit, though it need not be.—*Eddy v. Beal*, 34 Ind. 159.

[d] (Sup. 1877)

It is unnecessary to file an affidavit or bond in an action of replevin, where the immediate delivery of the property is not demanded.—*Hodson v. Warner*, 60 Ind. 214.

[e] (Sup. 1885)

In an action to recover the possession of personal property, the complaint, if it contains also the statements required in an affidavit, and is properly verified, may answer the twofold purpose of complaint and affidavit.—*Louisville, E. & St. L. Ry. Co. v. Payne*, 103 Ind. 183, 2 N. E. 582.

[f] (Sup. 1890)

Under Rev. St. 1881, § 1267, providing that, if the plaintiff in an action for the possession of personal property claims immediate possession thereof, he must make an affidavit showing certain facts, it is proper to incorporate such affidavit in the complaint.—*Turpie v. Fagg*, 124 Ind. 476, 22 N. E. 743.

[g] (App. 1901)

Though Horner's Rev. St. 1897, § 1433, gives justices of the peace jurisdiction in replevin where the value of the property does not exceed \$100, the procedure and practice are still governed by Burns' Rev. St. 1894, § 1615 (Horner's Rev. St. 1897, § 1547), requiring that, in replevin before a justice, a verified complaint must be filed, in order to give

the justice jurisdiction; and, if the writ is issued without a verified complaint, the action is properly dismissed.—*Allen v. Frederick*, 59 N. E. 330, 26 Ind. App. 430.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 128-130.

See, also, 34 Cyc. p. 1428.

§ 28. — Requisites and sufficiency in general.

[a] (Sup. 1870)

It seems that in an action of replevin before a justice of the peace there is no necessity for the plaintiff's affidavit as such to state that he claims a judgment for the possession of the property, or that he demands damages for the detention thereof, though these statements will not vitiate the affidavit, and that the action of replevin may be maintained without asking damages for the detention of the property.—*Eddy v. Beal*, 34 Ind. 159.

[b] (Sup. 1881)

In a suit to recover the possession of property and damages for detention, a complaint containing all the allegations required and all the statutory requisites of an affidavit to obtain a writ for the delivery of the property and which was duly verified was sufficient as an affidavit of replevin.—*Cox v. Albert*, 78 Ind. 241.

[c] (Sup. 1889)

Rev. St. 1881, § 1547, providing that "whenever any plaintiff shall, by complaint in writing, verified by affidavit," set forth certain facts, he may have a writ of replevin, does not require verification by plaintiff in person. A verification by his attorney is sufficient.—*Hall v. Durham*, 117 Ind. 429, 20 N. E. 282.

[d] (Sup. 1890)

Under Rev. St. 1881, § 1267, providing that, if the plaintiff in an action for the possession of personal property claimed the immediate possession of the property, he or some one in his behalf must make an affidavit showing certain facts, it is the proper practice to combine the complaint and affidavit in one instrument.—*Turpie v. Fagg*, 22 N. E. 743, 124 Ind. 476.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. § 131.

See, also, 34 Cyc. pp. 1431-1436.

§ 30. — Description and value of property.

[a] (Sup. 1840)

If, in an action of replevin before a justice of the peace, the statement of demand filed before the writ issued state the value of the property, the omission of the averment of such value in the affidavit is not material.—*Mooney v. Myers*, 5 Blackf. 331.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 133, 134.

See, also, 34 Cyc. p. 1436.

§ 31. — Averments as to cause of detention.

[a] (Sup. 1855)

The affidavit for a writ of replevin before a justice of the peace need not aver that the property sought to be replevied had not been taken from the plaintiff for any tax or assessment, nor seized under any execution or attachment against his goods.—*Bringinghurst v. Pollard*, 6 Ind. 452.

[b] (Sup. 1869)

In an action of replevin in the court of common pleas, an affidavit of the plaintiff for delivery of the property to him which did not state whether or not it had been seized under an attachment against his property was bad.—*Bridges v. Layman*, 31 Ind. 384.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. § 135.

See, also, 34 Cyc. pp. 1433-1436.

§ 32. — Defects, objections, and amendment.

[a] (Sup. 1837)

After trial on the merits, in replevin, before a justice of the peace, the defendant cannot object to the sufficiency of the affidavit.—*Perkins v. Smith*, 4 Blackf. 299.

If the affidavit for a writ of replevin before a justice of the peace is relied on as a statement of demand, the defendant may afterwards object to it, though he has pleaded in bar and proceeded to trial.—*Id.*

[b] (Sup. 1872)

A motion in arrest of judgment does not reach defects in an affidavit for writ of replevin.—*Davis v. Warfield*, 38 Ind. 461.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 136, 137.

See, also, 34 Cyc. p. 1438.

§ 33. Replevin bond or undertaking.

Actions on bonds, see post, §§ 127-135.

Capacity of married women to execute, see

HUSBAND AND WIFE, § 87.

Computation of time for, see TIME, § 13.

Estoppel by recitals in, see ESTOPPEL, § 22.

Liabilities on bonds, see post, § 119.

Necessity of affixing stamp to bond, see INTERNAL REVENUE, § 32.

Parol evidence to vary bond, see EVIDENCE, § 401.

Persons entitled to question constitutionality of statute relating to, see CONSTITUTIONAL LAW, § 43.

Questioning sufficiency of replevin bond by motion in arrest, see JUDGMENT, § 259.

Validity of bonds executed on Sunday, see SUNDAY, § 30.

[a] (Sup. 1825)

The sheriff cannot object to a replevin bond because it is not executed by the tenant, but by his surety alone.—*Ridge v. Wilson*, 1 Blackf. 409.

[b] (Sup. 1840)

In replevin before a justice of the peace, the constable may retain possession of the replevin bond until the rendition of final judgment.—*Mooney v. Myers*, 5 Blackf. 331.

[c] (Sup. 1843)

A replevin bond executed in June, 1821, was taken and acknowledged before the clerk of a circuit court. The same clerk, since deceased, had issued execution on the bond, and his successor found the bond among the papers of the court. *Held*, that these facts were sufficient to establish the approval and filing of the bond, under the act of 1821, by the clerk in office at the date of the bond.—*Doe ex dem. Burge v. Cunningham*, 6 Blackf. 430.

[d] (Sup. 1860)

Where, in replevin, before a justice of the peace, a defendant goes into trial without objection to the bond, a defect in the bond, in not being in double the value of the property, is waived.—*Spencer v. Dickerson*, 15 Ind. 368.

[e] (Sup. 1870)

Under 2 Gav. & H. St. p. 598, which provides that the bond in a replevin suit shall "be payable to the defendant in a sum double the value of the goods," the bond should be double the value alleged in the complaint. A failure to comply gives good ground for a motion in arrest of judgment.—*Deardorff v. Ulmer*, 34 Ind. 353.

[f] (Sup. 1877)

2 Rev. St. 1876, p. 311, § 790, provides that no official or other bond shall be void for want of form or substance, or recital, or condition; and that in all actions on a defective bond plaintiff may suggest the defect in his complaint, and recover to the same extent as if it were perfect in all respects. *Held*, that a replevin bond in a justice's court is sufficient, though it provides for the payment of a specific sum, as required by statute in actions in the circuit court, instead of being "in a sum double the value of such goods," as required by 2 Rev. St. 1876, p. 628, in a replevin bond before a justice.—*Bugle v. Myers*, 59 Ind. 73.

[g] (Sup. 1877)

A replevin bond is not avoided by its erroneous description of the court in which the action is pending.—*Fuller v. Wright*, 59 Ind. 333.

[h] (Sup. 1877)

It is unnecessary to file a bond in an action of replevin, where the immediate delivery of the property is not demanded.—*Hodson v. Warner*, 60 Ind. 214.

[i] (Sup. 1878)

An undertaking in replevin signed by the surety only is valid.—*Phillippi Christian Church v. Harbaugh*, 64 Ind. 240.

[j] (Sup. 1881)

The obligors on a replevin bond are not relieved of liability thereon merely because the penalty of the bond was not double the value

of the property which was the subject-matter of the action.—*Carver v. Carver*, 77 Ind. 498.

[k] (Sup. 1882)

The issuing of a writ of replevin upon the filing of the bond is a sufficient approval of it by the justice.—*Coverdale v. Alexander*, 82 Ind. 503.

[l] (Sup. 1883)

An undertaking filed by plaintiff in replevin before a justice of the peace, as provided by Rev. St. 1881, § 1270, instead of the penal bond required by section 1547, is a substantial compliance with the latter section, and is valid and binding.—*Fawcner v. Baden*, 89 Ind. 587.

[m] (Sup. 1889)

Where a bond given by plaintiffs in replevin is delivered to the sheriff, who thereupon turns the property over to plaintiffs, there is an acceptance and approval of the bond.—*Hartlep v. Cole*, 120 Ind. 247, 22 N. E. 130.

[n] (App. 1892)

A bond filed on an application for a writ of replevin need not conform to the requirements of the bond set forth in Rev. St. 1881, § 1547, relating to proceedings in replevin, since section 1221 prescribes that no bond taken by any officer in the discharge of his duties shall be void for want of form, substance, recital, or condition.—*Lemert v. Shaffer*, 5 Ind. App. 468, 31 N. E. 1128, 32 N. E. 788.

A replevin bond is sufficient if it conforms to the requirements of Rev. St. 1881, § 1270, relating to proceedings in replevin in the circuit court, though it is not the particular kind of a bond required by section 1547, relating to proceedings in replevin in justice's court.—*Id.*

[o] (App. 1901)

Though *Hornor's Rev. St. 1897, § 1433*, gives justices of the peace jurisdiction in replevin where the value of the property does not exceed \$100, the procedure and practice are still governed by *Burns' Rev. St. 1894, § 1615* (*Hornor's Rev. St. 1897, § 1547*), requiring that in replevin before a justice a verified complaint and bond must be filed, in order to give the justice jurisdiction, and if the writ is issued without a bond the action is properly dismissed.—*Allen v. Frederick*, 59 N. E. 330, 26 Ind. App. 430.

FOR CASES FROM OTHER STATES.

SEE 42 CENT. DIG. Replev. §§ 138-153.
See, also, 34 Cyc. pp. 1441-1450.

§ 34. Writ.

FOR CASES FROM OTHER STATES.

SEE 42 CENT. DIG. Replev. §§ 154-159.
See, also, 34 Cyc. pp. 1451-1454.

§ 36. — Requisites and sufficiency in general.

[a] (Sup. 1835)

In an action of replevin the writ need not show that the affidavit required by the statute

had been made by the plaintiff.—*Magee v. Siggerson*, 4 Blackf. 70.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. § 157.

See, also, 34 Cyc. p. 1452.

§ 37. — Description and value of property.

[a] (Sup. 1835)

In an action of replevin, the writ must contain a description of the goods for which the action is brought.—*Magee v. Siggerson*, 4 Blackf. 70.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. § 158.

See, also, 34 Cyc. p. 1453.

§ 38. — Defects, objections, and amendment.

Estoppel of sureties, see PRINCIPAL AND SURETY, § 46.

[a] (Sup. 1848)

A writ of replevin against a sheriff, addressed to the sheriff, but delivered to and executed by the coroner, may be amended at the trial by substituting "coroner" for "sheriff" in the address of the writ.—*Simcoke v. Frederick*, 1 Ind. 54, Smith, 64.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. § 159.

See, also, 34 Cyc. p. 1453.

§ 40. Taking property under requisition, writ, or order.

[a] (Sup. 1892)

A constable, having in his possession a writ of replevin for a sewing machine, was admitted into the dwelling house of a third person with whom defendant in replevin was living, and, after ascertaining that the machine was there, left without serving his writ. Returning later in the day, he forced open the outer door of the house, which had been partially opened by the householder, but which she was endeavoring to close on ascertaining who was there. *Held* that, as the authority to break into a building or inclosure conferred in replevin by Rev. St. 1881, § 1271, is confined to sheriffs, the constable was guilty of a trespass, which rendered his subsequent acts unlawful, and justified the householder in resisting by force his further progress in serving the writ. 22 N. E. 553, reversed.—*State ex rel. McPherson v. Beckner*, 132 Ind. 371, 31 N. E. 950.

[b] (App. 1896)

A sheriff of one county cannot, under a writ of replevin, take property situated in another county from one claiming to own it, his powers being limited to his own county.—*Dederick v. Brandt*, 16 Ind. App. 264, 44 N. E. 1010.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 162-165.

See, also, 34 Cyc. p. 1456.

§ 41. Service of requisition, writ, or order, and accompanying papers.

Trespass by constable in serving writ, see SHERIFFS AND CONSTABLES, § 98.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 166-170.

See, also, 34 Cyc. pp. 1454-1457.

§ 44. Custody and care of property.

[a] (Sup. 1889)

Rev. St. 1881, § 1270, authorizing the appointment of receivers in actions of replevin, where the property claimed has a peculiar value that cannot be compensated by damages, does not alone control in that regard, but under section 1222, authorizing in general the appointment of receivers when "it may be necessary to secure ample justice to the parties," the court may, whenever justice requires it, appoint receivers in actions of replevin.—*Hellebush v. Blake*, 119 Ind. 349, 21 N. E. 976.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 174, 175.

See, also, 34 Cyc. p. 1458.

§ 45. Delivery of property to plaintiff.

[a] (Sup. 1866)

In an action to recover the possession of personal property wrongfully taken or unlawfully detained from the owner, the plaintiff need not demand the immediate possession of the property, but may leave possession to be determined by the final judgment.—*Catterlin v. Mitchell*, 27 Ind. 298, 89 Am. Dec. 501.

[b] (Sup. 1887)

The consideration for a bond executed by a plaintiff in replevin is the delivery to him under the writ of the property which he claimed.—*McFadden v. Fritz*, 10 N. E. 120, 110 Ind. 1.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. § 176.

See, also, 34 Cyc. p. 1458.

§ 46. Rights and liabilities of plaintiff in possession of property.

[a] (Sup. 1882)

Where goods are replevied from a sheriff by one claiming to own them and delivered to plaintiff, they cannot be taken from him under another execution against the same judgment debtor.—*Pipher v. Fordyce*, 88 Ind. 436.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 177, 178.

See, also, 34 Cyc. p. 1458.

§ 47. Proceedings for redelivery of property to defendant.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 179-186.

See, also, 34 Cyc. pp. 1459-1462.

§ 49. — Bonds or undertakings.

Actions on bonds, see post, §§ 127-135.
 Estoppel by, see ESTOPPEL, § 32.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 180-185.
 See, also, 34 Cyc. pp. 1461, 1462.

§ 51. Quashing or vacating requisition, writ, or order.

[a] (Sup. 1883)

The proper remedy of a defendant in replevin before a justice of the peace, who claims either that the affidavit is defective or the bond given by plaintiff insufficient, is by a motion to quash the writ for such defect, and not to dismiss the action.—*Fawcner v. Baden*, 89 Ind. 587.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 187-192.
 See, also, 34 Cyc. p. 1463.

§ 53. Return of requisition, writ, or order.

[a] (Sup. 1873)

The return of the sheriff on a writ of replevin is conclusive upon the parties to the action, and cannot be contradicted in such proceeding.—*Rowell v. Klein*, 44 Ind. 290, 15 Am. Rep. 235.

[b] (App. 1899)

Failure of an officer serving a writ of replevin to make his return on the writ does not affect the court's jurisdiction.—*Sterrett v. Timmons*, 52 N. E. 464, 21 Ind. App. 343.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 194-196.
 See, also, 34 Cyc. p. 1462.

§ 54. Effect of failure to replevy property.

[a] (Sup. 1846)

After the return of elongata to a writ of replevin, the plaintiff may have a writ of *capias* in withernam.—*Bennett v. Berry*, 8 Blackf. 1.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 197-199.

IV. PLEADING AND EVIDENCE.

Aider of pleading by verdict or judgment, see PLEADING, § 433.

Competency of husband or wife as witness in replevin proceedings by the other, see WITNESSES, § 52.

Competency of wife as witness in replevin suit by her husband, see WITNESSES, § 55.

Competency of witness, see WITNESSES, § 96.

In action by seller of goods on condition, see SALES, § 480.

Release of surety by filing new bond as affecting surety's competency as a witness, see WITNESSES, § 113.

§ 56. Declaration, complaint, or petition.

Aider by verdict or judgment, see PLEADING, § 433.

Conformity to process and variance, see PLEADING, § 74.

In justices' courts, see JUSTICES OF THE PEACE, § 91.

Pleading matters of fact or conclusions, see PLEADING, § 8.

Reference to other count or paragraph, see PLEADING, § 54.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 200-224.
 See, also, 34 Cyc. pp. 1464-1475.

§ 57. — Form and requisites in general.

[a] (Sup. 1880)

Where the complaint in an action of replevin before a justice of the peace stated that the property had not been taken on any "legal tax" assessment, fine, or execution, or any "legal" writ, the defect, if any, was cured by verdict.—*McPhelomy v. Solomon*, 15 Ind. 189.

[b] (Sup. 1866)

The objection that a complaint in replevin does not allege the value of the property is cured by a verdict assessing damages to the plaintiff for the detention thereof.—*Bales v. Scott*, 26 Ind. 202.

In an action of replevin for a note, a copy of the note need not be set out in the complaint.—*Id.*

[c] (Sup. 1866)

In an action to recover the possession of personal property wrongfully taken or unlawfully detained from the owner, it is sufficient to allege the plaintiff's right to the possession of the property, its description and value, and that it was wrongfully taken or unlawfully detained from him.—*Catterlin v. Mitchell*, 27 Ind. 298, 80 Am. Dec. 501.

[d] (Sup. 1877)

A complaint for detention of chattels is sufficient if it describes the personal property, alleges the ownership, the unlawful detention, and the right to possession, and that the same has not been taken by virtue, of any execution, or other writ against the plaintiff. 2 Rev. St. 1876, p. 628, § 71.—*Deacon v. Powers*, 57 Ind. 489.

[e] (Sup. 1879)

A complaint to replevy goods from a sheriff, alleging that plaintiff was owner and entitled to possession of an undivided interest in personal property unlawfully seized and unlawfully detained by the defendant, etc., is sufficient.—*Schenck v. Long*, 67 Ind. 579.

[f] (Sup. 1880)

A complaint in an action for the recovery of personal property, alleging merely that plaintiff is the owner of certain personal property, and not that he is entitled to the possession thereof, and containing no allegation that the same either has been wrongfully taken or is

unlawfully detained by defendant, is bad, on a demurrer thereto, for the want of sufficient facts.—*Entsminger v. Jackson*, 73 Ind. 144.

[c] (Sup. 1831)

An allegation in a complaint in replevin, that defendants "unlawfully and wrongfully took from the plaintiffs and converted to their own use" certain personal property, was sufficient, after verdict, to show that the property was taken without leave, and not returned.—*Roberts v. Porter*, 78 Ind. 130.

[h] (Sup. 1831)

In a suit to recover the possession of certain property and damages for detention, a complaint containing all the allegations required in a complaint in replevin and all the statutory requisites of an affidavit to obtain a writ for the delivery of the property and which was duly verified was sufficient.—*Cox v. Albert*, 78 Ind. 241.

[i] (Sup. 1834)

A complaint in replevin which fails to allege that the property is detained in the county of venue is good after verdict.—*Hoke v. Applegate*, 92 Ind. 570.

[j] (Sup. 1890)

Rev. St. 1881, § 1266, provides that when any personal goods are wrongfully taken or unlawfully detained from the owner or person claiming the possession thereof, or when taken on execution or attachment or claimed by any person other than the defendant, the owner or claimant may bring an action for the possession thereof. Section 1267 provides that, if the plaintiff claims immediate possession of the property, he or some one in his behalf, must make an affidavit showing certain facts. *Held*, that a complaint in replevin alleging that the plaintiffs were the owners and entitled to the possession of certain property which the defendant has possession of without right and unlawfully detained from the plaintiffs seized under an execution issued on a judgment which had been paid and which was paid before the execution issued is sufficient to try the title to the property.—*Turpie v. Fagg*, 22 N. E. 743, 124 Ind. 476.

[k] (App. 1831)

Rev. St. 1881, § 1547, does not require the complaint in replevin to allege that the property is detained in the county wherein the suit is brought.—*Gould v. O'Neal*, 1 Ind. App. 144, 27 N. E. 307.

[l] (App. 1831)

In replevin it is not necessary that the complaint allege that the action was brought in the proper township.—*Buck v. Young*, 27 N. E. 1106, 1 Ind. App. 558.

[m] (App. 1898)

A complaint in replevin stated that plaintiff was the owner and entitled to possession of a note for \$274.25; that defendant unlawfully detained possession of it; that said note had been discharged by plaintiff by giving defend-

ant another note for \$290, "in lieu of and in place of and to discharge the said note of \$274.25 and interest in full on the same, which said note the said defendant also holds." *Held* bad, in that it did not allege that defendant agreed to accept the last note as payment of the first, or that a demand had been made.—*Combs v. Bays*, 49 N. E. 358, 19 Ind. App. 263.

[n] (App. 1898)

Plaintiff alleged his appointment as administrator; that his decedent was the owner of certain notes, which defendant was in possession of, and wrongfully detained; and that he had demanded possession, which had been refused. *Held* to sufficiently state a cause of action in replevin.—*McAfee v. Montgomery*, 51 N. E. 957, 21 Ind. App. 196.

[o] (Sup. 1905)

A complaint to recover possession of a dwelling house to be sufficient must aver that it is personal property.—*Adams v. Tully*, 164 Ind. 292, 73 N. E. 595.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 200-205, 207.

See, also, 34 Cyc. p. 1464.

§ 58. — Title and right to possession of plaintiff.

[a] (Sup. 1842)

A declaration in replevin by husband and wife should show specially the wife's interest in the goods.—*Gentry v. Bargas*, 6 Blackf. 261.

[b] (Sup. 1873)

A complaint in replevin that does not allege ownership of the property, but only alleges a promise of the defendant to vest the ownership in the plaintiff on certain conditions being complied with, is bad.—*Bailey v. Troxell*, 43 Ind. 432.

[c] (Sup. 1877)

In an action for detention of logs, an allegation as to the title of the land is immaterial; the gist of the action being merely as to the right of possession of the logs.—*Deacon v. Powers*, 57 Ind. 489.

[d] (Sup. 1879)

In replevin of a note, a complaint describing a note payable to a third person, and not assigned to the plaintiff, is sufficient.—*High-note v. White*, 67 Ind. 596.

[e] (Sup. 1831)

An assignee may, in replevin, allege generally that he is owner, and need not set up that he is owner of the goods "as assignee."—*Krug v. McGilliard*, 76 Ind. 28.

[f] (Sup. 1834)

In replevin by a guardian, the allegation that "plaintiff, as guardian, is entitled to possession," sufficiently alleges title.—*Hoke v. Applegate*, 92 Ind. 570.

[g] (Sup. 1899)

General allegations, in a complaint in replevin, that plaintiff is entitled to possession, and that defendant's possession is unlawful, are of no avail on demurrer, where it also contains specific allegations as to the character of plaintiff's title, showing him not entitled to possession.—*Thieme v. Zumpe*, 52 N. E. 449, 152 Ind. 350.

[h] (App. 1899)

In replevin, a complaint which alleges that plaintiff is the owner and entitled to immediate possession of certain described personal property, unlawfully detained by defendant, contains a sufficient averment of title.—*Goodman v. Sampliner*, 54 N. E. 823, 23 Ind. App. 72.

[i] (App. 1900)

Where, in replevin, plaintiff averred he purchased a laundry from defendant, that part of the equipment was a certain ironing machine, which was pointed out to him, but that another one was substituted in the bill of sale, which fact was not discovered by him because of his ignorance of the names of both machines, and that, when the wrong machine was shipped him, he refused to receive the same, it was not necessary to set out the bill of sale, or ask that it be reformed, since the foundation of the action was not the bill of sale, but plaintiff's right of possession of the machine purchased.—*Bain v. Trixler*, 56 N. E. 690, 24 Ind. App. 246.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 211-214.

See, also, 34 Cyc. pp. 1468-1470.

§ 59. — Description and value of property.

Insufficiency of description as ground for arrest of judgment, see JUDGMENT, § 263.

[a] (Sup. 1843)

In replevin in the detinue, which is now the usual form, the declaration need not state the value of the goods.—*Britton v. Morss*, 6 Blackf. 469.

[b] (Sup. 1868)

In a complaint in replevin, a description of the property as "a box of skins and furs marked J. Windoes, Logansport, Indiana," is a sufficient identification.—*Minchrod v. Windoes*, 29 Ind. 288.

[c] (Sup. 1868)

The description of the property in a complaint in replevin as "one white shoat, of the value of fourteen dollars," is sufficiently specific.—*Onstatt v. Ream*, 30 Ind. 259, 95 Am. Dec. 695.

[d] (Sup. 1878)

A description of the property in replevin as "one crib of corn, said crib being the north crib of three cribs situate south of the house," is sufficient.—*Smith v. Stanford*, 62 Ind. 392.

[e] (Sup. 1884)

A description in a complaint in replevin, "A certain number of bills or U. S. treasury notes, commonly called 'greenbacks,' amounting to \$11,272.86. The denominations of said bills plaintiff is unable to give, for the reason that the same are in the possession of defendant"—is sufficiently definite.—*Hoke v. Applegate*, 92 Ind. 570.

A complaint in replevin describing the property as "one lot of paper money of the lawful funds of the United States, known as United States treasury notes, commonly called 'greenbacks,' of the amount and value of \$9,514, one lot of paper money of the lawful funds of the United States, known as national bank notes, commonly called 'blackbacks,' of the amount and value of \$9,514, one lot of paper money of the lawful funds of the United States, composed of United States treasury notes, commonly called 'greenbacks,' and national bank notes, commonly called 'blackbacks,' of the amount and value of \$9,514." *Held*, that after verdict this description is sufficient.—*Id.*

[f] (Sup. 1889)

A complaint, describing the property as a certain quantity of wheat of a certain value, "said wheat having grown in and harvested" on a specified date, "having been threshed off the following described real estate, and the wheat grown situate thereon," a description of the real estate then being given, is not bad because too indefinite.—*Hall v. Durham*, 20 N. E. 282, 117 Ind. 429.

[g] (App. 1891)

In replevin for a horse a complaint is sufficient as to description which describes the property as "one gray horse, six years old this spring, about 16¼ hands high, with a small knot about half-way between the right nostril and right eye, near the front of face or nose, with collar mark on top of neck, dark mane and tail, with top end of tail light in color."—*Wood v. Darnell*, 1 Ind. App. 215, 27 N. E. 447.

[h] (App. 1907)

A complaint in replevin to recover "a certain car plant" in the possession of defendant corporation, near B., in a designated county and state, contained a sufficient description of the property.—*Indiana Union Traction Co. v. Bick*, 40 Ind. App. 451, 81 N. E. 617.

[i] (App. 1909)

The complaint, in an action to recover stock of a bank, showing that defendants wrongfully procured to be transferred to them 10 shares of stock thereof belonging to plaintiff, is sufficient, without describing the particular certificate by which plaintiff claimed to hold such stock.—*Hill v. Kerstetter*, 43 Ind. App. 431, 86 N. E. 997, 87 N. E. 695.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 215-218.

See, also, 34 Cyc. pp. 1471, 1472.

§ 60. — Taking and detention by defendant.

[a] (Sup. 1858)

If a complaint fail to comply with 2 Rev. St. p. 464, § 71, requiring that, in proceedings before a justice for the return of property, the complaint shall allege that the property has not been taken under an execution or other writ, shall be verified by affidavit, and a proper bond filed, before the writ issue, the court has no jurisdiction, and an objection to the sufficiency of the complaint should be sustained.—*Dowell v. Richardson*, 10 Ind. 573.

[b] (Sup. 1875)

In replevin in justice's court, a complaint which does not allege, as required by 2 Gav. & H. St. p. 598, § 72, that the property has not been taken by virtue of an execution or other writ against the plaintiff, or, if it has been so taken, that the same is exempt from execution, is bad.—*McCoy v. Reck*, 50 Ind. 283.

In replevin, a complaint which alleges that the property in question was given by plaintiff to defendant in exchange for other personal property, on false and fraudulent representations made by defendant set out in the complaint, but which does not allege the rescission of the contract of exchange, is bad.—*Id.*

[c] (Sup. 1883)

A complaint in replevin need not aver that the property was not taken for a tax, assessment, or fine, or seized under an execution or attachment against plaintiff.—*Payne v. June*, 92 Ind. 252.

[d] (Sup. 1884)

In replevin, objection to certain paragraphs of the amended complaint that none of them states that the property was detained in the county where the suit was commenced is not valid.—*Hoke v. Applegate*, 92 Ind. 570.

[e] (Sup. 1885)

A complaint in an action to recover the possession of personal property, alleging "that the said property has been wrongfully detained by the defendant, under color of an execution issued by C., justice of the peace of Pike county, Indiana, in favor of said defendant, against the property of" plaintiff, "which execution, and the judgment upon which the same purports to have been issued, are, as plaintiff believes and charges, absolutely void," is bad on demurrer for want of sufficient facts. It does not allege that the property is unlawfully detained.—*Louisville, E. & St. L. Ry. Co. v. Payne*, 103 Ind. 183, 2 N. E. 582.

[f] (Sup. 1890)

Under Rev. St. 1881, § 1266, providing that when any personal goods are wrongfully detained from the owner, or person claiming possession thereof, the owner or claimant may bring an action for the possession thereof, an allegation in a complaint that plaintiff is entitled to the possession of the property, which defendant has possession of without right, and unlawfully

ly detains from plaintiff, is sufficient to entitle plaintiff to maintain an action for the possession of the property, although it is not averred, as required by section 1267, that the property had not been seized on execution, or if so was exempt.—*Turpie v. Fagg*, 124 Ind. 476, 22 N. E. 743.

[g] (Sup. 1890)

It is not necessary to allege, in an action for the unlawful detention of chattels, that defendant unlawfully obtained possession.—*Ross v. Menefee*, 125 Ind. 432, 25 N. E. 545.

[h] (App. 1891)

In replevin, an allegation in the complaint that defendant "unlawfully holds" the property is equivalent to an allegation that it is "unlawfully detained," within the meaning of Rev. St. 1881, § 1547.—*Gould v. O'Neal*, 1 Ind. App. 144, 27 N. E. 307.

[i] (App. 1894)

A complaint in replevin against a town which alleges that the property claimed was taken by the town marshal to satisfy a tax assessed against plaintiff, and which does not allege that the tax was illegal, is demurrable.—*Town of Andrews v. Sellers*, 11 Ind. App. 301, 38 N. E. 1101.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 219-222.

See, also, 34 Cyc. pp. 1473, 1474.

§ 61. — Demand.

[a] (Sup. 1842)

If, in an action of replevin commenced before a justice of the peace, the affidavit filed be such as the statute on the subject requires, no other statement of the demand is necessary.—*Andre v. Johnson*, 6 Blackf. 188.

[b] (Sup. 1890)

Plaintiff sued to recover personal property which he alleged had been obtained from him by fraud and duress. The averments were that defendant threatened to arrest, imprison, and send plaintiff to state prison for the crime of rape; threatened to beat and wound him; refused to permit him to confer with an attorney, or to consult with his friends; that defendant and another induced him to believe that they were armed with deadly weapons; and that they put him in great fear; also, that defendant knew that plaintiff was not guilty of the offense charged, and that the property was surrendered because of such wrongful acts, and upon no other consideration. *Held*, that the complaint stated a good cause of action, and was not bad because it did not allege a rescission or demand by plaintiff.—*Reynolds v. Copeland*, 71 Ind. 422.

[c] (Sup. 1890)

A complaint in replevin is demurrable for want of an allegation of a demand, notwithstanding it alleged that defendant had possession without right, where there was a specific

allegation showing that defendant had possession under a claim of right.—*Thieme v. Zumpe*, 52 N. E. 440, 152 Ind. 359.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. § 223.

See, also, 34 Cyc. p. 1474.

§ 63. Plea, answer, or affidavit of defense, in general.

Admissions, see PLEADING, § 129.

Matter in avoidance, see PLEADING, § 136.

Pleading matters of fact or conclusions, see PLEADING, § 8.

[a] (Sup. 1823)

A defendant in replevin, as in other pleas, may plead several pleas.—*Martin v. Ray*, 1 Blackf. 291.

[b] (Sup. 1823)

In replevin, defendant cannot plead in bar to the action before the cause of action is made known by a declaration.—*Liggit v. Kintner*, 1 Blackf. 532.

[c] (Sup. 1834)

Defendant in replevin pleaded that he was a constable, and "that two executions dated on," etc., "issued by a justice of the peace, were directed to him, and that he levied these executions on the goods of L., which were the same goods mentioned in the declaration, and were not the goods of the plaintiff." *Held*, that while this was not a sufficient plea of justification, because it failed to sufficiently describe the writs, it was good as a plea of property in a stranger, and the other averments might be considered as surplusage.—*Parsley v. Huston*, 3 Blackf. 348.

[d] (Sup. 1836)

In replevin, the first plea was of property in one S. P.; the second, that the defendant took the goods as constable by virtue of an execution against S. P., and that the goods belonged to S. P. *Held*, that the second plea might be rejected on motion of the plaintiff; it being substantially the same with the first.—*Mann v. Perkins*, 4 Blackf. 271.

[e] (Sup. 1837)

In replevin for the unlawful detainer of goods, "non cepit" is not a good plea. The general issue in such case is "non detinet."—*Walpole v. Smith*, 4 Blackf. 304.

[f] (Sup. 1841)

A plea to an action of replevin brought by A. B. that by virtue of a distress warrant, etc. directed to the defendant a constable, etc., against C. D. (setting out the substance of the warrant), the defendant distrained the goods specified in the declaration of the demised premises for rent, etc., is good.—*Harris v. Boggs*, 5 Blackf. 489.

[g] (Sup. 1842)

A plea, in replevin, of property in a stranger or in the defendant, denies the plaintiff's

property in the goods, and gives the plaintiff a right to begin.—*Gentry v. Bargas*, 6 Blackf. 261.

A plea in replevin, relying on the defendant's seizure of the goods as a constable under an execution against a third person, should aver the property of the goods to be in such third person.—*Id.*

[h] (Sup. 1846)

In replevin for unlawfully detaining plaintiff's horse, defendant pleaded that he had taken up the horse as an estray, defendant being then and there a householder; that within two days thereafter he had advertised the horse as taken up, particularly describing the animal, in three public places of the township; that, before 10 days had expired after such advertising, plaintiff had brought this action, and had thereby obtained possession of the horse. *Held*, that the plea was sufficient to show that defendant's possession of the horse was lawful.—*Barnes v. Tannehill*, 7 Blackf. 604.

[i] (Sup. 1848)

A plea of "non cepit" admits property in the plaintiff.—*Simcoke v. Frederick*, 1 Ind. 54, Smith, 64.

A plea of property in a stranger does not admit property in the plaintiff, and in such case the plaintiff must prove property in himself to entitle him to recover.—*Id.*

[j] (Sup. 1851)

In replevin in detainer, the general issue raises the question of the property of the plaintiff.—*Ashby v. West*, 3 Ind. 170.

[k] (Sup. 1855)

In replevin, the plea of non detinet, under Rev. St. 1843, put in issue, not only the detention of the goods but also the property of the plaintiff therein.—*Noble v. Epperly*, 6 Ind. 414.

[l] (Sup. 1861)

The defendant, in a suit for replevin for a horse, answered that up to and after the date of the suit the horse was in another county. *Held*, that this was a question of fact pleaded in abatement, and that, if not pleaded, it would have been waived.—*Keller v. Miller*, 17 Ind. 206.

[m] (Sup. 1863)

2 Rev. St. p. 34, § 33, provides that an action of replevin shall be commenced in the county where defendants, or some one of them, has his usual place of residence; that where there are several defendants, residing in different counties, the action may be brought in any county where either defendant resides, and a separate summons may be issued to any other county where defendants may be found; and in cases of nonresidents or persons having no permanent residence in the state, the action may be commenced and process served in any county where they may be found. *Held*, that in such an action where, of several defendants, some reside in the county where it is brought, and others reside out of it, and plaintiff dis-

misses as to the former, the nonresidents should be allowed to file a plea in abatement setting up that the former were not necessary parties, but were made so for the fraudulent purpose of obtaining jurisdiction over the nonresidents in a court properly having no jurisdiction.—*Shryer v. Miner*, 20 Ind. 175.

[n] (Sup. 1866)

Where A. brought replevin against the sheriff to recover possession of personal property, which he had seized under execution, an answer which alleged that the property belonged to B. and was fraudulently held in the name of A., and that defendant had in his hands an execution against A., and had seized the property under such writ, was bad for not showing that the execution was against the goods and chattels of A., since, if it was against his person, the sheriff had no right to make the levy.—*Debord v. La Hue*, 26 Ind. 212.

[o] (Sup. 1867)

Where the treasurer has by deputy seized property for the payment of taxes, it is not necessary that his answer, justifying the seizure, should show that the deputy had been sworn as such.—*Noland v. Busby*, 28 Ind. 154.

[p] (Sup. 1867)

In an action for the possession of personal property, the defendant set up, among other things, that he held the property in question as sheriff under an order of attachment duly issued out of the office of the clerk of the circuit court against the property of a third person, whose property it was. A copy of the writ was made a part of the paragraph. *Held*, that the writ was valid on its face, and that the answer was good as a plea of property in a stranger.—*Levi v. Darling*, 28 Ind. 497.

In an action for the possession of personal property defendant answered, among other grounds of defense, that he held the property as sheriff under an order of attachment duly issued out of the office of the clerk of the V. circuit court against the property of A., whose property it was, etc. *Held*, that the sheriff had a right to retain the writ of attachment until the return of the goods replevied from him, so that he could proceed with its execution.—*Id.*

[q] (Sup. 1869)

Where defendant justifies the seizure and detention of property as a constable by virtue of an execution in his hands, the original execution or a copy thereof must be filed with his answer.—*Bridges v. Layman*, 31 Ind. 384.

[r] (Sup. 1872)

Since defendant in replevin may show under a general denial that the title of the property is in a third person, a paragraph in the answer which, in addition to the general denial, sets up title in a third person, is bad as argumentative.—*Davis v. Warfield*, 38 Ind. 461.

[s] (Sup. 1873)

In an action to recover possession of personal property, an answer of property in a stranger, or in the defendant, in effect denies the property or ownership of the plaintiff, and is a good plea in bar.—*Landers v. George*, 40 Ind. 180.

[t] (Sup. 1873)

In an action to recover the possession of personal property, the general denial is a good answer. Property in the defendant and another is also good, but unnecessary when the general denial is in.—*Thompson v. Sweetser*, 43 Ind. 312.

[u] (Sup. 1873)

Since proof of ownership may be made by defendant in replevin under general denial, it was not error to strike out a special answer setting up property in the defendant.—*Sparks v. Heritage*, 45 Ind. 68.

[v] (Super. 1873)

Where a constable, in answer to a complaint in replevin, pleads that he levied on the property as the property of the plaintiff to satisfy an execution issued upon a judgment rendered before a justice of the peace against the plaintiff, the execution upon which the levy is made is not a written instrument, within the meaning of the statute requiring such to be filed with the pleading. It is but evidence of the facts alleged in the answer, and need not be made a part of the answer.—*Thurston v. Boardman*, Wils. 433.

[w] (Sup. 1879)

The answer in replevin alleged that defendant was a constable, and that he levied on the property and took possession thereof as the property of the O. Company, but did not aver that the property belonged to the O. Company and was subject to execution. *Held* bad on demurrer.—*Olds v. Andrews*, 66 Ind. 147.

[ww] (Sup. 1879)

A complaint in replevin alleged title and right of possession at the date of the commencement of the suit. The answer merely alleged title in the defendant at the date of the filing of the answer, based on an alleged sale, before the beginning of the suit, for storage charges, on a contract to which it was not alleged that plaintiff was a party. *Held*, that the answer was insufficient.—*Smith v. Little*, 67 Ind. 549.

[x] (Sup. 1880)

Where, in replevin for a horse, defendant sets up a lien on the animal and a sale to enforce the same, at which he was purchaser, the answer is sufficient, though it appears therefrom that the sale was invalid.—*Shappen-docia v. Spencer*, 73 Ind. 128.

An answer in replevin for a mare setting up a livery keeper's lien and a sale of the mare thereunder need not include as a part thereof the notice of sale or a copy thereof, but it is

sufficient to aver what the notice contained.—Id.

[xx] (Sup. 1883)

In replevin, an answer is sufficient which alleges that defendants purchased the property at a constable's sale and are the owners of it, that the only title under which plaintiff claims is by virtue of a chattel mortgage, and that the mortgage was made to defraud creditors and is void.—*McFadden v. Fritz*, 90 Ind. 590.

[y] (Sup. 1885)

As one who is not actually or constructively in possession of the property cannot properly be made a defendant in a replevin suit, if he is made a defendant on the ground of claiming "some interest," and files a general denial, no issue is thereby raised.—*Van Gorder v. Smith*, 90 Ind. 404.

[yy] (Sup. 1889)

In replevin for property claimed by plaintiff as vendee, an answer averring that defendant had taken possession of the property as assignee of the vendor, and objecting to the jurisdiction of the court in an action brought against him as such assignee but which does not deny plaintiff's ownership or right to possession of the property sued for, or that defendant's detention of the property is wrongful, is insufficient.—*Martz v. Putnam*, 117 Ind. 392, 20 N. E. 270.

[z] (Sup. 1890)

In an action to recover personal property, the complaint failed to aver that the property was unlawfully detained in the county in which suit was brought. Defendants pleaded in abatement that they were nonresidents, that they had never been in said county, and that they had not been served with process therein. *Held*, that the plea was not demurrable.—*Rauber v. Whitney*, 125 Ind. 216, 25 N. E. 186.

[zz] (App. 1909)

In replevin against a purchasing agent to recover certain wool on which the agent claimed a lien for advances and commissions, the agent was not bound to negative a waiver of his lien in his answer, since the lien may continue as between claimant and the owner after possession is changed, if there is no intention on the lienor's part to relinquish it.—*Welker v. Appleman*, 90 N. E. 35.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 225-238.
See, also, 34 Cyc. pp. 1476-1482.

§ 64. Avowry or cognizance and plea thereto.

Verdict and findings, see post, § 96.

[a] (Sup. 1838)

An avowry for rent due need not show that a warrant, founded on oath, had been taken out before making the distress, nor that the goods distrained belonged to the tenant;

nor need it set out the particulars of the landlord's title.—*Wright v. Mathews*, 2 Blackf. 187.

[b] (Sup. 1848)

The office of an avowry is not to deny property in the plaintiff, but to set up some right in the defendant to take the property in dispute, without regard to the ownership.—*Simcoke v. Frederick*, 1 Ind. 54, Smith, 64.

In replevin against a sheriff, a plea that defendant took the goods by virtue of an execution against one A. in favor of a third party, with an averment that the goods were the property of said A., is no more than a plea of property in a stranger, and does not amount to an avowry.—Id.

[c] (Sup. 1851)

An avowry for rent due need not show that the goods distrained belonged to the tenant.—*Applegate v. Crawford*, 2 Ind. 579.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 239-241.
See, also, 34 Cyc. pp. 1482-1485.

§ 66. Replication or reply.

[a] (Sup. 1859)

The complaint in replevin alleged ownership and right of possession in himself, and possession without right and unlawful detention by the defendant. The defendant answered that he did not unlawfully detain, but that the property was in a stranger. *Held*, that this last allegation was an argumentative denial of property in the plaintiff and so there was a good issue on both allegations without a reply.—*Riddle v. Parke*, 12 Ind. 89.

[b] (Sup. 1872)

In an action to recover possession of personal property, an answer of property in a stranger, or in the defendant, in effect denies the property or ownership of the plaintiff, and is a good plea in bar, and completes the issue without a reply.—*Landers v. George*, 40 Ind. 160.

[c] (Sup. 1884)

To an action in replevin by the guardian of an insane person, defendant answered that the ward gave the property to defendant, and plaintiff made reply that the ward was insane, and that since his appointment he (the guardian) had demanded the property and revoked the gifts. *Held*, that the reply was bad for not alleging a continuance of the ward's insanity, a judicial determination that he was insane, and that the guardian was lawfully appointed and qualified.—*Hoke v. Applegate*, 92 Ind. 570.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 243, 244.
See, also, 34 Cyc. pp. 1486, 1487.

§ 67. Demurrer.

Effect as opening record, see PLEADING, § 217.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

[a] (Sup. 1880)

A complaint for the claim and delivery of personal property described several notes and mortgages securing them which had been executed and delivered to the plaintiff and which were his property and in his possession until obtained from him by the defendants, and averred that the notes and mortgages were obtained from plaintiff by fraud, and while he was under duress, in that defendants threatened to arrest, imprison, and send plaintiff to the state prison for a felony and threatened to wound him and refused to permit plaintiff to confer with an attorney or consult with his friends, and that defendant and another did with acts, threats, and gestures induce the plaintiff to believe that they were armed with deadly weapons, and that they put plaintiff in great fear. It was also averred that the defendants knew that the plaintiff was not guilty of the crime charged, and that the instruments in controversy were surrendered because of such wrongful acts, and on no other consideration. *Held*, that the complaint was sufficient to withstand demurrer.—*Reynolds v. Copeland*, 71 Ind. 422.

[b] (Sup. 1880)

Where an answer in replevin alleged "that on said — day of —, 1876, defendants had acquired a lien upon said mare," etc., the omission to state the day and month on which the lien accrued rendered the answer subject to a motion to make more specific, but did not render it obnoxious to a demurrer for want of facts.—*Shappendocia v. Spencer*, 73 Ind. 128.

[c] (Sup. 1882)

Where the plaintiff sues to recover the possession of a specific share and certain quantity of wheat, of which he alleges that he is the owner and entitled to the possession, and that defendant has possession thereof without right, and unlawfully detains the same from the plaintiff, the complaint is sufficient to withstand a demurrer thereto for the want of facts. The joint ownership of the wheat by the plaintiff and defendant, if it exists, is not apparent on the face of the complaint, and is matter of defense, to be shown by the answer.—*Ingel v. Scott*, 86 Ind. 518.

[d] (App. 1894)

Where no proper affidavit accompanies the complaint in replevin, the plaintiff is not entitled to possession of the property, but the action proceeds nevertheless so that the title to the property or the ultimate right to the possession thereof may be determined, and in no event does the failure of the complaint to contain the averment that the property was not taken for a tax render the pleading bad on demurrer.—*Town of Andrews v. Sellers*, 38 N. E. 1101, 11 Ind. App. 301.

[e] (App. 1902)

The cross-complaint is not defective on demurrer for failing to allege the county in which it is believed that the goods are detained.—*Tanner v. Mishawaka Woolen Mfg. Co.*, 63 N. E. 313, 28 Ind. App. 536.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 246-250.
See, also, 34 Cyc. pp. 1487, 1488.

§ 68. Amended and supplemental pleadings.

Discretion of court, see PLEADING, § 236.

In justices' courts, see JUSTICES OF THE PEACE, § 96.

[a] (App. 1900)

In replevin, an amendment to defendant's answer, made after the close of the evidence, which alleged that the plaintiff, in a former attachment suit involving the same property, made claim to it, and was represented by counsel, and that the judgment in such suit was against the nominal plaintiffs, who, in reality, represented the present plaintiff, was good against a demurrer for want of facts, since it showed that plaintiff was privy to the former action, and was bound by the judgment therein.—*Case v. Moorman*, 58 N. E. 85, 25 Ind. App. 293.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 251-256.
See, also, 34 Cyc. pp. 1489, 1490.

§ 69. Issues, proof, and variance.

[a] (Sup. 1840)

The plea of non cepit in replevin admits property in the plaintiff, and puts in issue only the caption, and the defendant cannot show property out of the plaintiff under it.—*Trotter v. Taylor*, 5 Blackf. 431.

[b] (Sup. 1842)

The defendant in an action of replevin commenced before a justice of the peace, and taken by appeal to the circuit court, may, by the statute of Indiana, prove property in himself or a stranger without pleading it.—*Lewis v. Masters*, 6 Blackf. 243.

[c] (Sup. 1857)

If commenced before a justice and appealed to the circuit court, the defendant may prove property in himself or in a stranger under the general issue, without pleading it.—*Hall v. Henline*, 9 Ind. 256.

[d] (Sup. 1861)

In a suit for the possession of personal property, the answer was—First, a general denial; and second, a claim under a mortgage. A reply alleged that the mortgage was procured by a fraudulent representation, and the incapacity of the defendant to execute it. *Held*, that a demurrer to the defective paragraph of the reply reached back to the defective answer, to which it was offered in reply, and which was bad for a failure to properly plead the mortgage; that the defendant, being thus left to his general denial, might offer his right of possession under the mortgage, as evidence in defense.—*Louchheim v. Gill*, 17 Ind. 139.

[e] (Sup. 1872)

Under a general denial in replevin, defendant may show title in a third person.—*Kennedy v. Shaw*, 38 Ind. 474.

[f] Defendant in replevin may give evidence of his ownership of the property, under a general denial.—(Sup. 1873) *Sparks v. Heritage*, 45 Ind. 66; (1878) *May v. Pavey*, 63 Ind. 4.

[g] (Sup. 1874)

An averment of property in defendant in replevin is sustained by a proof of a qualified property, such as a lien for services upon the goods claimed.—*Darter v. Brown*, 48 Ind. 395.

[h] (Sup. 1875)

In an action for the recovery of the possession of personal property, defendant may, under an answer of general denial, prove that he is a constable and holds the property as such, by virtue of a levy made thereon by him under an execution in his hands issued on a judgment against a third person, and that the property is owned by the plaintiff, and such third person jointly as partners.—*Branch v. Wiseman*, 51 Ind. 1.

[i] (Sup. 1877)

Where in an action to replevy personal property, brought against the defendant personally, he claims possession of the same as administrator of the estate of a decedent, it is necessary, to establish such defense, that he show, not merely that he came into lawful possession of the property as such administrator, but also that it is the property of such estate.—*Rose v. Cash*, 58 Ind. 278.

[j] (Sup. 1879)

A complaint in replevin against a sheriff, alleging that plaintiff was the owner and entitled to the possession of an undivided interest in personal property unlawfully seized and detained by defendant, is not sustained by proof of the seizure of the undivided interest of plaintiff's co-owner.—*Schenck v. Long*, 67 Ind. 579.

[k] (Sup. 1879)

In an action to recover possession of personal property, the allegation that defendant has possession thereof without right, and unlawfully detains the same from plaintiff, constitutes the gravamen of the complaint, and must be proved, to entitle plaintiff to recover.—*Krug v. Herod*, 69 Ind. 78.

[l] (Sup. 1881)

An action under Code, § 128, to recover the possession of personal property shown to have been wrongfully taken and unlawfully detained by defendant, in which no order for the seizure of the property is demanded or issued, may be maintained without proof by plaintiff that the detention of the property by defendant was in the county where the action was brought; such proof, if necessary in any case, being required only where the immediate possession of the property is demanded.—*Robinson v. Shatzley*, 75 Ind. 461.

[m] (Sup. 1881)

In an action of replevin there need be no direct evidence of the county where the goods are detained, but it may be inferred.—*Louthain v. May*, 77 Ind. 109.

[n] Although the affidavit in replevin must state in what county the property is detained, this allegation need not be proved.—(Sup. 1881) *Cox v. Albert*, 78 Ind. 241; (App. 1891) *Buck v. Young*, 1 Ind. App. 558, 27 N. E. 1106.

[o] (Sup. 1888)

Replevin will not lie to recover property taken for taxes, and plaintiff in replevin must prove that the property claimed was not taken for a tax assessment.—*Maple v. Vestal*, 114 Ind. 325, 16 N. E. 620.

[p] (Sup. 1888)

In replevin for five hogs, where the constable's return shows that he has taken four, and no return is made that the other one could not be found, the evidence is properly confined to the four seized, under Rev. St. 1881, § 1549, relating to replevin in justices' courts, providing that, if the property cannot be found, the suit shall proceed as if it had been so found.—*Burket v. Pheister*, 114 Ind. 503, 16 N. E. 813.

[q] (App. 1891)

In an action of replevin by a mortgagee, the property was described in the complaint as "one sorrel gelding horse, with hind hoofs and bald face, about 16½ hands high, and 12 years old, worth \$80." It was described in the mortgage as "one sorrel gelding horse, white hind feet, with bald face, about 16½ hands high, 12 years old, worth \$80, now in possession of the mortgagor." The evidence showed that the horse that was mortgaged was the one replevied, and that it was about 16 years old and 15½ hands high, with one hind leg white nearly to the knee, and one fore leg white up to and above the pastern joint. *Held*, that there was no material variance.—*Buck v. Young*, 1 Ind. App. 558, 27 N. E. 1106.

In replevin it is not necessary to prove the township in which the defendant resides.—*Id.*

A mortgage by virtue of which the right of possession to property is claimed in replevin is not the foundation of the action, and hence, if the property is sufficiently described in the complaint, a somewhat different description in the mortgage introduced to sustain the cause of action does not constitute a fatal variance.—*Id.*

[r] (App. 1892)

In replevin, the plaintiff must rely upon his own title, and not upon the want of title in the defendant; and under an answer of general denial the defendant may give any evidence tending to show want of title in the plaintiff, and hence may show title in himself or in a third person.—*Swope v. Paul*, 31 N. E. 42, 4 Ind. App. 463.

[s] (App. 1894)

In an action to recover possession of property seized under execution, the general denial to the complaint put in issue the entire question of ownership and the right of possession of the plaintiff and anything that tended to negative the proposition that the plaintiff was the owner was legitimate evidence for defense.—*Benjamin*

v. McElwaine-Richards Co., 37 N. E. 362, 10 Ind. App. 76.

[t] (App. 1895)

In replevin by a purchaser at a sheriff's sale, defendant may, under a general denial, show that such sale was absolutely void.—Shipman Coal Min. & Manuf'g Co. v. Pfeiffer, 11 Ind. App. 445, 39 N. E. 291.

[u] (App. 1896)

Where, in replevin, D. claimed title to the property, evidence of title in the D. Manufacturing Company was not sufficient to sustain his claim of ownership.—Dederick v. Brandt, 44 N. E. 1010, 16 Ind. App. 264.

[v] (Sup. 1906)

Where defendant in replevin filed a general denial, the right of possession of the property sued for, its value, and damages for the taking or detention thereof were in issue.—Jackson v. Morgan, 167 Ind. 528, 78 N. E. 633.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 257-279.

See, also, 34 Cyc. pp. 1491-1500.

§ 70. Presumptions and burden of proof.

[a] (Sup. 1848)

Plaintiff, in replevin, must recover on the strength of his own title, and the burden is upon him to prove his title, if property in a stranger is pleaded, although not proven.—Simcoke v. Frederick, 1 Ind. 54, Smith, 64.

[b] (Sup. 1850)

In an action of replevin against an officer, by a claimant of attached goods, the mere fact that an attachment has been issued is no evidence of indebtedness to the attaching plaintiff.—Pierce v. Gibson, 2 Ind. 408.

[c] (Sup. 1855)

In replevin the plea of property in the defendant imposes upon the plaintiff the burden of proving property in himself.—Noble v. Epperly, 6 Ind. 414.

[d] (Sup. 1864)

Where the defendant in replevin pleads property in himself, the burden of proof is on the plaintiff to show his title or his right of possession.—Turner v. Cool, 23 Ind. 56, 85 Am. Dec. 449.

[e] (App. 1904)

Ownership or right of possession in plaintiff in replevin and possession held by defendant do not change the burden of proof, which remains with plaintiff to establish that defendant wrongfully holds possession of the property.—Morgan v. Jackson, 69 N. E. 410, 32 Ind. App. 169.

[f] (App. 1908)

In an action by the designated beneficiary for the possession of an insurance policy, providing that no change of beneficiary shall take effect until indorsed upon the policy, the bur-

den of proving the right of possession thereto is on defendant.—Stewart v. Gwynn, 41 Ind. App. 320, 82 N. E. 1000, 83 N. E. 753.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 280-284.

See, also, 34 Cyc. pp. 1500-1503.

§ 71. Admissibility of evidence.

Admissions as evidence, see EVIDENCE, §§ 281, 253.

Evidence admissible by reason of admission of similar evidence, see EVIDENCE, § 155.

Hearsay evidence, see EVIDENCE, § 317.

Of conveyance in fraud of creditors, see FRAUDULENT CONVEYANCES, § 286.

Opinion evidence, see EVIDENCE, §§ 500, 501.

Order of proof, see TRIAL, § 60.

Parol evidence to vary instrument, see EVIDENCE, § 434.

Res gestæ, see EVIDENCE, §§ 121, 122.

[a] (Sup. 1861)

In replevin, the plaintiff, to prove title in himself, offered in evidence a judgment recovered before a justice of the peace against defendant and another, and the execution issued on the judgment and the constable's return thereon, by which it appeared that the constable levied on certain property as the property of defendant and sold it to plaintiff. Held, that the evidence was relevant, and it should have been admitted.—Lucas v. Dangerfield, 17 Ind. 282.

[b] (Sup. 1884)

In an action to recover the possession of a mare, the fact that the mare has several colts, all of which were possessed and owned by plaintiff, was admissible in evidence as tending to prove his title to the mare, leaving the jury to determine the weight and force of the evidence.—Pacey v. Powell, 97 Ind. 371.

[c] (Sup. 1885)

In replevin, the opinion of a mortgagor of chattels as to the value thereof may be shown by proof that he offered the same goods absolutely in payment of the mortgage debt.—Curme, Dunn & Co. v. Rauh, 100 Ind. 247.

[d] (Sup. 1890)

Where plaintiff in replevin failed for lack of proof of a demand, defendant on a second trial of the case could not show that there was in fact a demand made prior to the first action.—Williams v. Lewis, 24 N. E. 733, 124 Ind. 344.

[e] (App. 1898)

In replevin to recover mill machinery, a deed of the mill, in which the machinery was located, to one of the claimants, and a record of a circuit court quieting title in him, were admissible as bearing on the question of ownership and right to possession.—Fox v. Cox, 50 N. E. 92, 20 Ind. App. 61.

[f] (App. 1907)

In replevin to recover possession of a "car plant," evidence was admissible to show what

the car plant was composed of.—*Indiana Union Traction Co. v. Bick*, 40 Ind. App. 451, 81 N. E. 617.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 285-291.

See, also, 34 Cyc. pp. 1504-1507.

§ 72. Weight and sufficiency of evidence.

[a] (Sup. 1837)

Replevin for the detainer of a horse. Plea, property in defendant. Replication in denial, and issue. It appeared that the plaintiff had bought the horse of the defendant, but that the latter still had him in possession. *Held*, that these facts did not necessarily show that the issue must be found against the plaintiff, unless he had proved a demand and refusal of the horse.—*Litterel v. St. John*, 4 Blackf. 328.

[b] (Sup. 1879)

In replevin for a buggy, the evidence showed that it with other property, real and personal, had been mortgaged by A. to B. and C., and that, on foreclosure of the mortgage, the sheriff had sold the buggy to B., who took immediate possession of it, and afterwards sold it to plaintiff. Defendant claimed title through a purchaser at constable's sale of the buggy, made after the sheriff's sale, but upon a levy made before it. There was nothing which tended to show that the execution on which the constable sold had any priority of lien over the mortgage. *Held*, that the evidence made a prima facie case for the plaintiff, and that, on verdict below for defendant, a new trial should have been granted.—*Sharp v. McBride*, 69 Ind. 396.

[c] (Sup. 1881)

In replevin it is not necessary that the evidence as to the place where the property is detained should be direct, but the place of detention may be inferred from circumstances.—*Louthain v. May*, 77 Ind. 109.

[d] (Sup. 1882)

In an action against an officer for property claimed to be exempt, evidence that a schedule containing a description of the property was presented to the officer and a demand made that such property be set apart, together with the officer's return showing the seizure of such property, prima facie establishes the liability of the officer.—*Boesker v. Pickett*, 81 Ind. 554.

[e] (App. 1886)

There was sufficient evidence in replevin of a taking into possession where an officer, under attachment levied on personal property, forbade persons claiming the right of possession to touch or remove it, and placed a person in charge of it as his representative.—*Aman v. Mottweiler*, 15 Ind. App. 405, 44 N. E. 63.

[f] (App. 1904)

Where, in an action to recover personal property, plaintiff testified that she was the owner thereof, and that she had notified defendant not to receive or advance money on any

article of personal property brought to his place of business by her husband, such evidence was sufficient to sustain a verdict in favor of plaintiff on the issue of ownership.—*Mariotte v. Bremer*, 71 N. E. 250, 33 Ind. App. 701.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 292-295.

See, also, 34 Cyc. pp. 1507-1509.

V. DAMAGES.

Verdict for damages, see post, § 97.

§ 74. Elements of compensation.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 298, 299, 303-310, 422.

See, also, 34 Cyc. pp. 1560-1570.

§ 75. — In general.

[a] (Sup. 1828)

If an action of replevin be brought for taking several articles, and, on an issue as to the plaintiff's property in them, he prove himself entitled to a part, the defendant has a right to a return of the others, and to damages for the taking of them.—*Wright v. Mathews*, 2 Blackf. 187.

[b] (Sup. 1853)

In replevin, only compensatory damages can be recovered.—*Hotchkiss v. Jones*, 4 Ind. 260.

[c] (Sup. 1855)

In a suit, under the Revised Statutes of 1852, to recover possession of personal property, the damages must depend on the nature of the defendant's interest in the property, whether that of a bailee or absolute owner, the time he has been deprived of it, the character of the property, etc.—*Noble v. Epperly*, 6 Ind. 468.

[d] (Sup. 1871)

In replevin for hogs, plaintiff was entitled to damages for the time necessarily spent and expenses incurred in hunting for the hogs, and also for any deterioration in the value of the same while in defendant's hands.—*Mitchell v. Burch*, 36 Ind. 529.

[e] (Sup. 1882)

In replevin where property has been delivered to the plaintiff and he succeeds in the action, he is entitled to damages for any deterioration in the value of the property while in defendant's hands and for expense and time lost in searching for it, though not for time spent in commencing the action, and the damages may be merely nominal.—*Yelton v. Slinkard*, 85 Ind. 190.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 298, 299, 303, 304, 422.

See, also, 34 Cyc. p. 1568.

§ 76. — Detention of property.

[a] (Sup. 1877)

The evidence in an action of replevin, to recover possession of a fanning mill, showed that the mill was left by plaintiff in a barn situated on land sold by him to defendant's wife three years prior to the action; that the mill was broken and out of repair at the time, and had remained so; and that it was replevied from defendant and delivered to plaintiff on the next day after demand. *Held*, that plaintiff was entitled to nominal damages only.—*Stevens v. McClure*, 56 Ind. 384.

[b] (Sup. 1881)

In an action to recover possession of personal property seized under execution, the plaintiff is not entitled to damages for the detention of the property if not entitled to recover the property itself.—*Smith v. Harris*, 76 Ind. 104.

[c] (App. 1892)

In an action to recover a horse wrongfully detained by defendant, the measure of damages is the value of the use of the horse from date of demand to date of trial.—*Farrar v. Eash*, 5 Ind. App. 238, 31 N. E. 1125.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 305, 306.

See, also, 34 Cyc. pp. 1562-1564.

§ 78. — Depreciation in value of property.

[a] (Sup. 1882)

Where, in replevin, the property involved and as to which a return is ordered is only partially destroyed, being returned in a damaged condition, due to an improper act or omission of plaintiff, the measure of damages must be at least the difference between its value as so damaged and its value when taken.—*Yelton v. Slinkard*, 85 Ind. 190.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 307, 308.

See, also, 34 Cyc. p. 1564.

§ 82. Amount awarded.

Excessive damages, see DAMAGES, § 139.

[a] (Sup. 1852)

In replevin, damages cannot be assessed beyond the amount claimed in the declaration.—*O'Neal v. Wade*, 3 Ind. 410.

[b] (Sup. 1853)

Where complaint in replevin alleges no damage, the amount of recovery is limited by the value alleged.—*Hotchkiss v. Jones*, 4 Ind. 260.

[c] (Sup. 1878)

In replevin for a machine, the plaintiff alleged its value to be \$25, and the jury found that the plaintiff was entitled to its possession, and that its value was \$65. *Held*, that the plaintiff's valuation in such cases should not be regarded as a limitation on the amount which

he would be entitled to recover if the property could not be found, or he should fail to get possession of it.—*Singer Mfg. Co. v. Doney*, 65 Ind. 65.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 297, 301, 302.

See, also, 34 Cyc. pp. 1567-1570.

§ 83. Damages to defendant in general.

Judgment for defendant, see post, § 103.

[a] (Sup. 1834)

St. 7 Hen. VIII and St. 21 Hen. VIII, giving the defendant in replevin damages in certain cases, do not apply to a case where the defendant pleads property in the goods.—*White v. Lloyd*, 3 Blackf. 390.

Defendant in replevin was in no case entitled to damages by a common law.—*Id.*

In replevin, if defendant claim property and obtain a verdict, he is entitled to a return of the goods, but not to damages.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 311-318.

See, also, 34 Cyc. p. 1567.

VI. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW.

Right to open and close, see TRIAL, § 25.

§ 85. Dismissal or nonsuit before trial.

As breach of replevin bond, see post, § 119.

At trial, see post, § 89.

[a] (Sup. 1861)

In an action of replevin, a disclaimer of any interest in the property, filed by one of the defendants, is no reason for dismissing the suit against him, and his motion for dismissal, grounded on such disclaimer, is properly refused.—*Smith v. Emerson*, 16 Ind. 355.

[b] (Sup. 1872)

A dismissal by plaintiff of an action in replevin before the announcement of a finding by the court or the rendition of a verdict by the jury precludes a judgment for a return of the property.—*Wiseman v. Lynn*, 39 Ind. 250.

[c] (Sup. 1879)

A defendant in replevin, on his verified disclaimer of interest in the property and allegation of title and possession in a third person, is not entitled to a dismissal of the suit.—*Choen v. Porter*, 66 Ind. 194.

[d] (Sup. 1890)

Under Rev. St. 1881, § 572, relating to judgments in replevin after dismissal of the action, the court cannot adjudge a return of the property.—*Hulman v. Benighof*, 125 Ind. 481, 25 N. E. 549.

[c] (App. 1892)

Where, in replevin, the plaintiff who has possession of the property dismisses such action, the court has no power to award a judgment of return.—*Peffley v. Kenrick*, 31 N. E. 40, 4 Ind. App. 510.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 320-335.

See, also, 34 Cyc. pp. 1509-1517.

§ 86. Scope of inquiry and power of court.

[a] (Sup. 1881)

Where the purchaser of land at a sheriff's sale permitted the tenant to remain in possession and harvest his grain, and then replevied the grain, a deed executed before the decree of sale was admissible to show that the tenant's possession was under color and claim of right.—*Bowen v. Roach*, 78 Ind. 361.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 336-340.

See, also, 34 Cyc. pp. 1517, 1518.

§ 87. Mode and conduct of trial.

Right to open and close, see TRIAL, § 25.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 341, 342.

See, also, 34 Cyc. p. 1518.

§ 88. Questions for jury in general.

Instructions invading province of jury, see TRIAL, § 186.

[a] (App. 1901)

Where the plaintiff knew that her husband had sold a horse belonging to her before the vendee sold it to defendant, it was proper, in replevin, to submit to the jury, as the main issue, the question whether plaintiff consented to the sale.—*Carrico v. Shepherd*, 59 N. E. 347, 26 Ind. App. 207.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 343-348.

See, also, 34 Cyc. pp. 1518, 1519.

§ 89. Dismissal or nonsuit at trial.

[a] (Sup. 1854)

In the trial of an action of replevin, under Rev. St. 1843, p. 702, § 182, providing that, "if it appear upon a nonsuit of the plaintiff * * * that the defendant is entitled to a return of the goods, he shall have judgment and execution therefor accordingly, with damages for the detention thereof, which may be assessed by a writ of inquiry," on a nonsuit ordered at the close of plaintiff's evidence, defendant has a right to have judgment rendered in his favor for the same, and his damages assessed for their detention by writ of inquiry.—*Mikesill v. Chaney*, 6 Ind. 52.

Under Rev. St. 1843, p. 702, § 182, providing that, if it appear on a nonsuit of a plain-

tiff in replevin that defendant is entitled to a return of the goods, he shall have judgment therefor, with damages for their detention, a defendant has a right to show that he is entitled to possession of the goods after plaintiff suffers a nonsuit after closing his evidence.—Id.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 349-351.

§ 91. Instructions.

Error in instructions cured by withdrawal or giving other instructions, see TRIAL, § 296.

Instructions invading province of jury, see TRIAL, § 186.

[a] (Sup. 1861)

In a replevin suit for a horse, it was held that an instruction "that to enable plaintiff to recover, the jury must be satisfied from the evidence that he has a general or special property in the horse, and a right to his immediate possession, and that the evidence proves either an unlawful taking or unlawful determination by the defendant," was proper, and, being requested by the defendant, should have been given.—*Clark v. Heck*, 17 Ind. 281.

[b] (Sup. 1882)

In replevin by a wife for property alleged to have been taken on execution against her husband, an instruction was properly refused that if the plaintiff and her husband combined and confederated together to hinder, delay, or prevent defendants from collecting their judgments from the husband they should find for defendants as fraud vitiates all contracts, for it did not follow that, if plaintiff had combined with her husband to hinder and delay the defendants in the collection of their judgment, they could rightfully levy on and sell her property for the satisfaction of their demand.—*Hadley v. Hadley*, 82 Ind. 75.

In replevin it appeared that the property belonged to the plaintiff, that defendant as sheriff, having an execution on a judgment against plaintiff's husband in favor of his codefendants, by their direction levied the execution on the property in controversy, indorsed a schedule of the property levied on the execution, and did not remove the property, but left it where he found it on the execution of a delivery bond by the plaintiff and her husband, and that the property was thus in their possession at the time suit was commenced. Held, that requested instructions from which the jury would understand the word "possession" to mean actual possession and not embracing constructive possession were properly refused as being misleading.—Id.

In replevin a requested instruction that, if the property was not in the possession of the defendants at the date of the commencement of the suit, the jury should find its value, and need not find any verdict as to who was the owner of the property or any part thereof at the

commencement of the suit, was properly refused, as such a verdict would have been altogether defective.—*Id.*

FOR CASES FROM OTHER STATES.

SEE 42 CENT. DIG. Replev. §§ 354-359.
See, also, 34 Cyc. pp. 1520-1522.

§ 92. Verdict and findings.

Construction and operation of special interrogatories, see TRIAL, § 365.

Failure to answer interrogatories or make findings, see TRIAL, § 356.

FOR CASES FROM OTHER STATES.

SEE 42 CENT. DIG. Replev. §§ 360-387.
See, also, 34 Cyc. pp. 1523-1537.

§ 93. — Requisites and sufficiency in general.

[a] (Sup. 1835)

In replevin, the pleas were (1) that the defendant had not taken or detained the property; (2) property in a stranger; and (3) property in the defendant. The plaintiff joined issue on the first plea, and replied to the second and third, property in himself. Verdict, "We find the property to be in the plaintiff." Judgment against the defendant for costs. *Held*, that this verdict did not authorize a judgment for plaintiff as the jury had not found that the horse had been taken or detained by the defendant.—*Huff v. Gilbert*, 4 Blackf. 19.

[b] (Sup. 1855)

At the trial of an action of replevin, the jury returning a general verdict for the defendant, they were remanded by the court, with instructions to find the value of the property and the damages for its detention; and the jury accordingly found said value and assessed damages for the defendant. *Held*, there was no error.—*Noble v. Epperly*, 6 Ind. 468.

[c] (Sup. 1857)

In a suit to recover personal property, where one of the defendants claimed title in himself and the other disclaimed title and possession, the finding "that the possession of the property mentioned in the complaint be given to the plaintiff" is equivalent to finding the property in the plaintiff, and that he is entitled to the possession.—*Robertson v. Caldwell*, 9 Ind. 514.

[d] (Sup. 1858)

A verdict in replevin must show what property belongs to the plaintiff.—*Dowell v. Richardson*, 10 Ind. 573.

[e] (Sup. 1859)

Replevin against two; denial by both; answer by A. that the property was in M., and by B. that it was in himself; verdict "for the defendants." *Held*, that the verdict, being general and embracing all the issues, was inconsistent and bad, unless the defendants saw fit to treat it as on the denial alone, which they had a right to do.—*Tardy v. Howard*, 12 Ind. 404.

[f] (Sup. 1859)

In an action to recover personal property, a verdict that the plaintiff recover the property and one cent damages for detention thereof sufficiently shows that the right of possession is in plaintiff.—*Stephens v. Scott*, 13 Ind. 515.

[g] (Sup. 1861)

In a suit to recover a horse alleged to have been wrongfully taken and obtained by the defendant, he answered (1) property in himself; (2) in a third person; (3) denial. *Held*, that a verdict: "We, the jury, find for the plaintiff; find the property in the horse to be in him, and that he is entitled to possession," etc. "We also find the value of the horse to be \$125"—sufficiently covered all the issues in the case.—*Clark v. Heck*, 17 Ind. 281.

[h] (Sup. 1864)

A verdict for the defendant in a replevin suit is in effect a finding that the plaintiff unlawfully took the property, that the defendant is entitled to the possession of it, and that there has been a breach of the replevin bond, in that the action has not been prosecuted with effect.—*Wheat v. Catterlin*, 23 Ind. 85.

[i] (Sup. 1864)

In a replevin suit, it is not necessary that the verdict should find that the defendant actually took and detained the goods, where the taking into possession and detention are admitted in the answer.—*Wilcoxon v. Annesley*, 23 Ind. 285.

[j] (Sup. 1865)

In a replevin suit, a general finding for the plaintiff embraces an allegation in the complaint of ownership in the property.—*Rowan v. Teague*, 24 Ind. 304.

[k] (Sup. 1871)

In replevin to recover certain property the verdict was as follows: "We the jury, find the property replevied to be the property of the plaintiff, and assess his damages at twenty-five dollars, and assess his damages for the detention thereof at twenty-five dollars. G. R., Foreman." "We the jury, find the nine hogs not replevied to be the property of the plaintiff, and are of the value of ninety-five dollars, and assess his damages for the detention thereof at ninety-five dollars. G. R., Foreman." *Held*, that while it would have been better form to have included both findings in one verdict, yet the omission to do so did not vitiate the verdict, and that the same was sufficient.—*Mitchell v. Burch*, 36 Ind. 529.

[l] (Sup. 1874)

A special finding in these words, "We, the jury, find that the plaintiff had a right to replevy the mill," amounts to no more than a conclusion of law, which the jury could not decide, and will not authorize a judgment for the possession of the property.—*Keller v. Boatman*, 49 Ind. 104.

[m] (Sup. 1879)

The complaint in an action of replevin alleged that the defendants had possession without right, and unlawfully detained the property, etc. An answer of general denial was filed. The verdict of the jury was, "We, the jury, find the property was replevied in Miami county, and at the commencement of this suit the right of and possession thereto was in the plaintiff, and assess his damages at \$25." *Held*, that the verdict was defective, as it does not in terms find the issue joined between the parties.—*Ridenour v. Beekman*, 68 Ind. 230.

Where the verdict in replevin proceedings fails to find that defendant wrongfully detained the property though it finds that plaintiff had the right of property and the right of possession thereof, it is error for the jury to assess either costs or damages against the defendant.—*Id.*

[n] (Sup. 1880)

In a suit for the cancellation of a note and mortgage and the recovery of personal property, a verdict: "We, the jury, find for the plaintiff, and that the defendant unlawfully detained the property mentioned in the plaintiff's complaint and that said property is of the value of \$384, and we assess the plaintiff's damages at \$400 for the retention thereof," is sufficient, as the first clause is a general finding on all the issues, and is not cut down by special matters stated in the verdict.—*Washburn v. Roberts*, 72 Ind. 213.

[o] (Sup. 1882)

Where, in replevin by a chattel mortgagee against creditors claiming the property under executions issued against the mortgagor, for anything that appeared in the pleadings, answers, or verdict, plaintiff's title might have been founded on a right altogether different and distinct from that created by the mortgage, there was no inconsistency on the face of a general verdict for plaintiff and answers to interrogatories to the effect that the mortgagor had written authority from the mortgagee to sell the property, retain possession thereof, and, in addition to applying proceeds to sales thereon, might also apply a portion of such proceeds to the payment of claims not mentioned in the mortgage.—*Louthain v. Miller*, 85 Ind. 161.

[p] (Sup. 1882)

In an action of replevin, a verdict finding for the plaintiff as against all the defendants that he was at a certain date the owner and in possession of the property described in the complaint, and is still the owner thereof, that at the date named the defendants unlawfully detained possession of the property and that its value was \$90, presents no irregularity that would require a venire de novo.—*Berghoff v. McDonald*, 87 Ind. 549.

[q] (Sup. 1882)

In an action of replevin against a sheriff and execution plaintiffs, a verdict for defend-

ants generally as to part of the property, instead of for the sheriff alone, is good.—*Brunk v. Champ*, 88 Ind. 188.

[r] (Sup. 1883)

A general finding for plaintiffs in replevin is a finding that they are owners and entitled to possession.—*Payne v. June*, 92 Ind. 252.

[s] (Sup. 1884)

A general verdict for defendant in replevin finds all the issues against plaintiff.—*Baldwin v. Burrows*, 95 Ind. 81.

[t] (Sup. 1889)

In replevin a verdict that defendant is entitled to the possession of the property sued for will not be considered contrary to law because it gives the value of the property, though such finding may not be authorized.—*Van Meter v. Barnett*, 119 Ind. 35, 20 N. E. 426.

[u] (Sup. 1889)

In replevin for a quantity of clover seed raised on certain land, the court found that plaintiff had rented said land in the spring of 1884 for one year, and for as much longer as he might desire to retain it; that clover was sown on the land in that year, which in 1886 produced a crop of seed; and that in April, 1886, the defendant took a conveyance of the land, with constructive notice of the rights of the plaintiff in the clover. But it was not found that the lease was continued by plaintiff beyond the one year, nor that the clover raised was the same clover described in the complaint, nor by whom the clover was sown, nor that defendant was in possession of the land, or of the clover. *Held*, that the findings of fact were not sufficient to sustain a judgment for plaintiff.—*Hess v. Hess*, 119 Ind. 66, 21 N. E. 339.

[v] (Sup. 1890)

A special verdict in an action of replevin commenced with a statement that the plaintiff was and is the owner of the property, which statement was followed immediately with a further finding that the plaintiff turned the cow with a bell on, in and upon the public highway, and on the morning of the following day she was found in the inclosure of the defendant, and that he held her in his possession and gave the plaintiff written notice of having taken the animal up. *Held*, that such statement was not a conclusion.—*Haffner v. Barnard*, 24 N. E. 152, 123 Ind. 429.

When the facts stated in a special verdict in an action of replevin show a rightful possession of personal property, the continuation of the right must be presumed until the contrary is made to appear.—*Id.*

[w] (App. 1891)

Under Rev. St. 1881, § 1547, which provides that a complaint in replevin before a justice shall set forth that plaintiff's personal goods have been wrongfully taken or are unlawfully detained, a verdict that plaintiff is entitled to possession of the property, without

saying that he was the owner, is sufficient to sustain judgment for plaintiff, since, under such a complaint, plaintiff might recover upon proof of either general or special ownership.—*Buck v. Young*, 1 Ind. App. 558, 27 N. E. 1106.

[ww] (App. 1892)

Where, in replevin, both the title and right of possession are in issue, a general finding for plaintiff is not so defective and uncertain that no judgment can be rendered thereon; nor is it objectionable because it does not cover all the issues.—*Van Gundy v. Carrigan*, 4 Ind. App. 333, 30 N. E. 933.

[x] (App. 1894)

Defendants having admitted the detention by denying plaintiff's ownership, a verdict finding plaintiff the owner, and entitled to possession, implies that the detention was unlawful.—*Kluse v. Sparks*, 10 Ind. App. 444, 36 N. E. 914, 37 N. E. 1047.

[xx] (App. 1896)

The special finding of a jury in replevin that a road supervisor, in performance of his statutory duty, had impounded plaintiff's hogs, which he found running at large on inclosed lands, giving plaintiff written notice thereof, and that plaintiff had never paid or tendered the costs and expenses of such impounding, was sufficient to sustain a judgment for the defendant.—*Wilhelm v. Scott*, 14 Ind. App. 275, 40 N. E. 537, 42 N. E. 827.

A special verdict in replevin, showing that defendant, in the discharge of his official duty, came into possession of the animals while running at large, and impounded them; that plaintiff was given notice thereof; and that, after they had been left in defendant's possession 20 days, plaintiff, without paying defendant's fees, and without demand, commenced his action,—warrants judgment for defendant, though it contains no finding that defendant advertised them as provided by statute, as it cannot be presumed that defendant failed in his duties.—*Id.*

[y] (App. 1898)

Where, in replevin, the title and right of possession were in issue, a general verdict for plaintiff was sufficient.—*McAfee v. Montgomery*, 51 N. E. 957, 21 Ind. App. 196.

In replevin it was alleged that defendant was wrongfully in possession of property, which he denied. *Held*, a verdict not finding that the property was unlawfully detained was sufficient, as such finding would be unnecessary.—*Id.*

[yy] (App. 1898)

In replevin for an engine seized by the seller on failure of the purchaser to comply with the conditions of a mortgage thereon executed to such seller, a judgment for plaintiff is not sustained by a special verdict showing a breach of warranty but failing to show any damages resulting from such breach.—*C. Ault-*

man & Co. v. Richardson, 52 N. E. 86, 21 Ind. App. 211.

[z] (Sup. 1906)

Burns' Ann. St. 1901, § 558, declares that in actions for the recovery of specific personal property the jury must assess the value of the property and damages for the taking or detention, whenever by their verdict there will be a judgment for the recovery or return of the property. Section 581 provides that in such an action judgment for plaintiff may be for the delivery of the property, or the value thereof in case delivery cannot be had, and damages for the detention. *Held* that, whether the verdict in replevin be for plaintiff or defendant, the value of the property and all damages for its taking and detention must be settled and determined in the action of replevin.—*Jackson v. Morgan*, 167 Ind. 528, 78 N. E. 633.

[zz] (App. 1909)

In replevin for wool on which defendant claimed a lien for commissions, answers to special interrogatories that the wool was delivered on cars for plaintiff, and that plaintiff was the owner, but that defendant retained possession, were not in irreconcilable conflict with a general verdict for defendant, on the theory that defendant, though loading the wool on the cars for plaintiff, intended to retain control under his lien until his claim was paid.—*Welker v. Appleman*, 90 N. E. 35.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 360-368, 371-375.

See, also, 34 Cyc. p. 1523.

§ 95. — Description of property.

[a] (Sup. 1899)

Where the property claimed is specifically described in a complaint in a replevin suit, a reference to it in the verdict as "said property" is sufficient.—*Anderson v. Lane*, 32 Ind. 102.

FOR CASES FROM OTHER STATES.

SEE 42 CENT. DIG. Replev. § 370.

See, also, 34 Cyc. p. 1530.

§ 96. — Value of property.

[a] (Sup. 1832)

Where demurrer to an avowry for rent is overruled, the jury impaneled under the statute in such case must find the value of the distress, as well as the arrears of rent, or the defendant cannot have judgment for the rent due.—*Given v. Blann*, 3 Blackf. 64.

[b] (Sup. 1857)

In a suit to recover possession of personal property, semble, that if the property cannot be found, or if the plaintiff cannot give bond, but be found entitled to possession, or if the verdict be for the defendant, the jury must assess the value of the property as well as damages for its detention.—*Chissom v. Lamcool*, 9 Ind. 530.

[c] (Sup. 1859)

A verdict for defendants, in replevin, which does not find the value of the property, is insufficient, and no return thereon can be awarded.—*Tar'cy v. Howard*, 12 Ind. 404.

[d] (Sup. 1888)

Under Rev. St. 1881, § 1550, relating to replevin before justices, and providing that, if defendant prevails, judgment shall be rendered that he have return of the property; and under section 549, relating to civil procedure and providing, "In actions for the recovery of specific personal property, the jury must assess the value of the property, as also the damages, * * * whenever, by their verdict, there will be a judgment for the recovery or return of the property"—where the cause originates before a justice, and the verdict is that defendant have return of the property, the jury need not assess the value or the damages.—*Burket v. Pheister*, 114 Ind. 503, 16 N. E. 813.

[e] (App. 1892)

Rev. St. 1881, § 549, provides that in replevin the value of the property and the damages for the taking or detention must be assessed, whenever "there will be a judgment for the recovery or return of the property." Section 572 provides that judgment for the plaintiff may be for the delivery of the property, "or the value thereof in case a delivery cannot be had, and damages for the detention." *Held*, that a finding for plaintiff need not determine the value of the goods, and assess his damages, where he is already in possession under the writ, and that an omission to do so, if not error, is not one of which defendants can complain.—*Van Gundy v. Carrigan*, 4 Ind. App. 333, 30 N. E. 983.

[f] (App. 1892)

Rev. St. 1881, § 549, provides that, in an action for the recovery of specific personal property, the jury must assess the value of the property, and the damages for detention, when, by their verdict, there will be judgment for the return of the property. Section 572 provides that judgment for plaintiff may be for the return of the property, or the value thereof, in case a delivery cannot be had, and damages for detention. *Held* that, where the jury finds for plaintiff, it must fix the value of the property, and assess the damages for detention, whether the plaintiff did or not demand by his action the immediate delivery of the property.—*Farrar v. Eash*, 5 Ind. App. 238, 31 N. E. 1125.

[g] (App. 1898)

Under *Burns'* Rev. St. 1894, §§ 558, 581 (Rev. St. 1881, §§ 549, 572), providing that in replevin the jury must assess the value of the property whenever there will be judgment for the recovery or return of the property, and that judgment for plaintiff may be for the property, or its value in case a delivery thereof cannot be had, the jury need not assess the

value of the property where it has been delivered to plaintiff under the writ.—*Busching v. Sunman*, 40 N. E. 1091, 19 Ind. App. 683.

[h] (App. 1907)

Burns' Ann. St. 1901, § 558, providing that in replevin the jury must assess the value of the property, as well as damages for the taking and detention, did not require that the verdict should state the value of the property, where at the time the verdict in favor of plaintiff was returned all of the property had been surrendered to him.—*Indiana Union Traction Co. v. Bick*, 40 Ind. App. 451, 81 N. E. 617.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 376-385.

See, also, 34 Cyc. pp. 1532-1536.

§ 97. — Damages.

[a] (Sup. 1869)

Where there is a verdict for plaintiff in replevin, the defendant cannot complain of the failure of the jury to assess damages for the detention of property.—*Anderson v. Lane*, 32 Ind. 102.

[b] (Sup. 1874)

A general verdict for the plaintiff in replevin is, in effect, a finding that the ownership and right of possession of the property is in him, where both these questions are in issue; but the verdict should find that amount of damages sustained by the detention of the property.—*Crocker v. Hoffman*, 48 Ind. 207.

[c] (App. 1891)

Where in replevin damages are claimed but none are proved none need be found in the verdict.—*Ruck v. Young*, 27 N. E. 1106, 1 Ind. App. 538.

A verdict for plaintiff in replevin need not assess damages.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 386, 387.

See, also, 34 Cyc. p. 1537.

§ 98. New trial.

Newly discovered evidence as grounds for new trial, see NEW TRIAL, § 104.

FOR CASES FROM OTHER STATES,

See, 34 Cyc. p. 1536.

§ 99. Judgment.

Arrest of, see JUDGMENT, § 263.

Collateral attack thereon, see JUDGMENT, § 486.

Correction of judgment, see JUDGMENT, §§ 313, 323, 324.

Entry nunc pro tunc, see JUDGMENT, § 273.

Evidence thereof as a prior adjudication in subsequent action by defendants for value of property, see JUDGMENT, § 966.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 388-429, 498-501.

See, also, 34 Cyc. pp. 1538-1533.

§ 100. — Form and requisites in general.

[a] (App. 1899)

A judgment in replevin, as originally entered, was merely for the return of the property. The court's docket showed that the judgment was for the return of the property to the plaintiff, and stated its value as filed by the findings. At a subsequent term, on plaintiff's motion, the court directed the entry of judgment nunc pro tunc for the return of property, and for its value if not returned, as provided in Horner's Rev. St. 1897, § 572 (Burns' Rev. St. 1894, § 581), declaring that judgment in replevin may be for delivery of property, or its value if not returned. *Held*, that the omission of the alternative portion of the judgment was a clerical error merely, the correction of which was authorized.—*Brittenham v. Robinson*, 54 N. E. 133, 22 Ind. App. 536.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 388, 393-396.
See, also, 34 Cyc. pp. 1538-1542.

§ 101. — By default.

[a] (Sup. 1882)

An affidavit in a replevin suit in which a judgment was rendered in favor of the defendant because of the nonappearance of plaintiff constitutes no part of the affidavit or proceedings to set aside the default and cannot be used in connection therewith, unless it was referred to and made a part of the affidavit to set aside the default.—*Williams v. Kessler*, 82 Ind. 183.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. § 389.
See, also, 34 Cyc. p. 1543.

§ 102. — Partial recovery.

[a] (Sup. 1828)

If an action of replevin be brought for taking several articles, and, on an issue as to the plaintiff's property in them, he prove himself entitled to a part, the defendant has a right to a return of the others and to damages for the taking of them.—*Wright v. Mathews*, 2 Blackf. 187.

[b] (Sup. 1873)

In an action to recover possession of a chattel of which the defendant is part owner with plaintiff, the former cannot have judgment for the possession of the part owned by him, nor for the value thereof if possession be not given by the plaintiff. One has as much right to the possession of the chattel as the other.—*Mills v. Malott*, 43 Ind. 248.

[c] (Sup. 1884)

In a joint replevin suit, there may be judgment for one plaintiff and against another.—*Hamilton v. Browning*, 94 Ind. 242.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. § 391.
See, also, 34 Cyc. p. 1544.

§ 103. — For defendant.

[a] (Sup. 1827)

Where, in an action by a tenant against a constable levying under a distress warrant, the constable justified under the warrant, and obtained judgment on a demurrer to his plea, he was entitled to a return of the goods.—*Haris v. McFaddin*, 2 Blackf. 71.

[b] (Sup. 1830)

Where, in replevin, defendant avowed the taking of the goods as a distress for rent, due to him from the plaintiff, to which avowry plaintiff pleaded non tenuit, and riens in arrear, and issue was joined on both pleas, a verdict for defendant on both issues, the jury finding the amount of rent in arrear, but not the value of the goods distrained, was sufficient to sustain a common-law judgment for a return of the goods to the defendant, and for costs, but not for the arrears of rent.—*Larkin v. Wilburn*, 2 Blackf. 343.

[c] (Sup. 1851)

In replevin for goods distrained for rent, where the constable justifies under his warrant, he is entitled to a return of the goods.—*Applegate v. Crawford*, 2 Ind. 579.

[d] (Sup. 1856)

Where, in an action for the recovery of the possession of personal property, the verdict is that the property belonged to the defendant, was of a certain value, and for damages for the detention thereof by the plaintiff, the question whether the property was returnable was for the court to decide on rendering judgment.—*Plant v. Crane*, 7 Ind. 486.

[e] (Sup. 1861)

If the case made by the evidence in a replevin suit authorizes a return of the property, it may, after verdict, be awarded by the court, on motion by the defendant, although he has not claimed a return in his pleadings; but the return cannot be awarded if the evidence fails to show that the goods have been delivered to and are in possession of the plaintiff, or the value of the property does not appear to have been assessed.—*Conner v. Comstock*, 17 Ind. 90.

[f] (Sup. 1863)

It is not necessary that the answer of the defendant in replevin should claim a return of the property; but, if the case made by the evidence authorizes a return, it may be awarded by the court, after verdict.—*Matlock's Adm'r v. Straughn*, 21 Ind. 128.

[g] (Sup. 1865)

In an action of replevin, where the answer puts in issue the title of the plaintiff, as well as the taking and detention of the property by the defendant, and the record does not show that any bond has been given which could authorize the delivery of the property to the plaintiff, a general finding for the defendant will not support a judgment for the return

of the property.—*McKeal v. Freeman*, 25 Ind. 151.

[b] (Sup. 1883)

Under a general denial in an answer or cross-complaint in replevin, praying the return of the property to defendant, judgment may be rendered for a return.—*Williams v. Kessler*, 82 Ind. 183.

[i] (Sup. 1889)

Rev. St. 1881, § 1502, provides that on appeal from a justice of the peace to the circuit court the cause must be there tried under the rules prescribed for trials before justices. *Held*, that in replevin brought originally in justice's court, where the property before the trial has been delivered to plaintiff and the finding of the jury is for defendant, the proper form of the verdict and judgment both before the justice and in the circuit court on appeal is that defendant have return of the property; and a provision in the judgment that, if a return cannot be had, the defendant recover the value of the property as fixed by the jury, is erroneous.—*Van Meter v. Barnett*, 119 Ind. 35, 20 N. E. 426, modified (1892) *Everman v. Hyman*, 3 Ind. App. 459, 29 N. E. 1140.

[j] (App. 1892)

A judgment in replevin against plaintiff is not void, or subject to collateral attack by him, because it omits to order a return of the property.—*Fromlet v. Poor*, 3 Ind. App. 425, 29 N. E. 1081.

[k] (App. 1896)

Where plaintiff in replevin has possession of the property under the writ, a judgment in favor of defendant must conform to Rev. St. 1894, § 1618 (Rev. St. 1881, § 1530), providing that if "defendant prevail judgment shall be rendered in his favor for his costs, and that he have return of the property," and such judgment should not be in the alternative, but should be for his costs and a return of the property.—*Woodard v. Myers*, 15 Ind. App. 42, 43 N. E. 573.

[l] (App. 1907)

The decree in an action of replevin and a counterclaim of an equitable lien should be for the defendant for the amount of his interest and upon payment thereof, for the return of the property.—*Reardon v. Higgins*, 39 Ind. App. 363, 79 N. E. 208.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 396, 398-411.

§ 105. — Award of possession or return of property.

[a] (Sup. 1839)

In replevin the plea was property in the defendant, and a verdict was given for the defendant, assessing his damages at \$40.75. Judgment was rendered that the defendant have a return of the goods and recover the damages assessed, with costs. *Held*, that the

assessment of damages was surplusage, that that part of the judgment which was founded upon it was erroneous, and that the residue of the judgment was right.—*Wolf v. Blue*, 5 Blackf. 153.

[b] (Sup. 1857)

When property is attached on a writ and delivered to the plaintiffs on their giving bonds to redeliver, the proper judgment, upon the finding of the jury for the plaintiffs, is that the property was in them, or that they were entitled to its possession.—*Chisson v. Lamcool*, 9 Ind. 530.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 412-415.

See, also, 34 Cyc. pp. 1545-1547.

§ 106. — Recovery of value of property.

[a] (Sup. 1853)

Compensatory damages only can be given in replevin, and where no damages are alleged, the amount of the recovery cannot exceed the alleged value of the property.—*Hotchkiss v. Jones*, 4 Ind. 260.

[b] (Sup. 1871)

Where the property has been delivered to the plaintiff under a writ in replevin, it is error to render judgment for the value of the property.—*Blackwell v. Acton*, 38 Ind. 425.

[c] (Sup. 1877)

Personal property left by the grantor on real estate conveyed to a married woman was replevied from her husband by, and delivered to, such grantor on the day following that on which demand therefor had been made. *Held* that, in the absence of evidence of actual damage, an assessment of damages equal to the value of the property replevied was excessive.—*Stevens v. McClure*, 36 Ind. 384.

[d] (Sup. 1883)

Where, in replevin, the property is adjudged to plaintiff and is not returned or cannot be found, he is entitled to judgment for its value, though he did not claim the value in his complaint.—*Yelton v. Slinkard*, 85 Ind. 190.

[e] (Sup. 1885)

There can be no judgment for the value of the property in replevin, in the absence of any judgment for a return thereof.—*Foster v. Brigham*, 99 Ind. 505.

[f] (Sup. 1887)

In claim and delivery to recover the possession of a note, where it appears that defendant professing to be willing to buy it of plaintiff, had, over the protest of plaintiff, appropriated it, and given in payment for it a note of plaintiff held by him, and a small amount of cash to make up the difference, which plaintiff refused to accept in payment, the measure of damages is the value of the note, principal, and interest.

—Vancleave v. Beach, 110 Ind. 269, 11 N. E. 228.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 416-423.

See, also, 34 Cyc. p. 1552.

§ 107. — Alternative judgment.

[a] (Sup. 1866)

In an action of replevin, if the finding is for the plaintiff, the judgment should be in the alternative, that the plaintiff recover the possession of the property, or the value thereof, in case a delivery cannot be had, together with the damages assessed for the detention thereof.—Bales v. Scott, 26 Ind. 202.

[b] (Sup. 1870)

A judgment for the plaintiff in an action of replevin should be in the alternative—that the plaintiff recover the possession of the property or the value thereof in case a delivery thereof cannot be had, and damages for the detention.—Thompson v. Eagleton, 33 Ind. 300.

[c] (App. 1892)

Where the jury finds for plaintiff, and fixes the value of the property, and assesses damages for detention, the court should render an alternative judgment for the return of the property, or its value and damages.—Farrar v. Eash, 5 Ind. App. 238, 31 N. E. 1125.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 396, 424-428.

See, also, 34 Cyc. p. 1548.

§ 109. — Operation and effect.

Conclusiveness, see JUDGMENT, §§ 634-749.

Merger and bar of causes of action and defenses, see JUDGMENT, §§ 540-633.

[a] (Sup. 1890)

Under Rev. St. 1881, § 572, relating to judgments in replevin after dismissal of the action, the court cannot adjudge a return of the property, and in an action on the bond defendant may show in whom title was, and defend against all but nominal damages.—Hulman v. Benighof, 125 Ind. 481, 25 N. E. 549.

[b] (App. 1894)

In an action on a bond given in a replevin suit which was dismissed for want of jurisdiction, and without an adjudication as to the ownership of the property, evidence that plaintiff was not the owner is admissible in mitigation of damages.—Robinson v. Teeter, 10 Ind. App. 698, 38 N. E. 222.

[c] (Sup. 1906)

Where there is a judgment in replevin for the return of the property, the claim for damages includes the value of such property as well as all other damages; such claim for damages being indivisible.—Jackson v. Morgan, 167 Ind. 528, 78 N. E. 633.

Where defendant in replevin had judgment for the return of the property, and, in case that

could not be had, an alternative judgment for the value thereof, a subsequent action for other damages accruing before the trial cannot be maintained.—Id.

[d] (App. 1907)

That a judgment in a replevin was for nominal damages only could have no effect on the right of a party to plead a counterclaim.—Reardon v. Higgins, 39 Ind. App. 363, 79 N. E. 206.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 429, 498-501.

See, also, 34 Cyc. p. 1550.

§ 110. Performance of judgment for return of property.

[a] (Sup. 1882)

Where, in replevin, a return of the property is adjudged, it must be returned substantially as it was when taken.—Yelton v. Slinkard, 85 Ind. 190.

[b] (Sup. 1886)

Where the judgment in replevin awards plaintiff property retained by defendant under a delivery bond, it must be returned in as good order as when received under the bond, and within a reasonable time after a return has been awarded, and no demand is necessary for its return.—June v. Payne, 107 Ind. 307, 7 N. E. 370, 8 N. E. 556.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 430-436.

See, also, 34 Cyc. pp. 1550-1552.

§ 111. Execution and enforcement of judgment.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 438-445.

See, also, 34 Cyc. pp. 1552-1553.

§ 112. — In general.

[a] (Sup. 1866)

Execution in replevin should issue in the language of the statute, requiring the sheriff to deliver the property and collect the damages, or if the delivery of the property cannot be had, collect the value thereof, and the damages.—Bales v. Scott, 26 Ind. 202.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 438-444.

See, also, 34 Cyc. p. 1552.

§ 115. Effect on title to property of satisfaction of judgment for value or damages.

[a] (App. 1892)

As a general rule, where the value of property in dispute is fixed by the verdict of the jury or finding of the court, and a judgment is rendered for the amount of such value, and the judgment is paid, the title to the property becomes vested in the party against whom the judgment was rendered, for if the owner elect to take a judgment on the replevin bond, and collects it, he has thereby abandoned his right to the proper-

ty, and the title passes as fully as if it had been transferred by purchase.—*McFadden v. Schroeder*, 4 Ind. App. 305, 29 N. E. 491, 30 N. E. 711.

The doctrine of relation is never given force when an unconscionable result would follow therefrom, and it is given force only when no intervening rights of innocent purchasers are impaired.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. § 437.

See, also, 34 Cyc. p. 1550.

§ 116. Appeal and error.

Appellate jurisdiction as between particular courts, see COURTS, § 220 (2).

Appellate jurisdiction as dependent on amount in controversy, see APPEAL AND ERROR, § 65.

[a] (Sup. 1858)

The objection that the jury did not assess damages, in a suit to recover possession or damages, must be made at the time, when it can be corrected.—*Ruger v. Bungan*, 10 Ind. 451.

[b] (Sup. 1863)

An objection to the form of a judgment in replevin, in order to be available here, must have been first brought to the attention of the court below in the proper manner.—*Baker v. Horsey*, 21 Ind. 246.

[c] (Sup. 1864)

Where the finding in replevin did not ascertain the value of the goods, but the appellant, in whose favor it was, made no motion in the lower court to have it corrected, he will be regarded in the Supreme Court as having waived the error.—*Wilcoxon v. Annesley*, 23 Ind. 285.

[d] (Sup. 1868)

On a general verdict for defendant in replevin, judgment was rendered for the return of the property. No exception was taken to the nature of the judgment. *Held*, that an objection to the judgment on the ground that the verdict did not find the value of the property could not be raised on appeal.—*Watts v. Green*, 30 Ind. 98.

[e] (Sup. 1870)

In replevin, where defendant appears to the action and goes to trial on the merits without objection to the affidavit or writ issued thereon, he cannot, on appeal, raise any objection to the affidavit as such, or to the writ.—*Eddy v. Beal*, 34 Ind. 159.

[f] (Sup. 1876)

The plaintiff in an action for the recovery of the possession of personal property cannot complain of a verdict and judgment against him therein, because they do not provide for a return of the property taken under the writ.—*Branch v. Wiseman*, 51 Ind. 1.

[g] (Sup. 1889)

Defendant in replevin can waive his right to execute a forthcoming bond, and, where the

contrary does not appear, the waiver will be presumed when necessary to sustain the action of the sheriff in accepting a bond from plaintiffs and delivering the property to the plaintiffs.—*Hartlep v. Cole*, 120 Ind. 247, 22 N. E. 130.

[h] (App. 1892)

Rev. St. 1881, § 1550, provides that in replevin before justices of the peace, if the cause be dismissed or the defendant prevail, judgment shall be rendered that he have return of the property. Section 1502 provides that appeals to the circuit court shall be tried under the same rules and regulations prescribed for trials before justices. *Held*, that where, in replevin, the property has been delivered to plaintiff, and defendant prevails on appeal to the circuit court, the judgment should be for an absolute return to him of the property, and not for a return of the property or the value thereof.—*Everman v. Hyman*, 3 Ind. App. 459, 29 N. E. 1140.

[i] (App. 1892)

Rev. St. 1881, § 549, provides that in replevin the value of the property and the damages for the taking or detention must be assessed whenever "there will be a judgment for the recovery or return of the property." Section 572 provides that judgment for the plaintiff may be for the delivery of the property, "or the value thereof in case a delivery cannot be had, and damages for the detention." *Held*, that a finding for plaintiff need not determine the value of the goods, and assess his damages, where he is already in possession under the writ; and that an omission to do so, if error, is not one of which defendants can complain.—*Van Gundy v. Carrigan*, 4 Ind. App. 333, 30 N. E. 933.

[j] (App. 1896)

Plaintiff in replevin, who was not entitled to the possession of the property, was not prejudiced by a finding that it should be returned to defendant, though plaintiff's assignor may have had the right of possession.—*Hyde v. Courtwright*, 14 Ind. App. 106, 42 N. E. 647.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 446-459.

See, also, 34 Cyc. p. 1553.

§ 117. Costs.

[a] (Sup. 1828)

Where, in replevin, plaintiff recovers judgment for the value of part of the property, and defendant for the rest, each is entitled to costs.—*Chinn v. Russell* 2 Blackf. 171; *Wright v. Mathews*, *Id.* 187.

[b] (Sup. 1834)

Though a defendant in replevin claiming property is not entitled to costs by the common law, nor by the English statutes on the subject, yet by the statute law of Indiana he is entitled to costs when he obtains a verdict as in all other cases.—*White v. Lloyd*, 3 Blackf. 390.

[c] (*Sup.* 1834)

Although a defendant in replevin, claiming property, is not entitled to costs by the common law, yet under a statute allowing defendant costs where he prevails, a defendant who obtains a verdict in replevin is entitled to costs, as in all other cases.—*Mitchell v. State ex rel. Board of Trustees of Union County Seminary*, 3 Blackf. 891.

[d] (*App.* 1891)

Where in replevin the property was apportioned between the parties, it was not error to apportion the costs between them in the same ratio.—*Sullivan v. O'Hara*, 27 N. E. 590, 1 Ind. App. 259.

[e] (*App.* 1892)

On recovery of judgment in replevin against a sheriff and attaching creditors, who appear and contest the title to the goods, the creditors are solely liable for costs.—*Van Gundy v. Carigan*, 4 Ind. App. 333, 30 N. E. 933.

[f] (*App.* 1898)

Where, pending an action in replevin against a town marshal and the execution creditor for goods taken on execution, a part of the goods not legally held by the marshal was returned by him, and thereafter judgment against plaintiff as to the remaining goods was rendered, a division of the costs could not properly be made by the court, taxing against plaintiff all costs after the return of such illegally held property.—*Grim v. Adkins*, 51 N. E. 494, 21 Ind. App. 108.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 460-469.

See, also, 34 Cyc. pp. 1556-1558.

VII. LIABILITIES ON BONDS AND UNDERTAKINGS.

Conclusiveness of judgment in replevin, as against sureties on replevin bond, see *PRINCIPAL AND SURETY*, § 145.

Liability of officer executing writ on his official bond, see *SHERIFFS AND CONSTABLES*, § 157. Release of liability on, see *RELEASE*, § 31.

§ 118. Accrual or release of liability by breach or fulfillment of conditions.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 470-479.

See, also, 34 Cyc. pp. 1573-1579.

§ 119. — Replevin bonds or undertakings.

[a] (*Sup.* 1840)

Where a replevin bond is conditioned to prosecute the suit without delay, and to return the goods if a return should be awarded, it is a breach of the condition, for which an action may be sustained, if the plaintiff in replevin do not succeed, though there be no award of a return of goods.—*Brown v. Parker*, 5 Blackf. 291.

[b] (*Sup.* 1866)

Where, in an action of replevin, the defendant has judgment for a return of the property, but the value of the property is not ascertained by the verdict of the jury, as the statute requires, the defendant may still have his action on the bond to recover the value of the property.—*Whitney v. Lehmer*, 26 Ind. 503.

[c] (*Sup.* 1872)

Where plaintiff in replevin dismisses before verdict, the sureties on the replevin bond are liable for a failure of their principal to prosecute the action with effect.—*Wiseman v. Lynn*, 39 Ind. 250.

[d] (*Sup.* 1874)

Where the court in an action of replevin finds in favor of the defendant, that he is entitled to a return of the property, and finds its value, and renders judgment for the return and, on failure to return, for the value of the property, this will give the defendant a right of action on the replevin bond for the amount of damage to him, not exceeding the value of the property not returned.—*Landers v. George*, 49 Ind. 309.

[e] (*Sup.* 1882)

A dismissal of a replevin suit constitutes a breach of the bond entitling the obligee to an action for a return of the property or its value, even though the dismissal was ordered on his own motion for defect in the writ.—*Waddell v. Bradway*, 84 Ind. 537.

[f] (*Sup.* 1883)

Sureties on a replevin bond are not liable where no judgment of return has been rendered, though the verdict required such judgment.—*Thomas v. Irwin*, 90 Ind. 557.

[g] (*Sup.* 1884)

After a replevin suit is compromised and dismissed by the parties, no suit can be maintained on the bond.—*Gerard v. Dill*, 96 Ind. 101.

[h] (*App.* 1892)

The condition in a replevin bond to prosecute the suit to effect, and without delay, means a continuous prosecution to a final judgment in favor of the plaintiff. The plaintiff must diligently pursue the case and must succeed.—*Peffley v. Kenrick*, 31 N. E. 40, 4 Ind. App. 510.

A replevin bond was conditioned to "prosecute this action with effect, and return the property to defendant, if return be adjudged by the court, and pay all such sums of money as may be recovered in the action for any cause whatever." The writ was dismissed without trial. *Held* that, though no judgment for return of the property could be entered on the dismissal of the writ, the condition of the bond was broken by the failure to prosecute, and the surety was liable in a suit on the bond for the value of the property.—*Id.*

The three conditions in a replevin bond, to wit, the prosecution of the action with effect and without delay, the return of the property

if its return be adjudged by the court, and the payment of such sums of money as may be recovered against his principal, are independent, and a right of action accrues upon the bond if there be a failure to keep any of them.—Id.

[1] (App. 1901)

Under Burns' Rev. St. 1901, § 1235 (Hornor's Rev. St. 1901, § 1221), providing that the principal and sureties to a bond shall be bound to the full extent contemplated by the law requiring the same, though defective in form, the sureties on a replevin bond which omits the statutory provision that the principal shall prosecute his action with effect are liable where the principal dismisses his action without a determination of the merits.—Rauh v. Waterman, 61 N. E. 743, 63 N. E. 42, 29 Ind. App. 344.

[1] (App. 1908)

Right of action on a replevin bond carries with it the right to damages for failure to perform its conditions.—Lindsey v. Hewitt, 42 Ind. App. 573, 86 N. E. 446.

Where plaintiff in replevin is in possession of the property, and defendant recovers judgment for its return, but the value of the property is not found as required by Burns' Ann. St. 1908, § 575 (Burns' Ann. St. 1901, § 558), defendant in the replevin suit may sue on the bond to recover the value of the property, the common-law remedy for breach of the bond not being excluded by Burns' Ann. St. 1908, § 569 (Burns' Ann. St. 1901, § 581), authorizing on verdict for plaintiff, judgment in the alternative for the return of the property or the value thereof in case a return cannot be made.—Id.

Plaintiff in replevin, having failed to have adjudicated the value of the property, cannot object to an adjudication in an action against him on the bond on a refusal to return the property as offered, though Burns' Ann. St. 1908, § 575 (Burns' Ann. St. 1901, § 558), requires that the jury in replevin must assess the value of the property.—Id.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. § 470-478.

See, also, 34 Cyc. pp. 1574, 1575.

§ 122. Rights and remedies of sureties.

[a] (Sup. 1874)

In an action of replevin, where a bond is filed and possession of the property obtained, and afterward the suit is dismissed by agreement of the parties, the plaintiff agreeing to pay the defendant a certain sum, but where no judgment is rendered, if the surety on the replevin bond afterward, without the request of the plaintiff, pays the amount agreed to be paid to the defendant, he cannot recover the same of his principal; the payment being voluntary on the part of the surety.—Hollinsbee v. Ritchey, 49 Ind. 261.

[b] (App. 1906)

The principal, on a delivery bond, given to recover possession of property taken on exe-

cution, is primarily liable, and his duty is to hold his surety thereon harmless.—Hubbard v. Security Trust Co., 38 Ind. App. 156, 78 N. E. 79.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. § 480.

See, also, 34 Cyc. pp. 1579-1588.

§ 124. Extent of liability.

Right to costs as affected by amount of recovery, see COSTS, § 22.

[a] (Sup. 1839)

Judgment by default in a suit on a delivery bond cannot be for more than the value of the property agreed to be delivered, the costs, and 10 per cent. damages.—Campbell v. Woolen, 5 Blackf. 80.

[b] (Sup. 1844)

A constable seized some horses of A., on an execution against him, and delivered them to B., to be kept. A., without satisfying the execution, tendered to B. the amount of the expense of keeping the horses, and demanded them. B. having refused to deliver the horses, A. replevied them, and afterwards suffered a nonsuit in the action of replevin. Held, in a suit by B. against A. and his sureties on the replevin bond, that plaintiff was entitled to recover, in damages, a reasonable charge for the keeping of the horses.—Davis v. Crow, 7 Blackf. 129.

In an action on a replevin bond, the plaintiff cannot recover the fees paid to his lawyer in the replevin suit, nor compensation for his own attendance at court in the suit, nor his lawyer's fees paid in the suit on the bond.—Id.

[c] (Sup. 1857)

One who becomes surety on the replevin bond given by a defendant becomes a joint debtor with the principal defendant.—Hutchins v. Hanna, 8 Ind. 533.

Where the judgment against a defendant in replevin is governed by a contract made between the parties when no appraisalment law was in force, the liability of a surety on defendant's replevin bond is governed by the same contract.—Id.

[d] (Sup. 1861)

The sureties in a replevin bond become responsible, by their obligation, for any misconduct of the plaintiffs in the suit, in letting judgment go against them; they should attend to such matters at the time of the suit, and cannot afterwards set them up to avoid their liability on the bond.—Walls v. Johnson, 16 Ind. 374.

If, on a judgment for a return of the property in replevin, the property, though it could have been returned, was converted by the obligees in the replevin bond, interest on the value of the property from the rendition of the judgment of return should be included as part of the damages in a suit on the replevin bond.—Id.

In a suit on a replevin bond, the court should give judgment for the value of the property, if it cannot be returned.—*Id.*

[e] (Sup. 1863)

In an action on a replevin bond, to recover the value of chattels wrongfully replevied, the measure of damages is the value of the goods, and not the price at which the defendant may have sold them.—*Schrader v. Wolfen*, 21 Ind. 238.

[f] (Sup. 1864)

In an action by the obligees against the obligors in a replevin bond, where the title to the property was not determined in the replevin suit, and the title thereto, and the right of possession, are in a person other than the obligees, they are only entitled to nominal damages.—*Stockwell v. Byrne*, 22 Ind. 6.

[g] (Sup. 1864)

Where a person, as a means of getting possession of lumber loaded on cars under a contract of sale without paying for it, brings a replevin suit against the vendor, which goes against him, and he leaves the vendor to obtain payment by a suit on the replevin bond, the jury may give as damages the value of all the lumber on the cars though its amount was underestimated in the replevin bond, and they may add interest on the value of the lumber during its detention.—*Story v. O'Dea*, 23 Ind. 326.

[h] (Sup. 1882)

In an action on a replevin bond, deterioration from bad packing and storage of goods returned is a proper element of damage, as well as interest from the time of replevin.—*Yelton v. Slinkard*, 85 Ind. 190.

[i] (Sup. 1882)

Land was deeded to M. and an infant. By the deed it was provided that M. should have possession of the rents and profits till the infant should arrive at the age of 21 years, when the infant should own the land in fee simple. On attaining her majority the infant conveyed the land to C., who replevied a part of the crop from M. The replevin suit was dismissed for want of a proper bond, but no part of the crop was ever returned to plaintiff, nor did the judgment of dismissal provide for its return. There was no evidence in the suit as to whether C. was not entitled to the part of the crop taken by him. *Held*, that in an action on the replevin bond M. was only entitled to nominal damages.—*Miller v. Cheney*, 88 Ind. 466.

[j] (Sup. 1889)

The recovery cannot exceed the penalty named in the bond.—*Kellar v. Carr*, 119 Ind. 127, 21 N. E. 463.

Costs incurred in defending a replevin suit are recoverable by defendant in an action on the replevin bond, but costs made by the plaintiff are not so recoverable.—*Id.*

[k] (Sup. 1890)

When judgment has been given for defendants for the return of the property or its value as found by the jury, no other damages than such value can be assessed in a suit on the replevin bond.—*Ringgenberg v. Hartman*, 124 Ind. 186, 24 N. E. 987.

[l] (App. 1891)

In an action on a replevin bond it appeared that the plaintiff's right to the property was derived from the levy of an execution against a third person who owned the goods, and that the defendant, who was defeated in the replevin suit, held an unsatisfied chattel mortgage on the goods for more than their value. *Held*, that only nominal damages could be recovered, since, as the levy was made after the execution of the mortgage, the mortgagor's interest, which was all that was levied on, was worthless.—*Consolidated Tank Line Co. v. Bronson*, 2 Ind. App. 1, 28 N. E. 155.

Attorney's fees incurred in the prosecution of a replevin suit cannot be recovered in an action on the replevin bond.—*Id.*

[m] (App. 1894)

In an action on a replevin bond, where it appears that the replevin suit was dismissed for want of jurisdiction, and the property returned to plaintiff, and there was no adjudication as to ownership, and there is evidence that plaintiff was not the owner of the property, a judgment for nominal damages will not be reversed.—*Robinson v. Teeter*, 10 Ind. App. 698, 38 N. E. 222.

[n] (App. 1908)

Where property depreciates in value after being replevied, and before judgment for its return, plaintiff can recover the value at the time suit was brought, with 6 per cent. interest.—*Lindsey v. Hewitt*, 42 Ind. App. 573, 86 N. E. 446.

Generally, when suing on a replevin bond, defendant in replevin is entitled to the value of the property from the time he was awarded its return, with interest until the trial on the bond.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 487-497.
See, also, 34 Cyc. pp. 1582-1583.

§ 127. Actions.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 502, 506-540.
See, also, 34 Cyc. pp. 1589-1608.

§ 128. — Right of action.

Bar of action by former judgment, see JUDGMENT, § 590.

Nature of action as in contract or tort, see ACTION, § 27.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 502, 506-509.
See, also, 34 Cyc. pp. 1589, 1590.

§ 130. — Defenses.

[a] (Sup. 1841)

In an action on a replevin bond, in which the breach assigned was the plaintiff's failure in the suit, pleas to the effect that the action of replevin was dismissed against the will of the plaintiff therein were bad on demurrer, as such dismissal was no bar to the action; plaintiff being bound to obtain a judgment in his favor or be held liable on the bond.—*Sherry v. Foreman*, 6 Blackf. 56.

In an action on a replevin bond, in which the breach was the failure to prosecute the action with effect, the plea that the property replevied belonged to the principal obligor presented no defense to the action, though it might have been matter in mitigation of damages.—*Id.*

[b] (Sup. 1867)

Where plaintiff in replevin has obtained possession of the property under his writ, neither he nor his sureties can be permitted to allege, in defense of an action on the bond, that no suit was pending when the bond was executed, because no summons ever issued in the replevin suit.—*Sammons v. Newman*, 27 Ind. 508.

[c] (Sup. 1872)

In an action on a replevin bond, an answer of property in the plaintiff in the action of replevin is no defense, but goes to the mitigation of damages.—*Wiseman v. Lynn*, 39 Ind. 250.

[d] (Sup. 1881)

The fact that the penalty named in a replevin bond is less than double the value of the property cannot be set up as a defense in a suit on the bond, especially where the writ of replevin had been issued and possession of the property obtained upon it.—*Trueblood v. Knox*, 73 Ind. 310.

[e] (Sup. 1882)

That the writ issued by the justice was defective, and that the circuit court on appeal dismissed the suit because of the lack of a proper summons and writ, is not a defense to a suit on a replevin bond given in a suit before a justice of the peace.—*Waddell v. Bradway*, 84 Ind. 537.

[f] (Sup. 1882)

The failure of the jury to assess the value of property taken in replevin will not prevent plaintiff in an action on the undertaking from recovering such value if a return cannot be had.—*Yelton v. Slinkard*, 85 Ind. 190.

[g] (Sup. 1883)

The fact that a surety held an unpaid mortgage on the property replevied is no defense to a suit on the replevin bond.—*Woods v. Kessler*, 93 Ind. 356.

[h] (Sup. 1885)

A person having by his execution of a replevin bond enabled his co-obligor and principal to get possession of and convert to his own

use another's property, ought not to be permitted to escape liability for the value of such property, on the ground that the justice of the peace by whom said bond was approved had no jurisdiction over his person, when the record shows that his co-obligor and principal in said bond had voluntarily submitted his person to the jurisdiction of said justice of the peace.—*Harbaugh v. Albertson*, 102 Ind. 69, 1 N. E. 298.

[i] (Sup. 1886)

Where plaintiff in a replevin suit obtains possession of the property in an apparently regular manner, through instrumentalities and proceedings set on foot by himself, neither he nor his sureties, in a suit on the bond, will be heard to impeach the return of the sheriff, and the regularity of the proceedings.—*McFadden v. Ross*, 8 N. E. 161, 108 Ind. 512.

[j] (Sup. 1887)

Where a plaintiff asks and obtains the delivery of property sued for in an action of replevin, he and his sureties are estopped from averring that there was no consideration for their undertaking.—*McFadden v. Fritz*, 110 Ind. 1, 10 N. E. 120.

[k] (Sup. 1889)

Where plaintiffs in replevin execute a bond and obtain possession of the property, they are estopped after judgment for defendant, and a failure to comply therewith, to set up as a defense to a suit on the bond that the statutory provisions as to its execution were not technically complied with.—*Hartlep v. Cole*, 120 Ind. 247, 22 N. E. 130.

The fact that defendant in replevin, who had recovered judgment against plaintiffs therein, was enforcing the execution issued on the judgment against plaintiffs, is no defense to a suit on the replevin bond, nor on an appeal bond given on an appeal from the judgment.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 514-517.

See, also, 34 Cyc. pp. 1593-1596.

§ 131. — Jurisdiction and venue.

Jurisdiction as dependent on amount or value in controversy, see COURTS, § 169.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. § 510.

See, also, 34 Cyc. p. 1590.

§ 132. — Parties.

[a] (Sup. 1861)

Where property, seized by a sheriff on execution, is replevied from him, and afterward the replevin suit is decided in his favor, suit on the replevin bond may be brought by the sheriff and the execution plaintiff jointly.—*Walls v. Johnson*, 16 Ind. 374.

[b] (Sup. 1883)

Where several judgment creditors levy separate executions on property which is taken

from the sheriff by replevin, they may join in a suit on the replevin bond.—*Thomas v. Irwin*, 90 Ind. 537.

Where property levied on by a sheriff under execution on separate judgments is taken from the sheriff on replevin, the assignee of one of the judgments, the assignment of which is technically defective, is a proper party plaintiff in an action on the replevin bond, since he is a real party in interest.—*Id.*

[c] (Sup. 1886)

Where goods have been taken possession of by the plaintiffs in a replevin suit, and an ordinary replevin bond has been executed by them and their sureties to the plaintiffs, a stranger, who is neither a party to the suit nor to the bond, cannot maintain an action thereon against the obligors.—*Pipher v. Johnson*, 108 Ind. 401, 9 N. E. 378.

[d] (Sup. 1889)

In an action on a replevin bond, a demurrer to the complaint, on the ground that the one to whom the bond was payable was not made a party plaintiff, is properly overruled, where the complaint alleges that such payee has no interest in the controversy.—*Kellar v. Carr*, 119 Ind. 127, 21 N. E. 463.

[e] (App. 1899)

The assignee of an execution plaintiff, being the real party in interest, may sue on a bond given the sheriff in replevin of the goods levied on under the execution, without joining the sheriff.—*Kahn v. Gavit*, 55 N. E. 268, 23 Ind. App. 274.

[f] (Sup. 1906)

In an action on a replevin bond, persons who were not parties to the bond were improperly joined as defendants.—*Jackson v. Morgan*, 167 Ind. 528, 78 N. E. 633.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 518, 519.

See, also, 34 Cyc. pp. 1596-1598.

§ 133. — Pleading.

[a] (Sup. 1844)

On the execution of a writ of inquiry for judgment on a replevin bond for the plaintiff on demurrer, evidence that the goods replevied belonged to the principal on the bond is admissible in mitigation of damages.—*Wallace v. Clark*, 7 Blackf. 298.

[b] (Sup. 1852)

To a declaration on a replevin bond the defendant pleaded that the plaintiff ought not to maintain his action, because the suit in replevin was dismissed by agreement of the parties. *Held*, that the plea was bad, because it attempted to set up a parol dispensation of a specialty, and because the agreement would not include an agreement to dispense with a return of the property, without which the dismissal would itself be a breach of the bond.—*O'Neal v. Wade*, 3 Ind. 410.

[c] (Sup. 1864)

Where the proceedings in an action of replevin are reviewed and corrected during the pendency of an action on the replevin bond, the court may allow the complaint in the action on the bond to be amended by adding the proceedings and judgment on review.—*Wheat v. Catterlin*, 23 Ind. 85.

[d] (Sup. 1864)

A complaint in an action on a replevin bond, which alleges that the suit of replevin was commenced against A. and B., and that the property replevied was in the possession of both of them, and that judgment was rendered in favor of the defendants, shows a cause of action in favor of B., although it avers further that the lumber belonged to A.—*Story v. O'Dea*, 23 Ind. 326.

[e] (Sup. 1864)

In a suit upon a replevin bond, where the answer was a general denial, the plaintiff should give in evidence the undertaking sued on to entitle him to recovery.—*Smith v. Lisher*, 23 Ind. 500.

Matters in mitigation of damages only, in an action on a replevin bond, cannot be specially pleaded or set up in the answer, but should be given in evidence under the general denial.—*Id.*

[f] (Sup. 1867)

Where, in an action on a replevin bond, a transcript of the proceedings in the replevin suit is filed with the complaint, the court will strike it out on motion; but it is not cause for demurrer.—*Sammons v. Newman*, 27 Ind. 508.

In an action on a replevin bond, pleas which did not go in bar of the action, but only in mitigation of damages, are not allowable.—*Id.*

[g] (Sup. 1876)

In an action on a replevin bond, where the defense is that the value of the property replevied exceeds the jurisdiction of the justice in whose court the suit is pending, such defense must be specially pleaded, unless it appears affirmatively from the proceedings of the justice.—*Tyler v. Bowlus*, 54 Ind. 333, 601.

[h] (Sup. 1880)

A complaint on a replevin bond, for failure to return the property after judgment therefor, need not state who were sureties and who the principals, nor set out copies of the writ of replevin and the return of the officer thereon.—*Shappendocia v. Spencer*, 73 Ind. 133.

[i] (Sup. 1883)

In an action against the sureties on a replevin bond, the ownership and right to possession are *res judicata*.—*Woods v. Kessler*, 93 Ind. 356.

[j] (Sup. 1884)

A complaint on a replevin bond, alleging judgment for return of half of goods worth \$400, or payment of the sum, and for costs.

and for breaches a failure to deliver, pay value, or to pay costs, does not show any impossibility of delivering the goods, and is therefore good on demurrer.—*Fisse v. Katsentine*, 93 Ind. 490.

[k] (Supp. 1886)

Where it is averred, in a complaint on a replevin bond, that defendants failed and refused to pay the judgment rendered against them in the replevin proceedings, it is not necessary to also aver that such judgment remains in full force, and unappealed from.—*Blackburn v. Crowder*, 108 Ind. 238, 9 N. E. 108.

[l] (App. 1891)

A third person executed to defendant a mortgage to secure a payment of notes executed by such third person as principal and defendant as security. The mortgage provided that on failure of such third person to pay the notes when due defendant was to take possession of the property, and have full ownership without notice or demand. The notes not being paid when due, the property was delivered to defendant at an agreed valuation, which left a balance unsatisfied. Plaintiff obtained judgment against such third person, and execution was issued on the judgment and levied on a part of the property. The officer being about to sell the property on execution, defendant brought suit against him to recover possession, and on the execution of a bond the possession was given to defendant. Defendant, failing to return the replevied property, as ordered by the court, plaintiff sued on the replevin bond. *Held*, that if the title to the property was not in issue, but the right to the possession only, the defendant had the right to prove under his answer which was not in bar, but in mitigation, that he held a valid, unsatisfied, and prior mortgage lien on the property.—*Consolidated Tank Line Co. v. Bronson*, 28 N. E. 155, 2 Ind. App. 1.

[m] (App. 1896)

In an action on a replevin bond a demurrer to the complaint should be sustained when neither the original bond nor a copy was filed with the complaint, as required by Rev. St. 1894, § 365 (Rev. St. 1881, § 362).—*Burt v. Little*, 12 Ind. App. 567, 40 N. E. 929.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 520-526.

See, also, 34 Cyc. pp. 1598-1602.

§ 134. — Evidence.

Documentary evidence, see EVIDENCE, § 332.

Parol evidence to vary instrument, see EVIDENCE, § 400.

[a] (Supp. 1829)

Where chattels have been wrongfully replevied from a sheriff, and the party replevying, in answer to an action on the replevin bond, attempts to prove that "after the dismissal of the replevin suit he offered to return the chattels to the sheriff, which he refused to accept, because instructed so to do by the attorney of the execution plaintiff," such proof is inadmissi-

ble, because insufficient to establish a legal tender.—*Schrader v. Wolfen*, 21 Ind. 238.

[b] (Supp. 1872)

The recital in a replevin bond of the value of the property is sufficient evidence of the value, in an action on the bond.—*Wiseman v. Lynn*, 39 Ind. 250.

[c] (Supp. 1882)

Although a statute requires the jury, in a replevin suit, to assess the value of the property, the failure of the jury so to do does not affect the right of plaintiff in a suit on the replevin bond to prove the value and damage, where a return of the property is not made as ordered.—*Yelton v. Slinkard*, 85 Ind. 190.

[d] (Supp. 1883)

The dismissal of a replevin suit does not remove the papers from the record, and the admission of such papers in evidence in a suit on the replevin bond is not error.—*Woods v. Kessler*, 93 Ind. 356.

[e] (Supp. 1886)

In an action upon a replevin bond given to retain the possession of property, the return of the property, after the commencement of the action, may be considered in mitigation of damages.—*June v. Payne*, 107 Ind. 307, 7 N. E. 370, 8 N. E. 556.

[f] (Supp. 1886)

In a suit on a replevin bond, where the genuineness of the signatures is admitted, and the approval of the sheriff is indorsed thereon as of the date of the commencement of the action, the bond is admissible in evidence.—*McFadden v. Ross*, 108 Ind. 512, 8 N. E. 161.

[g] (Supp. 1890)

Evidence, in an action on a replevin bond, that defendants, who were plaintiffs in the replevin suit, held a mortgage on the property involved in that suit, and that the notes secured thereby are still unpaid, is admissible in mitigation of damages.—*Ringgenberg v. Hartman*, 124 Ind. 186, 24 N. E. 987.

An objection to the admission of such evidence on the ground of want of mutuality, because one of the obligees in the replevin bond acquired his interest in the property after the execution of the mortgage, cannot be sustained.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 527-531.

See, also, 34 Cyc. pp. 1602-1605.

§ 135. — Trial, judgment, and review.

[a] (Supp. 1829)

Where, in debt on a delivery bond for property levied on, the declaration alleged a breach in the nondelivery of the property in as good order as it was when the bond was executed, according to the condition of the bond, and judgment was given for plaintiff on demurrer, the quantum of damages sustained by plaintiff for the breach of the contract was the

only subject of inquiry before the jury.—*Chinn v. Perry*, 2 Blackf. 268.

[b] (*Sup.* 1889)

The fact that defendant in replevin, who had recovered judgment against plaintiffs therein, was enforcing the execution issued on the judgment against plaintiffs, is no defense to a suit on an appeal bond given on an appeal from the judgment.—*Hartlep v. Cole*, 120 Ind. 247, 22 N. E. 130.

[c] (*Sup.* 1890)

It is harmless error, in an action on a replevin bond, to strike out an allegation in the cross-complaint that the clerk by mistake, in the replevin suit, wrote the judgment that defendants in that suit were the "owners," of the property, whereas the question involved in the suit was the right of possession only, as courts will ignore such judgment, so far as it attempts to settle the question of title, and such allegation added nothing to the cross-complaint.—*Ringgenberg v. Hartman*, 124 Ind. 186, 24 N. E. 987.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Replev. §§ 532-540.

See, also, 34 Cyc. pp. 1606-1608.

REPLEVIN BAIL.

See—

Stay of execution. EXECUTION, §§ 121, 141, 158, 171, 177, 233, 293, 327, 422.

Against personal representative. EXECUTORS AND ADMINISTRATORS, § 454.

Capacity of married women to execute.

HUSBAND AND WIFE, § 87.

Extinguishment of judgment lien. JUDGMENT, § 800.

In bastardy proceedings. BASTARDS, §§ 84-89.

Mortgages to indemnify. MORTGAGES, §§ 32, 438.

Right of action by administrator of bail. EXECUTORS AND ADMINISTRATORS, § 129.

Set-off in action on recognizance of note executed by one of two obligees in bond.

SET-OFF AND COUNTERCLAIM, § 47.

Subrogation of replevin bail. SUBROGATION, §§ 7, 25, 28, 35, 36.

REPLEVY OF JUDGMENT.

Right to execution, see EXECUTION, § 12.

REPLICATION.

See—

EQUITY, §§ 212-213.

Plea in abatement in criminal prosecution. CRIMINAL LAW, § 282.

PLEADING, §§ 164-186.

REPLY.

See—

EQUITY, §§ 212, 213.

PLEADING, §§ 164-186.

REPLY BRIEFS.

See APPEAL AND ERROR, § 762.

REPORT.

See—

Competency of official reports as evidence. EVIDENCE, § 333.

False report to commercial agency by buyer as affecting validity of sale. SALES, § 47.

Formation of opinion from rumor or newspaper reports as affecting competency of juror. JURY, § 100.

Privilege of public officers as to reports. LIBEL AND SLANDER, § 39.

Stenographer's report, incorporation into bill of exceptions. EXCEPTIONS, BILL OF, § 14.

By particular classes of persons.

See—

Banks. BANKS AND BANKING, § 16.

Board of Tax Commissioners, judicial notice of. EVIDENCE, § 48.

CARRIERS, § 9.

City engineer as basis for making of assessment for public improvements. MUNICIPAL CORPORATIONS, § 461.

Commissioners, appraisers, or viewers in condemnation proceedings. EMINENT DOMAIN, §§ 234, 235, 237.

Commissioners for assessment of damages from construction of public improvements. MUNICIPAL CORPORATIONS, § 402.

Commissioners or viewers in drainage proceedings. DRAINS, §§ 32, 33.

In highway proceedings. HIGHWAYS, §§ 39-41.

Congressional committee as documentary evidence. EVIDENCE, § 325.

Corporate officers, liability for failure to make. CORPORATIONS, § 338.

Corporations, failure to file as ground for dissolution. CORPORATIONS, § 590.

Of property for taxation. TAXATION, §§ 360-371½.

County superintendent of schools to bureau of statistics, right to special compensation. SCHOOLS AND SCHOOL DISTRICTS, § 48.

Foreign corporations. CORPORATIONS, § 649.

Master in Chancery in foreclosure proceedings. MORTGAGES, § 479.

Poor law officers. PAUPERS, § 5.

School teachers. SCHOOLS AND SCHOOL DISTRICTS, §§ 137, 144, 145.

Taxpayer of property for taxation. TAXATION, §§ 328-335½.

Penalties for making false report. TAXATION, § 839.

Township officer, failure to give as breach of bond. TOWNS, § 33.

Of particular acts, facts, transactions, or proceedings.

See—

Damages caused by dogs. ANIMALS, § 88.

Insolvency of decedent's estate. EXECUTORS AND ADMINISTRATORS, § 410.

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Judicial sale. JUDICIAL SALES, § 31.
 Sale by assignee for benefit of creditors. ASSIGNMENTS FOR BENEFIT OF CREDITORS, § 243.
 Of property of decedent. EXECUTORS AND ADMINISTRATORS, § 374.
 On foreclosure of mortgage. MORTGAGES, § 525.

In particular actions or proceedings.

See—

Condemnation proceedings. EMINENT DOMAIN, §§ 234, 235, 237.
 Drainage proceedings. DRAINS, §§ 32, 33.
 Foreclosure proceedings. MORTGAGES, §§ 479, 525.
 Highway proceedings. HIGHWAYS, §§ 39–41.

JUDICIAL SALES, § 31.
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 Public improvements. MUNICIPAL CORPORATIONS, §§ 402, 461.
 Reference. REFERENCE, §§ 79–107.
 In equity. EQUITY, §§ 406–410.

REPORTERS.

See—

Court stenographers. COURTS, § 57.
 Authority of county board to employ shorthand. COUNTIES, § 113.
 Authority to allow or settle bills of exceptions. EXCEPTIONS, BILL OF, § 32.
 Implied repeal of statute relating to employment of by revision or codification. STATUTES, § 167.

REPORTS.

Scope-Note.

[INCLUDES publications of judicial decisions for general circulation; right to publish or control publication of such decisions in general; constitutional and statutory provisions relating to such publication; public officers charged with the preparation and publication of such reports, and their rights, powers, and duties; and contracts for the publication and sale of such reports, and rights and liabilities arising therefrom.

[EXCLUDES stenographers' reports of judicial proceedings (see *Courts; Exceptions, Bill of; Appeal and Error*; and other specific heads); and reports of referees, masters, commissioners, auditors, etc. (see *Reference; Equity*). For complete list of matters excluded, see cross-references, post.]

Analysis.

- § 1. Right to publish or to control publication.
- § 2. Constitutional and statutory provisions.
- § 3. Reporters.
- § 6. Sale of copies.

Cross-References.

See—

Competency of law reports as evidence. EVIDENCE, § 362.
 Copyright of law reports. COPYRIGHTS, § 15.

Laws relating to price of as impairing obligation of contracts. CONSTITUTIONAL LAW, § 140.
 Reading or quoting reported cases in instructions to jury. TRIAL, § 241.

§ 1. Right to publish or to control publication.

Right of clerk to furnish copies of court opinions for publication, see COURTS, § 107.

[a] (Sup. 1906)

Any person may lawfully publish the decisions of the Supreme Court and Appellate Courts of Indiana.—*Ex parte Brown*, 166 Ind. 593, 78 N. E. 553.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Reports, § 1.

See, also, 34 Cyc. pp. 1612, 1613.

§ 2. Constitutional and statutory provisions.

Effect of partial invalidity of statute, see STATUTES, § 64.

[a] (Sup. 1875)

The fact that the reporter of the supreme court decisions, published by him under Act March 13, 1875, is entitled, by the consent of the state, to copyrights in such reports, which subject is governed exclusively by acts of Congress, does not invalidate that portion of said act limiting the price at which he may sell the

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copies so published.—*Black v. Merrill*, 51 Ind. 32.

[b] (*Sup.* 1876)

The provision of Act March 13, 1875, limiting the price at which the official reports of the Indiana supreme court published under that act may be sold by others than the official reporter, is valid, and no seller thereof can recover more than \$3 per copy for such reports, notwithstanding the purchaser may have agreed to pay a higher price.—*Welling v. Merrill*, 52 Ind. 350.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Reports, § 4.

See, also, 34 Cyc. p. 1613.

§ 3. Reporters.

Incompatibility of office of reporter with that of colonel of volunteers, see OFFICERS, § 30.
Occurrence and existence of vacancy in office of reporter, see OFFICERS, § 55.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Reports, §§ 2, 3.

See, also, 34 Cyc. pp. 1617, 1618.

§ 6. Sale of copies.

[a] (*Sup.* 1875)

The reporter of the supreme court decisions is bound by the provisions of Act March 13, 1875, limiting the price at which he may sell the official reports of such decisions, since he must be deemed to have assented thereto by continuing in office and publishing the reports under the provisions of the act, and such limitation applies to copies published by him in excess of the number required by the act.—*Black v. Merrill*, 51 Ind. 32.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Reports, § 4.

See, also, 34 Cyc. p. 1616.

REPRESENTATION.

See—

Among collaterals, as to right of inheritance. DESCENT AND DISTRIBUTION, §§ 32–35, 37–39.

Bank by officers and agents. BANKS AND BANKING, §§ 102–118.

Cestui que trust by trustee. TRUSTS, § 173.

Client by attorney. ATTORNEY AND CLIENT, §§ 62–103.

Conclusiveness of judgment as to parties suing or sued in representative capacity. JUDGMENT, § 670.

Construction of wills. WILLS, §§ 550–552.

Corporation by attorney. CORPORATIONS, § 508.

By officers and agents. CORPORATIONS, §§ 397–432.

Court and parties by receiver. RECEIVERS, § 81.

Decedent or creditors by executor or administrator. EXECUTORS AND ADMINISTRATORS, § 74.

One or more suing on behalf of all interested. PARTIES, §§ 9–12.

Partnership by individual partner. PARTNERSHIP, §§ 125, 126, 128, 129, 131, 133–135, 137, 139–146, 148, 150, 152–154, 156, 157, 162, 163.

Principal by agent—

BROKERS, §§ 93–103.

PRINCIPAL AND AGENT, §§ 91–94.

State by attorney. STATES, § 205.

By attorney general. ATTORNEY GENERAL, § 4.

REPRESENTATIONS.

See—

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False representations—

FALSE PRETENSES.

FRAUD.

Ground of estoppel in pais. ESTOPPEL, §§ 82–87.

By particular classes of persons.

See—

Agents. PRINCIPAL AND AGENT, § 156.

Officers and agents of corporations. CORPORATIONS, § 422.

Partner for firm. PARTNERSHIP, § 152.

REPRESENTATIVES.

See—

Personal representatives. EXECUTORS AND ADMINISTRATORS, § 337.

State representatives. STATES, §§ 24–34.

REPRODUCTION.

Written instruments, submission for comparison, see EVIDENCE, § 198.

REPUDIATION.

See—

ABANDONMENT.

Act of agent. PRINCIPAL AND AGENT, §§ 75, 161.

Of broker. BROKERS, § 103.

Of officer or agent of corporation. CORPORATIONS, § 426.

Of servant causing injury to third person. MASTER AND SERVANT, § 308.

Bet. GAMING, § 29.

Covenants in conveyance of right of way. RAILROADS, § 67.

Trust as affecting accrual of right of action within statute of limitations. LIMITATION OF ACTIONS, § 103.

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Allegations of indictment or information. INDICTMENT AND INFORMATION, § 73.

Of pleading. PLEADING, §§ 21, 34.

Constitutional provisions. CONSTITUTIONAL LAW, § 12.

Defenses alleged. PLEADING, § 93.

Description of boundaries. BOUNDARIES, § 3.

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Findings of court. TRIAL, § 398.

Of jury. TRIAL, §§ 358, 359.

Implied repeal of statute by inconsistent or repugnant act. STATUTES, § 159.

Revocation of will by subsequent inconsistent disposition of property. WILLS, § 182.

Instructions to jury—

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TRIAL, § 243.

Provisions of deeds. DEEDS, § 97.

Of statutes. STATUTES, § 207.

Of will. WILLS, § 471.

Record on appeal or other proceeding for review. APPEAL AND ERROR, § 664.

REPUTATION.

See—

Accused in prosecution for keeping disorderly house. DISORDERLY HOUSE, § 16.

Evidence of marriage. MARRIAGE, § 50.

General reputation, evidence of as bearing on character of accused. CRIMINAL LAW, § 379.

Injury to as element of compensation for assault. ASSAULT AND BATTERY, § 38.

Parties or other persons, evidence of in civil actions—

ASSAULT AND BATTERY, § 29.

DIVORCE, § 116.

EVIDENCE, § 106.

Persons as hearsay evidence. EVIDENCE, § 322.

Provided by master for injured servant. MASTER AND SERVANT, § 271.

Servant as bearing on contributory negligence. MASTER AND SERVANT, § 274.

WITNESSES, §§ 334-362.

REQUESTS.

See—

Findings by court. TRIAL, § 392.

By jury. TRIAL, § 351.

By referee. REFERENCE, § 87.

Ground of estoppel in pais. ESTOPPEL, § 81.

Instructions—

CRIMINAL LAW, §§ 824-835.

TRIAL, §§ 255-269.

Necessity for purposes of review—

APPEAL AND ERROR, § 216.

CRIMINAL LAW, § 1038.

Necessity of exception to refusal for purpose of review. APPEAL AND ERROR, § 263.

Neglect of creditor to proceed against principal after request of guarantor as discharge of guarantor. GUARANTY, § 71.

Reduction of instruction to writing. TRIAL, § 225.

Written instructions. TRIAL, § 224.

Payment, necessity in order to recover for money paid. MONEY PAID, § 1.

Proposals for contract. COUNTIES, § 117.

Submission of issues to jury. TRIAL, § 148.

To marry as condition precedent to action for breach of promise. BREACH OF MARRIAGE PROMISE, § 12.

To witnesses to attest will. WILLS, § 120.

REQUISITION.

See EXTRADITION, §§ 32, 36.

RESALE.

See—

Goods by seller. SALES, §§ 332-339.

Property sold under order or decree of court—

EXECUTION, § 237.

EXECUTORS AND ADMINISTRATORS, § 371.

GUARDIAN AND WARD, § 105.

JUDICIAL SALES, § 26.

RESCISSION.

See—

CANCELLATION OF INSTRUMENTS.

Condition precedent to recovery of wages. MASTER AND SERVANT, § 73.

Remedy of servant for wrongful discharge. MASTER AND SERVANT, § 35.

Of contracts, conveyances, or transactions of particular classes of persons.

See—

Between husband and wife. HUSBAND AND WIFE, § 52.

COUNTIES, § 127.

INFANTS, §§ 31, 58.

INSANE PERSONS, §§ 66, 79.

Married women. HUSBAND AND WIFE, §§ 74, 90.

MUNICIPAL CORPORATIONS, §§ 252, 354.

TOWNS, § 42.

Of particular acts, contracts, conveyances, or transactions.

See—

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COMPROMISE AND SETTLEMENT, § 18.

Contract. CONTRACTS, §§ 250-274.

As affecting right to specific performance.

SPECIFIC PERFORMANCE, § 61.

To devise or bequeath. WILLS, § 64.

To teach school. SCHOOLS AND SCHOOL DISTRICTS, § 138.

DEEDS, § 178.

EXCHANGE OF PROPERTY, § 5.

GIFTS, §§ 41, 74-76.

GUARANTY, § 24.

Insurance policy. INSURANCE, §§ 226-249.

Marriage contract. BREACH OF MARRIAGE PROMISE, § 9.

Settlement. HUSBAND AND WIFE, § 33.

Mortgage of homestead. HOMESTEAD, §§ 130, 131.

PAYMENT, § 53.

RELEASE, § 24.

Sale—

SALES, §§ 91, 95-108, 112-130.

VENDOR AND PURCHASER, §§ 85, 88-104, 106-123.

Of corporate stock. CORPORATIONS, § 117.

Satisfaction of mortgage. MORTGAGES, § 316.

Sunday contract. SUNDAY, § 16.

Suretyship. PRINCIPAL AND SURETY, § 49.

RESCUE.

Scope-Note.

[INCLUDES delivery of and attempts to deliver prisoners or property from lawful custody of officers or other persons, or from places where such prisoners or property are lawfully confined or held, by force or fraud; nature and elements of the crimes of rescue, pound breach, etc.; nature and extent of criminal responsibility therefor, and grounds of defense; and prosecution and punishment of such acts as public offenses.

[EXCLUDES resisting or obstructing execution of process (see *Obstructing Justice*); and escapes by prisoners themselves (see *Escape*). For complete list of matters excluded, see cross-references, post.]

Analysis.

- § 1. Nature and elements of offenses.
- § 2. Defenses.
- § 3. Indictment or information.

Cross-References.

See—

ESCAPE.

OBSTRUCTING JUSTICE.

§ 1. Nature and elements of offenses.

[a] (Sup. 1908)

Section 2400, Burns' Ann. St. 1908, providing that whoever, not being a person having the lawful custody of any prisoner charged with or convicted of a felony, shall aid in or accomplish the escape of such prisoner shall on conviction, be punished, etc., includes cases where the accused with force aids or accomplishes the escape of a prisoner, charged with or convicted of a felony, under such circumstances as would be a rescue at common law.—*State v. Sutton*, 170 Ind. 473, 84 N. E. 824.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rescue, § 1.

See, also, 34 Cyc. pp. 1632, 1633.

§ 2. Defenses.

[a] (Sup. 1884)

An affidavit under Rev. St. 1881, § 2034, for forcibly freeing a person from arrest, must charge that the defendant knew the person to be under arrest.—*Brunson v. State*, 97 Ind. 95.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rescue, § 2.

See, also, 34 Cyc. p. 1635.

§ 3. Indictment or information.

[a] (Sup. 1908)

Under section 2400, Burns' Ann. St. 1908, providing that whoever, not being a person having the lawful custody of any prisoner charged with or convicted of a felony, shall aid in or accomplish the escape of such prisoner, shall, on conviction be punished, etc., an affidavit for aid-

ing the escape of a prisoner in custody of a deputy sheriff, which alleges that accused drew a gun on the deputy and attempted to shoot him therewith, and held and struck a third person, who was assisting the deputy, whereby the prisoner escaped, is sufficient as against a motion to quash, though it does not aver that accused knew that the prisoner was in custody, since by averring specific acts which were in themselves unlawful, by which the escape was made possible, the rule that knowledge of custody must be averred, so that an innocent aiding may not be punished, was obviated.—*State v. Sutton*, 170 Ind. 473, 84 N. E. 824.

Since, by Burns' Ann. St. 1901, §§ 7533-7535, 7584, 7585, 7945, 7947, the appointment of a deputy sheriff is authorized, who is given all the powers of a sheriff, and it is required that the oath of office shall be certified on the certificate of any officer or deputy, and a certified copy thereof given to such officer or deputy, the second clause of section 7536, Burns' Ann. St. 1901, requiring a deputy sheriff to deposit such certified copy in the county clerk's office, makes the appointment of a deputy sheriff of public record; and hence an affidavit for aiding the escape of a prisoner in the custody of a deputy sheriff is sufficient as against a motion to quash, under section 2400, Burns' Ann. St. 1908, providing that whoever, not being a person having the lawful custody of any prisoner charged with or convicted of a felony, shall aid in or accomplish the escape of such prisoner shall, on conviction, be punished, etc., though it does not allege that the accused had knowledge that the prisoner was under arrest for a

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felony, as required where the prisoner is placed under arrest by a private person.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rescue, § 3.

See, also, 34 Cyc. pp. 1634, 1635.

RESERVATIONS.

See—

Case or question of law for determination by higher court. **APPEAL AND ERROR**, §§ 307–316.

Indian reservations. **INDIANS**, § 12.

Power to alter or amend statute conferring exemption as affecting revocability. **TAXATION**, § 208.

Questions of law for Supreme Court. **COURTS**, § 220 (6).

In particular contracts, instruments, or conveyances.

See—

Affecting testamentary character of conveyance. **WILLS**, § 88.

Creation of easement by reservation in grant. **EASEMENTS**, § 14.

Dedication of property to public use. **DEDICATION**, § 55.

Deeds. **DEEDS**, §§ 138, 142, 143.

Of rights of way to railroads. **RAILROADS**, § 71.

Devise. **WILLS**, § 584.

Easements and rights to use of water. **WATERS AND WATER COURSES**, § 156.

Grantor, affecting validity of conveyance as to creditors or subsequent purchasers. **FRAUDULENT CONVEYANCES**, §§ 110–113.

In assignment for benefit of creditors. **ASSIGNMENTS FOR BENEFIT OF CREDITORS**, §§ 95–99.

Possession, use, or power of sale by mortgagor, effect as to mortgagor's creditors. **CHATTEL MORTGAGES**, § 188.

Power of disposition or use of property by vendor as element of fraud as to creditors or subsequent purchasers. **FRAUDULENT CONVEYANCES**, § 142.

Right to flow lands. **WATERS AND WATER COURSES**, § 165.

RESERVOIRS.

See **WATERS AND WATER COURSES**, §§ 159–179.

RES GESTÆ.

See—

CRIMINAL LAW, §§ 362–368.

EVIDENCE, §§ 118–128.

RESIDENCE.

See—

ABSENTEES.

Affecting eligibility for liquor license. **INTOXICATING LIQUORS**, § 58.

Eligibility to office—

COUNTIES, §§ 42, 64.

OFFICERS, § 22.

Affecting, etc.—(Cont'd).

Liability to give security for costs. **COSTS**, § 110.

Necessity for judgment before setting aside fraudulent conveyance. **FRAUDULENT CONVEYANCES**, § 241.

Place for voting. **ELECTIONS**, § 204.

Place of taxation. **TAXATION**, § 254.

Affecting qualifications of pupils in public schools. **SCHOOLS AND SCHOOL DISTRICTS**, § 153.

Of signers of petition for issuance of bonds in aid of railroad. **MUNICIPAL CORPORATIONS**, § 917.

Of sureties on county contractors' bonds. **COUNTIES**, § 123.

Of voter. **ELECTIONS**, §§ 18, 71–76.

Affecting right to benefit of action for causing death. **DEATH**, § 32.

Right to exemptions. **EXEMPTIONS**, §§ 26–29.

Right to sue for causing death. **DEATH**, § 31.

Appearance by nonresident. **APPEARANCE**, § 19.

Arrest of nonresidents in civil actions. **ARREST**, § 11.

Change of residence as disqualifying city councilman. **MUNICIPAL CORPORATIONS**, § 151.

Of county officer as abandonment of office. **COUNTIES**, § 66.

Decedent, ground of jurisdiction of administration of estate. **EXECUTORS AND ADMINISTRATORS**, § 10.

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Failure to state residence of subscribers to stock of railroad company. **RAILROADS**, § 14.

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On rescission of contracts. CONTRACTS, § 266.

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On rescission of contracts of sale—

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REVENUE BONDS.

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APPEAL AND ERROR, §§ 1157–1180.

JUSTICES OF THE PEACE, § 189.

Affecting title of purchaser at execution sale. **EXECUTION**, § 276.

Judgment or order in criminal prosecutions. **CRIMINAL LAW**, §§ 1185–1190.

REVERSIONS.

Scope-Note.

[INCLUDES nature and incidents of ulterior estates remaining in grantors of particular estates; rights, powers, and liabilities of reversioners; and remedies relating thereto.

[EXCLUDES creation of such estates (see *Deeds*); and reversions after terms of years merely (see *Landlord and Tenant*). For complete list of matters excluded, see cross-references, post.]

Analysis.

- § 1. Nature and incidents in general.
- § 5. Rights and liabilities of reversioner as to property in general.
- § 7. Sales and conveyances by reversioners.

Cross-References.

See—

Bed of street to abutting owner. **MUNICIPAL CORPORATIONS**, § 663.

Land conveyed to railroad for right of way. **RAILROADS**, § 82.

Dedicated to public use. **DEDICATION**, § 65.

On death of donee without issue. **DESCENT AND DISTRIBUTION**, § 16.

Landlord's reversion. **LANDLORD AND TENANT**, §§ 51–66.

PARTITION, § 12.

Property acquired under power of eminent domain. **EMINENT DOMAIN**, § 325.

Or surplus to debtor on termination of bankruptcy proceedings. **BANKRUPTCY**, § 438.

To state for want of persons competent to hold or take. **ESCHEAT**.

Remedies for waste. **WASTE**.

Right of reversioner to sue for waste. **WASTE**, § 12.

§ 1. Nature and incidents in general.

[a] (Sup. 1910)

At common law an estate in reversion could be in abeyance, since it was consistent with the fee being always vested, or an intermediate freehold being in a third person who might

be sued for the property.—*Beatson v. Bowers*, 91 N. E. 922.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. *Revers.* § 1; 24 CENT. DIG. *Gifts*, § 21.

See, also, 16 Cyc. p. 661.

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§ 5. Rights and liabilities of reversioner as to property in general.

[a] (Sup. 1852)

A person who owns the reversion or remainder in land, if there is a suit pending between him and another involving a question of waste or improvements, may go upon the premises in a peaceable manner, with his witnesses, for the purpose of examining the same.—*Conwell v. State*, 3 Ind. 387, 56 Am. Dec. 512.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Revers. § 5.

See, also, 16 Cyc. p. 662.

§ 7. Sales and conveyances by reversioners.

[a] (Sup. 1907)

The conveyance of reversions and remainders may be impeached for fraud.—*McAdams v. Bailey*, 169 Ind. 518, 82 N. E. 1057, 13 L. R. A. (N. S.) 1003, 124 Am. St. Rep. 240.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Revers. § 7.

See, also, 16 Cyc. p. 662.

REVIEW.

See—

APPEAL AND ERROR.

Arrest of judgment based on defect in complaint for review. JUDGMENT, § 263.

Bill in equity. EQUITY, §§ 443-466.

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CRIMINAL LAW, §§ 1004-1199.

Disqualification of judge to review his own decision. JUDGES, § 48.

HABEAS CORPUS.

Right to trial by jury on appeal or other proceeding for review. JURY, § 17.

Of particular actions or proceedings.

See—

Accounting by executor or administrator. EXECUTORS AND ADMINISTRATORS, § 510.

By guardian. GUARDIAN AND WARD, § 161.

Actions by or against insane persons. INSANE PERSONS, § 102.

Allowance or disallowance of claim against estate of decedent. EXECUTORS AND ADMINISTRATORS, § 239.

Appointment of administrator. EXECUTORS AND ADMINISTRATORS, § 20.

Assessment for public improvement—

DRAINS, § 82.

MUNICIPAL CORPORATIONS, §§ 493, 496-508.

Of taxes—

MUNICIPAL CORPORATIONS, § 974.

TAXATION, §§ 452-500.

Change of location of school site. SCHOOLS AND SCHOOL DISTRICTS, § 69.

Decision of school board and officers. SCHOOLS AND SCHOOL DISTRICTS, §§ 11, 48, 61, 141, 154.

Disbarment proceedings. ATTORNEY AND CLIENT, § 57.

Disputed claims against estate of decedent. EXECUTORS AND ADMINISTRATORS, § 256.

Distribution of estate of decedent. EXECUTORS AND ADMINISTRATORS, § 314.

DIVORCE, §§ 184, 286.

Drainage proceedings. DRAINS, § 34.

Election contest. ELECTIONS, § 305.

Enforcement of mechanics' liens. MECHANICS' LIENS, § 309.

EXTRADITION, § 39.

Findings of referee on motion in trial court.

REFERENCE, § 107.

FORCIBLE ENTRY AND DETAINER, §§ 42, 43.

Highway proceedings. HIGHWAYS, §§ 57-60, 72, 77.

Inquisition of lunacy. INSANE PERSONS, § 27.

Issuance of liquor license. INTOXICATING LIQUORS, § 75.

Issues involving statute of frauds. FRAUDS, STATUTE OF, § 162.

Judgment, in same court. JUDGMENT, §§ 294-335.

Of justice of the peace. JUSTICES OF THE PEACE, §§ 139-209.

Location of boundaries. BOUNDARIES, § 54.

MANDAMUS, § 187.

Preliminary proceedings for public improvements. MUNICIPAL CORPORATIONS, § 321.

Removal of executor or administrator. EXECUTORS AND ADMINISTRATORS, § 35.

Report and findings or award of commissioners, appraisers, or viewers in condemnation proceedings. EMINENT DOMAIN, § 238.

Revocation of certificate or license of school teachers. SCHOOLS AND SCHOOL DISTRICTS, § 132.

Sale of property of decedent. EXECUTORS AND ADMINISTRATORS, § 358.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Review.

See, also, 34 Cyc. pp. 1696-1722.

REVISION.

See—

Assessment for public improvements. MUNICIPAL CORPORATIONS, §§ 493, 496-508.

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As constituting implied repeal. STATUTES, § 167.

Text books. SCHOOLS AND SCHOOL DISTRICTS, §§ 80, 167.

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See—

ABATEMENT AND REVIVAL, §§ 71-77.

Cause of action barred by statute of limitations. LIMITATION OF ACTIONS, §§ 139-164.

By repeal of statute. LIMITATION OF ACTIONS, § 6.

Debt barred by limitation as revival of lien or other security. LIMITATION OF ACTIONS, § 164.

Grounds for divorce after condonation. **DIVORCE**, § 51.
 Injunction after dissolution. **INJUNCTION**, § 183.
 Judgment—
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 JUSTICES OF THE PEACE, § 133.
STATUTES, §§ 169, 170.

REVIVOR.

See **EQUITY**, §§ 303-308, 441.

REVOCATION.

See—

Adoption of child. **ADOPTION**, § 16.
 Advancement. **DESCENT AND DISTRIBUTION**, § 102.
 Agency—
 BROKERS, § 44.
 PRINCIPAL AND AGENT, §§ 32-40.
 Appointment of guardian. **GUARDIAN AND WARD**, § 18.
 Authority to sign remonstrance against grant of liquor license. **INTOXICATING LIQUORS**, § 68.
CANCELLATION OF INSTRUMENTS.
 Certificate to practice medicine or surgery. **PHYSICIANS AND SURGEONS**, § 11.
 Charter or franchise for violation of anti-trust laws. **MONOPOLIES**, § 26.
 Dedication of property to public use. **DEDICATION**, §§ 29, 38.
 Discharge of bankrupt. **BANKRUPTCY**, § 417.
EASEMENTS, § 26.
 Election under will. **WILLS**, § 796.
 Exemption from taxation. **TAXATION**, §§ 205-208.

GIFTS, §§ 41, 74-76.
 Grant to use street for purpose other than highway. **MUNICIPAL CORPORATIONS**, § 690.
GUARANTY, § 24.
 Insurance policy. **INSURANCE**, § 226.
 Letters testamentary or of administration. **EXECUTORS AND ADMINISTRATORS**, § 32.
 Licenses for occupations and privileges. **LICENSES**, § 38.
 In respect to real property. **LICENSES**, §§ 57-60.
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 To physicians. **PHYSICIANS AND SURGEONS**, § 5.
 To raise dam. **WATERS AND WATER COURSES**, § 166.
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 To use, make, or sell patented articles. **PATENTS**, § 214.
 Liquor licenses. **INTOXICATING LIQUORS**, §§ 105-108.
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 Offer of contract. **CONTRACTS**, § 19.
 Order appointing receiver. **RECEIVERS**, § 58.
 For reference. **REFERENCE**, § 31.
POWERS, § 12.
 Submission to arbitration. **ARBITRATION AND AWARD**, § 16.
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 Suretyship. **PRINCIPAL AND SURETY**, § 51.
 Teacher's certificate. **SCHOOLS AND SCHOOL DISTRICTS**, § 132.
TRUSTS, § 59.
WILLS, §§ 79, 167-195.

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REWARDS.

Scope-Note.

[INCLUDES offers, by private persons or by the government, of a premium or compensation for a special or extraordinary service, not limited to any particular person or persons; acceptance of such offers and performance of the services, and rights and liabilities of the parties thereupon; and actions for such rewards.

[EXCLUDES effect on rights of finders of lost goods of offer of reward for recovery thereof (see *Finding Lost Goods*); and bounties for enlistment in the public service or engaging in particular industries or performing other acts for the public benefit (see *Bounties*). For complete list of matters excluded, see cross-references, post.]

Analysis.

- § 2. Offer.
- § 3. — By private persons.
- § 4. — By public authorities.
- § 5. Performance of service and conditions.
- § 7. — Previous knowledge and acceptance of offer.
- § 8. — Sufficiency.
- § 9. Persons who may receive.
- § 10. — In general.
- § 11. — Public officers.
- § 13. Payment.
- § 15. Actions.

Cross-References.

See BOUNTIES, § 1.

§ 2. Offer.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rewards, §§ 3-6.

See, also, 34 Cyc. pp. 1731-1737.

§ 3. — By private persons.

[a] (Sup. 1861)

The offer of a reward for the performance of any service is a conditional promise; and if any one coming within the terms of the offer, and before its revocation, performs the service, a legal and binding contract rests to pay the reward.—*Harson v. Pike*, 16 Ind. 140.

Until the performance of a service an offer of a reward is proposal merely, and not a contract, and may be revoked at pleasure.—*Id.*

[b] (Sup. 1877)

A person feeling himself aggrieved at the commission of a crime may, either orally or otherwise, publicly offer and bind himself to pay a reward to whomsoever may capture the offender.—*Hayden v. Souger*, 56 Ind. 42, 26 Am. Rep. 1.

[c] (Sup. 1887)

A general offer of reward may be withdrawn before any rights are acquired by accept-

ing or acting upon it; but where a proposition offering a reward for services to be performed is made by one person to another, who accepts it, the latter may be entitled to recover for services performed, although the former was permitted, with his consent, to withdraw the offer to pay the full amount of the reward before the services—obtaining the conviction of a murderer—were fully performed.—*Bronnenberg v. Coburn*, 110 Ind. 169, 11 N. E. 29.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rewards, §§ 3-5.

See, also, 34 Cyc. p. 733.

§ 4. — By public authorities.

[a] (Sup. 1880)

An offer of a reward by a county board for the arrest, prosecution, or conviction of a person charged with crime is ultra vires.—*Board of Com'rs of Grant County v. Bradford*, 72 Ind. 455, 37 Am. Rep. 174.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rewards, § 6.

See, also, 34 Cyc. pp. 1734-1736.

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§ 5. Performance of service and conditions.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rewards, §§ 7-12.

See, also, 34 Cyc. pp. 1742-1752; note, 79 C. C. A. 98; note, 25 Am. Dec. 189.

§ 7. — Previous knowledge and acceptance of offer.

[a] (Sup. 1861)

It is not necessary that notice should be given to the party offering a reward that his offer is being acted on.—*Harrison v. Pike*, 16 Ind. 140.

[b] (Sup. 1866)

Knowledge of the offer of a reward for the return of stolen property at the time that property is returned to the owner is not essential to the right of the person returning the property to claim the reward.—*Dawkins v. Sappington*, 26 Ind. 199.

[c] (App. 1891)

A person who has captured a thief for whose apprehension a reward has been offered is entitled to the reward although he made the capture without knowledge of the offer.—*Everman v. Hyman*, 26 Ind. App. 165, 28 N. E. 1022, 84 Am. St. Rep. 284.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rewards, § 7.

See, also, 34 Cyc. p. 1751.

§ 8. — Sufficiency.

[a] (App. 1891)

A reward offered for the capture of a thief is not earned by merely giving information to the sheriff which enables him to find and arrest the thief.—*Everman v. Hyman*, 26 Ind. App. 165, 28 N. E. 1022, 84 Am. St. Rep. 284.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rewards, §§ 8-12.

See, also, 34 Cyc. pp. 1743-1749.

§ 9. Persons who may receive.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rewards, §§ 13-15.

See, also, 34 Cyc. pp. 1742-1755.

§ 10. — In general.

[a] (Sup. 1851)

Plaintiff, for a reward offered, had captured and brought from New Orleans to the county line a criminal, who there escaped him. Plaintiff offered to compensate defendant, who owned a farm where the criminal lay hid, if he would assist in a recapture. Defendant succeeded in taking the criminal, and, delivering him up to the sheriff, received the reward. In assumption for the amount, *held*, that the defendant was the servant of plaintiff, and was entitled, not to the reward, but to a compensation for his services only.—*Pruitt v. Miller*, 3 Ind. 16.

[b] (Sup. 1904)

Act March 4, 1899, § 2 (Acts 1899, p. 381, c. 166; *Burns' Rev. St.* 1901, § 2330), relating to bribery at elections or conventions, provides that "any person or persons having knowledge or information of the violation of the provisions of this act, who shall procure or furnish or cause to be procured or furnished the testimony * * * shall be entitled to a reward." *Held*, that such section should be construed so as not to contravene public policy, which forbids a vote buyer or vote seller to profit by his act, whether made a crime by statute or not, and hence, in the absence therein of an express provision entitling them to the benefit thereof, neither could recover the reward thereunder.—*Board of Com'rs of Clinton County v. Davis*, 69 N. E. 680, 162 Ind. 60, 64 L. R. A. 780.

[c] (Sup. 1904)

Burns' Rev. St. 1901, § 2329, imposes a penalty for agreeing, on consideration, to refrain from voting; and section 2330 provides that any person having knowledge of a violation of the former section, and who shall furnish testimony securing a conviction, shall be entitled to a specified reward. *Held*, that a person who pays another for a promise not to vote cannot collect the reward.—*Board of Com'rs of Jay County v. Bliss*, 69 N. E. 1003, 162 Ind. 125.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rewards, § 13.

See, also, 34 Cyc. p. 1752.

§ 11. — Public officers.

[a] (Sup. 1877)

2 Rev. St. 1876, p. 638, § 110, and page 673, § 16, relating to special constables, provide that, whenever there shall be no constable convenient, the justice may appoint a special constable to act in a particular case, and note the appointment on the docket, "and shall direct process to him by his name." *Held*, that where a justice gave to a private person, whom he had appointed special constable, a warrant for an arrest, not directed to such person by name, it conferred no authority on him to make the arrest, and was insufficient to deprive him of the right to a reward offered for the arrest of the person named in the warrant, on the ground that it was his duty as an officer to make it without any reward.—*Hayden v. Souger*, 56 Ind. 42, 26 Am. Rep. 1.

Though a public offer of a reward for the arrest of an offender be made, a regular constable, in whose hands is a warrant for the arrest of such offender, cannot recover such reward for making such arrest, though it be made by him, on the faith of such reward, outside of his bailiwick.—*Id.*

Where, relying on a public offer of a reward for the capture of an offender, a private person, supposing himself to be authorized by a warrant delivered to him, makes such arrest, he is entitled to recover the amount of such reward if, in fact, such warrant imposed on him no duty, and

gave to him no authority to make such arrest.—Id.

[b] (*Sup.* 1887)

The marshal of a city is not required, as a part of his duty as such officer, to leave the city, and aid in the detection and conviction of a murderer in another county; and public policy does not, therefore, forbid that he should contract for and receive a reward for such services.—Bronnenberg v. Coburn, 110 Ind. 169, 11 N. E. 29.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rewards, §§ 14, 15.

See, also, 34 Cyc. pp. 1753-1755; note, 26 Am. Rep. 5.

§ 13. Payment.

Effect of judgment in action for award, see JUDGMENT, § 614.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rewards, §§ 17-19.

§ 15. Actions.

Construction and operation of findings of court, see TRIAL, § 404.

Effect of judgment as destroying lien, see JUDGMENT, § 614.

Pleading in justice court, see JUSTICES OF THE PEACE, § 91.

[a] (*Sup.* 1886)

In an action to recover on a reward offered for the return of a stolen horse, an answer alleging that at the time plaintiff restored the horse he did not know of the offer of the reward is bad.—Dawkins v. Sappington, 26 Ind. 199.

The first paragraph of a complaint alleged that defendant, having had a horse stolen from him, published a handbill offering a reward of \$50 for the return of the horse, and that thereupon plaintiff recovered and restored the horse. The second paragraph alleged the larceny of the horse, and that plaintiff recovered him from the thief and returned him to defendant, who, in consideration thereof, promised to pay, etc. A demurrer was sustained to the second paragraph, and to the first defendant answered that plaintiff, at the time he recovered and restored the horse, did not know of the offer of the reward. *Held*, that the second paragraph of the complaint was bad for want of an averment that the service was rendered at the request of defendant.—Id.

[b] (*Sup.* 1877)

One who has arrested a fugitive criminal in reliance on the offer of a reward by an individual need not allege in his complaint to recover the reward that the offer was made by public advertisement.—Hayden v. Souger, 56 Ind. 42, 26 Am. Rep. 1.

[c] (*Sup.* 1887)

A complaint averring that plaintiff had performed certain services for which defendant had offered a reward, and that defendant, although requested to pay the amount of the reward to

plaintiff, had refused, and still refuses, to pay the same, is good without an express averment that the amount is due and unpaid.—Bronnenberg v. Coburn, 110 Ind. 169, 11 N. E. 29.

[d] (*App.* 1891)

In an action to recover a reward offered "for the return of a stolen horse," it was proper to refuse to submit to the jury the special interrogatory: "Did plaintiff put defendant in possession of the horse described in the complaint before the beginning of this action?" since the reward offered was for the return of the horse, and not for the placing of it in the possession of the owner.—Everman v. Hyman, 28 N. E. 1022, 26 Ind. App. 165, 84 Am. St. Rep. 284.

[e] (*Sup.* 1904)

A complaint in an action for a reward offered by statute need not allege that the services were rendered with knowledge of the reward, or with intention to recover the same.—Board of Com'rs of Clinton County v. Davis, 69 N. E. 680, 162 Ind. 60, 64 L. R. A. 780.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rewards, §§ 21-24.

See, also, 34 Cyc. pp. 1756-1759.

RHETORIC.

Control of rhetorical usage in construing statutes, see STATUTES, § 189.

RIDICULE.

Exposing person to ridicule as libel, see LIBEL AND SLANDER, § 16.

RIGHT OF WAY.

See—

EASEMENTS.

Protection from surface water flowing from adjoining land. WATERS AND WATER COURSES, § 118.

Subject to execution. EXECUTION, § 28.

Taxation of railroad right of way, liability. TAXATION, § 145.

Mode of assessment. TAXATION, § 391.

Waters appurtenant to grant of right of way. WATERS AND WATER COURSES, § 154.

Particular rights of way.

See—

CANALS, § 13.

DRAINS, § 45.

Over street railroad tracks. STREET RAILROADS, § 85.

Railroads. RAILROADS, §§ 61-80.

Improvement of drain across. DRAINS, § 1.

Telegraph or telephone line. TELEGRAPHS AND TELEPHONES, § 8.

Turnpike or toll road. TURNPIKES AND TOLL ROADS, § 15.

RINKS.

See MUNICIPAL CORPORATIONS, § 631.

RIOT.

Scope-Note.

[INCLUDES tumultuous disturbance of the public peace by a number of persons mutually assisting one another in the execution of a common purpose by the use of force; nature and extent of criminal responsibility therefor, and grounds of defense; and prosecution and punishment of such acts as public offenses.

[EXCLUDES disturbance of the peace by fighting in a public place (see *Affray*); assemblages of persons for an unlawful purpose which is not carried into execution (see *Unlawful Assembly*); and liabilities of counties or cities, etc., for injuries by rioters (see *Counties*; *Municipal Corporations*). For complete list of matters excluded, see cross-references, post.]

Analysis.

- § 1. Nature and elements of offenses.
- § 2. Defenses.
- § 5. Indictment or information.
- § 6. Evidence.
- § 7. Trial and review.

Cross-References.

See—

Disturbance of the public peace by fighting in a public place. *AFFRAY*.

Exception of fire caused by riot from terms of insurance policy. *INSURANCE*, § 421.

Former jeopardy. *CRIMINAL LAW*, § 202.

Jurisdiction of justice. *CRIMINAL LAW*, § 90.

Limitation of liability for loss of or injury to live stock in course of transportation caused by riot. *CARRIERS*, § 218.

UNLAWFUL ASSEMBLY.

§ 1. Nature and elements of offenses.

[a] (*Sup.* 1841)

If three or more persons do an unlawful act of violence, as if they violently and unlawfully burst open the door of another person's dwelling house, etc., the offense is indictable.—*State v. Scaggs*, 6 Blackf. 37.

[b] (*Sup.* 1853)

Defendants were indicted for rioting, and the evidence showed that they were conducting a charivari. *Held*, that the fact that the witnesses who heard the noise were not alarmed by it, and that defendants were good humored at the time, did not change the nature of the offense.—*Bankus v. State*, 4 Ind. 114.

The making a great noise, in the nighttime, with voices or a trumpet, in the vicinity of inhabitants, if by three or more persons in concert, is by Rev. St. 1843, a riot.—*Id.*

[c] (*Sup.* 1857)

Where a party at some distance from a fight, and after it is ended, comes up immediately and beats the same person, he is not guilty of a riot.—*Sloan v. State*, 9 Ind. 565.

[d] (*Sup.* 1858)

Upon an information against several, for a riot, with separate trials, it must appear that two or more of the others charged joined with

the defendant in the riot.—*Hardebeck v. State*, 10 Ind. 459.

[e] (*Sup.* 1865)

On an information for a riot, an instruction to the jury that, if a person at some distance when the riot takes place comes up immediately afterwards and does violence on the same object, he is not guilty of a riot, is properly refused.—*Hibbs v. State*, 24 Ind. 140.

[f] (*Sup.* 1873)

Under 2 Gav. & H. St. p. 458, § 4, where three or more persons do any act (lawful or unlawful) in a violent and tumultuous manner, it is a riot.—*Kiphart v. State*, 42 Ind. 273.

[g] (*Sup.* 1879)

Under a statute making violent and tumultuous conduct by three or more persons a riot, persons conducting a charivari, or serenade, with bells, horns, tin pans, guns, etc., are guilty of a riot.—*State v. Brown*, 69 Ind. 95, 35 Am. Rep. 210.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Riot, §§ 1-5.

See, also, 34 Cyc. pp. 1774-1780.

§ 2. Defenses.

[a] (*Sup.* 1849)

Act Cong. Feb. 12, 1793, § 3, provides that when a person held to labor in any of the Unit-

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ed States, etc., shall escape into any other of said states, etc., the owner is entitled to seize such fugitive and take him before any magistrate, etc., and upon proof that the person so seized owes services or labor to the person claiming him, etc., it shall be the duty of such magistrate to give a certificate thereof to such claimant which will be sufficient warrant for removing said fugitive, etc. *Held*, that a warrant signed by a justice of the peace is sufficient for the arrest of an alleged fugitive from labor, and those acting under it are not liable for a riot caused thereby.—*Graves v. State*, 1 Ind. 368, Smith, 258.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Riot, § 6.

See, also, 34 Cyc. pp. 1784, 1785.

§ 5. Indictment or information.

[a] (Sup. 1840)

Where an indictment for a riot alleged that the defendants "fought through and with each other," it was *held* that if the words were necessary it would be necessary to allege that it was done riotously, but that the words were not necessary, and that the omission of such allegation did not vitiate the indictment.—*State v. Dillard*, 5 Blackf. 365, 35 Am. Dec. 128.

[b] (Sup. 1853)

An indictment for a riot after describing the time and place of the commission of the offense presented charged that "A. B., C. D., and E. F. riotously, routously, and unlawfully gathered and assembled together, and then and there did riotously, etc., make a great noise, tumult, and disturbance, to the terror of the citizens, etc., contrary, etc." *Held*, that the words were sufficiently descriptive of a riot.—*State v. Voeshall*, 4 Ind. 589.

[c] (Sup. 1858)

If an indictment for riot alleges that an unlawful act has been committed, the words "in terrorem populi" are not necessary; they being required only when the gist of the offense consists in the terror of the public inspired by the conduct of the parties.—*Thayer v. State*, 11 Ind. 287.

In an information for a riot, stating that "three persons or more, to wit," naming 21, "three persons," etc., is surplusage, and the charge is good against those named.—*Id.*

[d] (Sup. 1877)

"Riotous and tumultuous manner," in an affidavit for a riot, is equivalent to the statutory expression, "violent manner."—*State v. Kutter*, 59 Ind. 572.

[e] (App. 1891)

An affidavit and information charging that several named persons did, "in a riotous, tumultuous, and violent manner, assemble themselves together, and then and there, in a riotous, tumultuous, and violent manner, having then and there the present ability so to do, unlawfully attempt to commit a violent injury on the person of said affiant, by then and there violently and

unlawfully threatening to beat, cut, and shoot said affiant, contrary to the form," etc., sufficiently charges the commission of a riot, as defined by Rev. St. 1881, § 1981, providing that, "if three or more persons shall do an act in a violent and tumultuous manner, they shall be deemed guilty of a riot."—*State v. Acra*, 2 Ind. App. 384, 28 N. E. 570.

FOR CASES FROM OTHER STATES.

SEE 42 CENT. DIG. Riot, §§ 8-10.

See, also, 34 Cyc. pp. 1781-1784.

§ 6. Evidence.

Competency of witness, see CRIMINAL LAW, § 508.

Res gestæ, see CRIMINAL LAW, § 365.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Riot, § 11.

See, also, 34 Cyc. pp. 1785, 1786.

§ 7. Trial and review.

[a] (Sup. 1835)

Where there is an indictment against three for a riot, and a verdict of guilty as to one and not guilty as to the others, a judgment cannot be rendered on the verdict against him found guilty; aliter, if the indictment had been against the defendants together, with others whose names were unknown.—*Turpin v. State*, 4 Blackf. 72.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Riot, § 12.

See, also, 34 Cyc. p. 1787.

RIPARIAN RIGHTS.

See—

NAVIGABLE WATERS, §§ 39-44.

WATERS AND WATER COURSES, §§ 38-50.

RISKS.

See—

Assumed by servant. MASTER AND SERVANT, §§ 203-226.

Loss of goods after sale. SALES, § 150.

Within insurance policy. INSURANCE, §§ 402-467, 786-788.

RIVERS.

See—

Collisions between vessels. COLLISION, § 104. NAVIGABLE WATERS.

Riparian rights. WATERS AND WATER COURSES, §§ 38-50.

WATERS AND WATER COURSES, §§ 38-50.

ROADS.

See—

HIGHWAYS.

MUNICIPAL CORPORATIONS, §§ 646-706.

PRIVATE ROADS.

RAILROADS.

STREET RAILROADS.

TURNPIKES AND TOLL ROADS.

ROBBERY.

Scope-Note.

[INCLUDES taking, with intent to steal, personal property in possession of another, from his person or in his presence, against his will, by force or by putting him in fear, and attempts and assaults with intent to commit such offenses; nature and elements of the crime of robbery and of degrees thereof; nature and extent of criminal responsibility therefor, and grounds of defense; and prosecution and punishment of such acts as public offenses.

[EXCLUDES larceny from the person, without force or intimidation (see *Larceny*); and making threats with intent to obtain money or other property (see *Threats*). For complete list of matters excluded, see cross-references, post.]

Analysis.

- § 5. Taking in general.
- 6. Force.
- 8. Taking against will of owner or other in possession.
- 13. Assault with intent to rob.
- 14. Defenses.
- 16. Indictment or information.
- 17. — Requisites and sufficiency in general.
- 19. — Assault with intent to rob.
- 20. — Issues, proof, and variance.
- 21. Evidence.
- 23. — Admissibility.
- 24. — Weight and sufficiency.
- 25. Trial.
- 27. — Instructions.
- 29. Appeal and error.

Cross-References.

See—

Conspiracy to commit. CONSPIRACY, § 43.
Homicide in commission of or attempt to commit robbery. HOMICIDE, § 18.
Words imputing crime of as constituting libel or slander. LIBEL AND SLANDER, § 7.

§ 5. Taking in general.

[a] (Sup. 1871)

Merely snatching a pocketbook from the owner's hand is not robbery, but simple larceny; there being neither violence nor putting in fear.—*Bonsall v. State*, 35 Ind. 460.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rob. § 5.

See, also, 34 Cyc. p. 1798.

§ 6. Force.

[a] (Sup. 1860)

As the degree of force in the taking, necessary to constitute robbery, is not described in the statute, it is only necessary that the taking should be by means of force; and where several combine to push one rudely about, and

while his attention is thus drawn away, take his money, it is robbery.—*Seymour v. State*, 15 Ind. 288.

[b] (Sup. 1865)

On the trial of an indictment for robbery, the evidence showed that the accused was found standing astride the body of a man who was lying upon the ground drunk and unconscious; that he had taken from the pockets of the drunken man a pocketbook and other property, and in doing so had turned the pockets inside out. The indictment charged the taking to have been by force and violence. *Held*, that a sufficient degree of force to constitute violence was an essential ingredient of the crime as charged, and that the facts only

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showed larceny.—*Brennon v. State*, 25 Ind. 403.

[c] (Sup. 1878)

Although the principle of robbery is violence, yet robbery may be accomplished by exciting fear in the person robbed, which is, in law, constructive violence. The violence must be something more than a sudden taking or snatching of the property and must precede or accompany the taking. The fraudulent and felonious taking of property by means of a trick or contrivance, but without violence, does not constitute robbery.—*Shinn v. State*, 64 Ind. 13, 31 Am. Rep. 110.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rob. § 6.

See, also, 34 Cyc. p. 1799; note, 57 L. R. A. 432.

§ 8. Taking against will of owner or other in possession.

[a] (Sup. 1880)

If property be taken from the person of another by violence or putting in fear, against the will of such person, such taking is robbery.—*Seymour v. State*, 15 Ind. 288.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rob. § 8.

See, also, 34 Cyc. p. 1802.

§ 13. Assault with intent to rob.

Indictment, see post, § 19.

[a] (Sup. 1861)

An indictment will lie for assault and battery with intent to commit larceny.—*Cornellie v. State*, 16 Ind. 232.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rob. § 12.

See, also, 34 Cyc. pp. 1812, 1813.

§ 14. Defenses.

[a] (Sup. 1871)

Where the charge is assault and battery within intent to rob of a certain sum of money, it is no defense to show that the party assaulted had no money in his possession at the time.—*Hamilton v. State*, 36 Ind. 280, 10 Am. Rep. 22.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rob. § 14.

See, also, 34 Cyc. p. 1806.

§ 16. Indictment or information.

Joinder of counts, see INDICTMENT AND INFORMATION, § 128.

Pleading matters not known to grand jury, see INDICTMENT AND INFORMATION, § 69.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rob. §§ 16-27.

See, also, 34 Cyc. pp. 1802-1805.

§ 17. — Requisites and sufficiency in general.

Description of property in indictment for assault and battery with intent to rob, see ASSAULT AND BATTERY, § 78.

[a] (Sup. 1859)

An indictment for robbery need not allege that the taking was against the will of the person robbed, nor charge a carrying away.—*Terry v. State*, 13 Ind. 70.

"One pocketbook of the value of fifty cents, one bank note of the value of ten dollars, one bank note of the value of five dollars, one piece of gold coin of American coinage of the value of five dollars," is a sufficient description of the property in an indictment for robbery.—Id.

[b] (Sup. 1865)

In an indictment for robbery, the description of the property taken need not be more particular than is required in charging a larceny.—*Brennon v. State*, 25 Ind. 403.

[c] (Sup. 1867)

An indictment for robbery alleged that the accused on, etc., at, etc., "forcibly and feloniously took from the person of A. by violence and by putting him, the said A., in fear," certain personal property, which was described. *Held*, that the indictment contained a distinct charge of everything necessary to constitute the crime of robbery under the statute.—*Anderson v. State*, 28 Ind. 22.

[d] (Sup. 1875)

An indictment for robbery, the property alleged to have been taken being bank notes or bills, or United States treasury notes or bills, which, in describing such notes or bills, does not state their denominations by the use of the word "denomination," or equivalent words, is bad on motion to quash.—*Arnold v. State*, 52 Ind. 281, 21 Am. Rep. 175.

An indictment for robbery by taking bank or treasury notes must state the denominations of such notes, as well as their value. A statement of the value is not sufficient.—Id.

[e] (Sup. 1892)

An indictment for robbery good as to part of the property, where separate articles are severally described, will repel a motion in arrest.—*McQueen v. State*, 82 Ind. 72.

[f] (Sup. 1894)

A charge of larceny is always included in a charge of robbery. The indictment, therefore, should contain all the allegations essential in larceny, with the added matter that makes larceny robbery.—*Rains v. State*, 36 N. E. 532, 137 Ind. 83.

[g] (Sup. 1901)

An allegation in an indictment for robbery that the articles stolen were taken "violently" is equivalent to an allegation that they were taken "by violence," as such words are

used in the statutory definition of the crime.—*Craig v. State*, 62 N. E. 5, 157 Ind. 574.

An allegation of an assault made by defendant on the prosecuting witness is unnecessary in an indictment for robbery.—*Id.*

An allegation that defendant had the present ability to commit a violent injury on the person of the prosecuting witness is not necessary to the sufficiency of an indictment for robbery.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rob. §§ 16-23, 26.

See, also, 34 Cyc. pp. 1802-1805.

§ 19. — Assault with intent to rob.

[a] (*Sup.* 1861)

An indictment for assault and battery with intent to commit larceny charged that defendant "in and upon one A." etc., "unlawfully, feloniously, and maliciously did make an assault, and did unlawfully," etc., "touch, strike, and wound said A., with felonious intent the moneys of said A. from the person of said A. then and there feloniously and unlawfully to steal, take and carry away," etc. *Held* a good indictment, though not strictly pursuing the language of the statute.—*Cornelle v. State*, 16 Ind. 232.

[b] (*Sup.* 1879)

An indictment charging that the defendants on, etc., at, etc., "in a rude, insolent and angry manner did unlawfully touch one J. M., with intent forcibly and feloniously by violence and putting him in fear, to take from his person the goods and chattels of him, the said J. M.," etc., sets forth with sufficient certainty an assault and battery with intent to commit robbery.—*Buntin v. State*, 68 Ind. 38.

An indictment for assault with intent to commit robbery need not describe nor give the value of the property sought to be taken.—*Id.*

An indictment for assault and battery with intent to commit robbery, which alleges an intent to take goods and chattels, is sufficient without a more particular description of them.—*Id.*

[c] (*Sup.* 1880)

An indictment which charges an assault and battery with intent to rob need not describe the particular property which the defendant intended to take.—*Dickinson v. State*, 70 Ind. 247.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rob. § 25.

See, also, 34 Cyc. pp. 1812, 1813.

§ 20. — Issues, proof, and variance.

[a] (*Sup.* 1891)

Failure to prove an allegation of an indictment for robbery, that the money taken was "lawful money of the United States," was a variance, notwithstanding that Rev. St. 1881, § 1750, provides that it is sufficient to describe

money, etc., "as money," and that "such allegation" shall be sustained by proof of any amount of coin or notes, etc., "although the particular species of coin, * * * or the particular nature of such note, bill, or currency, be not proved."—*Taylor v. State*, 130 Ind. 66, 29 N. E. 415.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rob. § 27; 27 CENT.

DIG. Ind. & Inf. § 560.

See, also, 34 Cyc. pp. 1805, 1813.

§ 21. Evidence.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rob. §§ 28-36.

See, also, 34 Cyc. pp. 1806-1810, 1813; note, 101 Am. St. Rep. 481.

§ 23. — Admissibility.

[a] (*Sup.* 1890)

On a trial for robbery, the accused cannot show the character for honesty of one jointly indicted with him, but not on trial.—*Walls v. State*, 125 Ind. 400, 25 N. E. 457.

[b] (*Sup.* 1897)

Evidence that defendant is possessed of property is not admissible in defense to a prosecution for robbery, for the purpose of showing absence of motive.—*Reynolds v. State*, 147 Ind. 3, 46 N. E. 31.

[c] (*Sup.* 1908)

On a trial for assault with intent to rob, evidence that there was on the night of the assault and had been for a long time prior thereto \$200 to \$300 in money in the house of accused was incompetent to rebut the inference that accused attempted to rob one of his money.—*Craig v. State*, 171 Ind. 317, 86 N. E. 397.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rob. §§ 29-31.

See, also, 34 Cyc. pp. 1806-1808.

§ 24. — Weight and sufficiency.

[a] (*Sup.* 1861)

Evidence that one charged with assault and battery with intent to commit larceny put his hand or fingers into the pocket of another with evident intent to steal his pocketbook, which was frustrated by discovery and seizure of the defendant by the prosecutor, is sufficient evidence to uphold a conviction.—*Cornelle v. State*, 16 Ind. 232.

[b] (*Sup.* 1891)

On a trial for robbery, the evidence showed that the prosecuting witness, with a \$10 bill in his pocket, while going through an alley to the rear door of a saloon, was accosted by defendant, a stranger, who, after requesting the witness to attend a dance, and to "set 'em up," hit him in the face with a brick, knocking him down, and rendering him unconscious; that on regaining consciousness he got up, and went into the street, where, finding an acquaintance, he went back with him to the al-

ley, where he found defendant, whom, after a time, he accused of being his assailant. The witness went to the mayor's office, and then back to the saloon, where his wounds were dressed, at which time he discovered that his pocket was cut, and his money missing. *Held* that, while the evidence was weak in some particulars, the court, on appeal, would not disturb the judgment of conviction.—*McCarty v. State*, 127 Ind. 223, 26 N. E. 665.

[c] (Sup. 1901)

Evidence in a prosecution for assault with intent to commit robbery *held* sufficient to sustain conviction.—*Lee v. State*, 60 N. E. 299, 156 Ind. 541.

[d] (Sup. 1908)

On a trial for assault and battery with intent to rob, evidence *held* to identify accused as the person who committed the offense.—*Craig v. State*, 171 Ind. 317, 86 N. E. 397.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rob. §§ 32-36.

See, also, 34 Cyc. pp. 1808-1810.

§ 25. Trial.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rob. §§ 37-41.

See, also, 34 Cyc. pp. 1810-1812.

§ 27. — Instructions.

Instructions invading province of jury, see CRIMINAL LAW, §§ 763, 764.

Modification of requested instruction, see CRIMINAL LAW, § 834.

[a] (Sup. 1900)

On a trial for robbery, an instruction that, if the jury had a reasonable doubt of defendant's guilt, it was their duty to acquit, taken in connection with another instruction that the crime of robbery included that of petit larceny did not require the jury to acquit of both crimes.—*Duffy v. State*, 56 N. E. 209, 154 Ind. 250.

FOR CASES FROM OTHER STATES,

SEE 42 CENT. DIG. Rob. §§ 38-40.

See, also, 34 Cyc. p. 1810.

§ 29. Appeal and error.

Conclusiveness on appeal of verdict, see CRIMINAL LAW, § 1159.

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[INCLUDES transfers of ownership of personal property, absolute or conditional, for a price in money or its equivalent; contracts for such transfers, express or implied, executory or executed; bills of sale and other instruments in writing conveying absolute title to goods not given as security merely; rights and liabilities of parties to such transfers, contracts, or instruments in general; and remedies relating thereto.

[EXCLUDES sales of real property (see *Vendor and Purchaser*); transfers by way of barter or exchange (see *Exchange of Property*); bills of sale as securities for payment of debts (see *Chattel Mortgages*); transfers of rights in action (see *Assignments*); sales by or to particular classes of persons (see *Infants*; *Insane Persons*; and other specific heads), or persons in representative or fiduciary relations (see *Guardian and Ward*; *Executors and Administrators*; *Principal and Agent*; *Brokers*; *Factors*; *Trusts*; and other specific heads); sales of particular species of property (see *Shipping*; *Good Will*; *Patents*; and other specific heads); regulations of sales of particular articles (see *Food*; *Intoxicating Liquors*; *Poisons*; *Druggists*; *Weapons*; *Explosives*; and other specific heads); sales in execution of powers in general (see *Powers*); enforcement, by sale, of mortgages (see *Chattel Mortgages*) and pledges (see *Pledges*); sales by assignees for benefit of creditors, receivers, etc. (see *Assignments for Benefit of Creditors*; *Receivers*); sales under judgments, decrees, and orders of courts (see *Judicial Sales*); and under judicial process (see *Attachment*; *Execution*; *Sheriffs and Constables*); sales for taxes (see *Taxation*); and requirements of statute of frauds (see *Frauds, Statute of*). For complete list of matters excluded, see cross-references, post.]

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I. REQUISITES AND VALIDITY OF CONTRACT.

Application of statute of frauds, in general, see FRAUDS, STATUTE OF, §§ 81, 95.

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What constitutes sale within meaning of law punishing illegal sale of intoxicating liquors, see INTOXICATING LIQUORS, § 146.

§ 1. Nature and essentials of contract for sale of personal property in general.

Determination of price as prerequisite to transfer of title as against third persons, see post, § 226.

[a] (Sup. 1853)

A sale of personal property is not complete where something yet remains to be done by the seller before the article sold can be identified.—Bricker v. Hughes, 4 Ind. 146.

[b] (Sup. 1858)

It is not necessary that an order for the purchase of goods should mention the price of the articles ordered, and stipulate to pay for them. The contract amounts to an agreement to pay what the articles are reasonably worth, and, where such an order is accepted and the goods sent, the person ordering them will be liable to pay for them, though he may not actually receive them.—Prenatt v. Runyon, 12 Ind. 174.

[c] (App. 1904)

Where an alleged contract of sale had never been completed, the final terms thereof having never been adjusted, the seller cannot sue for breach thereof.—Bressler v. Kelly, 34 Ind. App. 235, 72 N. E. 613.

[d] (App. 1908)

A "sale" imports a contract upon a valuable consideration, between two or more persons, for the transfer of property.—Radebaugh v. Scanlan, 41 Ind. App. 109, 82 N. E. 544.

The word "sold" implies a contract of sale, founded upon a valuable consideration.—Id.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1, 3–5.

See, also, 35 Cyc. pp. 25–41.

§ 3. Sale distinguished from other transactions.

Assignments for benefit of creditors distinguished from sales, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, § 9.

Chattel mortgages distinguished from sales, see CHATTEL MORTGAGES, § 6.

Gift distinguished from sale, see GIFTS, § 5.

[a] (Sup. 1882)

A contract reciting that a quantity of ice had been sold by plaintiff to defendant to be delivered "as required" is an absolute sale of the quantity specified, and does not give defendant the option to accept the ice or not, as he chose.—Schreiber v. Butler, 84 Ind. 576.

[b] (App. 1896)

A contract by which the first party was to furnish to the second a music box with a drop-slot attachment, the second party to remit each week the collections therefrom, making up the amount to a certain sum if below that, until he had remitted \$250, when he was to own the box, with an option to the first party in case of default to sue for the balance due, or to refund one-half the collections remitted and retake the instrument, is a contract of sale and purchase, on which the first party can sue in case of a default in payment for the unpaid balance of the contract price.—Beist v. Sipe, 16 Ind. App. 4, 44 N. E. 762.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 6–19.

See, also, 35 Cyc. pp. 27–41; note, 14 L. R. A. 230.

§ 4. — Bailment in general.

Question for jury, see post, § 54.

[a] (Sup. 1841)

Plaintiff, the owner of certain bags, instructed a warehouseman in whose possession they were to deliver them to defendant if he called for them, but if they were not so called for to sell them. Defendant called and received the bags, paying the warehouseman his charges. It appeared that at the time of this transaction there was a contract between the plaintiff and defendant for a quantity of corn, to be delivered by the latter to the former in bags, which corn was not delivered. *Held*, that no contract of sale was shown, and that the defendant became merely a bailee of the bags, and was not liable for their value in an action of assumpsit for goods sold.—Cruikshank v. Henry, 6 Blackf. 19.

[b] (Sup. 1851)

Where wheat is delivered at a mill to be ground upon an agreement that the miller shall return to the farmer a given quantity of flour for so many bushels of wheat, the miller is a bailee, and not a purchaser.—Ashby v. West, 3 Ind. 170.

[c] (Sup. 1856)

In the sale of a mare, the stipulation that if she proved to be with foal the colt shall belong to the vendor, the vendee becomes merely a bailee and not owner of the colt, and therefore a purchaser of the colt from the vendee acquires no title as against the vendor.—Wolf v. Esteb, 7 Ind. 448.

[d] (Sup. 1859)

Wheat was placed in a mill under an agreement that the miller might mix it with his

own, convert it into flour when he pleased, sell the flour, and appropriate the proceeds to his own use, but that the owner at any time could demand the same quantity of like wheat, its current price, or its equivalent in flour which it would make. After the delivery, but before any demand, the mill and the wheat burned. *Held*, that the loss must fall on the latter, since the contract was one of sale and not bailment.—*Carlisle v. Wallace*, 12 Ind. 252, 74 Am. Dec. 207.

[e] (Sup. 1886)

Where grain is received by a dealer under a contract, express or implied, to pay the person delivering it the market price whenever he demands it, and such grain is mixed with other of like quality, from which shipments are made daily, the dealer becomes the owner and not the bailee of the grain.—*Lyon v. Lenon*, 106 Ind. 567, 7 N. E. 311.

Grain was received by a dealer under a contract to pay the person delivering it the market price whenever he demanded it, but such grain was mixed with other of like quality in bins, and shipments were made daily. *Held*, that the test for determining whether such transaction was a sale or a bailment is "Can the depositor by his contract compel a delivery of grain, or has the dealer an option to pay for it either by grain or in money?"—*Id.*

[f] (Sup. 1890)

Plaintiffs delivered wheat to defendants, who were dealers in grain, and conducted a warehouse and flouring mill, and defendants agreed to deliver to plaintiffs, on request, a designated quantity of flour and bran for each bushel of wheat. Before the delivery of all the flour and bran, defendants' warehouse was burned without fault on their part, and the flour and bran destroyed. *Held*, that the transaction was a sale, and not a bailment, there being no undertaking to restore the wheat either in its original or in an altered form, and plaintiff was entitled to recover the price of the wheat delivered.—*Woodward v. Semans*, 125 Ind. 330, 25 N. E. 444, 21 Am. St. Rep. 225.

[g] (Sup. 1890)

Wheat was delivered to the owner of a warehouse, who was buying and shipping grain, to be paid for at whatever the market price might be, in 20 days. The wheat was delivered on cars then loading at the warehouse for shipment. *Held*, a sale, and not a bailment, and that the burning of the warehouse and its contents 10 days after the delivery was no defense to an action for the price.—*Woodward v. Boone*, 126 Ind. 122, 25 N. E. 812.

[h] (Sup. 1896)

A warehouse receipt reciting: "Received of J. T. (for Burket Grain Elevator) 126 bu. 20 lbs. wheat, test 59 wt. at stored per bushel. Fire and heating at owner's risk,"—sufficiently shows that the wheat was received for storage only,

and was not sold.—*Miller v. State*, 144 Ind. 401, 43 N. E. 440.

[i] (App. 1896)

A contract by which the first party was to furnish to the second a music box with a drop-slot attachment, the second party to remit each week the collections therefrom, making up the amount to a certain sum if below that, until he had remitted \$250, when he was to own the box, with an option to the first party in case of default to sue for the balance due, or to refund one-half the collections remitted and retake the instrument, is a contract of sale and purchase, on which the first party can sue in case of a default in payment for the unpaid balance of the contract price.—*Beist v. Sipe*, 16 Ind. App. 4, 44 N. E. 762.

[j] (App. 1900)

The owner of grain delivered it to a warehouseman under a written agreement reciting the receipt of the grain and the warehouseman's agreement to pay the market price per bushel at any time up to a designated date, and that it was held subject to the owner's risk of loss by fire. The grain was placed in bins, and mixed with grain of like quality belonging to other persons. The warehouseman sold grain from such bins, but at all times had on hand a sufficient quantity of grain of like quality to redeliver to the depositors the quantity deposited by them. *Held*, that the transaction constituted a bailment, and not a sale, and that the warehouseman was not liable for the market price when not demanded until after loss by fire.—*McGrew v. Thayer*, 57 N. E. 262, 24 Ind. App. 578.

[k] (App. 1902)

An instrument reciting, "Received of S. 408 bushels of wheat, to be paid for at market price, on demand," reasonably admits of a construction that the transaction was a sale, and not a bailment.—*Ilagey v. Schroeder*, 65 N. E. 598, 30 Ind. App. 151.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 7-11.

See, also, 35 Cyc. pp. 28-33; note, 10 Am. Dec. 490; note, 2 Am. St. Rep. 711.

§ 5. — Lease or contract of hiring.

[a] (Sup. 1831)

The sale of a mare with foal, in consideration that the purchaser should raise the colt and return it to the seller, constitutes a bailment for hire, in reference to the colt.—*Duffy v. Howard*, 77 Ind. 182.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 12.

See, also, 35 Cyc. p. 40; note, 4 L. R. A. (N. S.) 207.

§ 7. — Agency in general.

Implied agency to sell goods, see PRINCIPAL AND AGENT, § 14.

[a] (App. 1899)

A contract providing that defendants were to manufacture and sell a certain number of machines to plaintiff, and that plaintiff was to purchase the machines from defendants at a specified price, and on certain terms, is a contract of sale, and not one constituting plaintiff defendants' agent.—*Whitman Agricultural Co. v. Hornbrook*, 55 N. E. 502, 24 Ind. App. 255.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 16, 17; 40 CENT. DIG. Princ. & A. § 10.

§ 9. Personal property which may be subject of sale.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 20-24.

See, also, 35 Cyc. pp. 44-47.

§ 11. — Existence and condition.

[a] (Sup. 1864)

A charge that growing corn is "not susceptible of delivery" would tend to mislead the jury, and is properly refused.—*Weatherly v. Higgins*, 6 Ind. 73.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 21.

See, also, 35 Cyc. pp. 45-47; note, 4 Am. Dec. 360.

§ 14. — After-acquired property.

[a] (Sup. 1869)

If a person sells personal property, such as a lot of hogs, to be delivered at a future time, he may go into the market, and buy them for delivery under the contract.—*Bales v. Weddle*, 14 Ind. 349.

[b] (Sup. 1865)

A contract for the delivery at a future day of a certain number of merchantable hogs will be fulfilled by the delivery of hogs of the stipulated description and number, although the vendor purchased them after the contract was made.—*Shipp v. Bowen*, 25 Ind. 44.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 24.

See, also, 35 Cyc. p. 46.

§ 15. Parties.

To warranty, see post, § 255.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 25-30.

See, also, 35 Cyc. pp. 41-44.

§ 17. — Participation in and relation to transaction.

[a] (Sup. 1864)

Where a father calls for a coffin for his son, who had come of age, and had a family of his own, upon one who knew all the circumstances of the case, the law does not raise an implied promise of payment on the part of the former.—*Norris v. Dodge's Adm'r*, 23 Ind. 190.

[b] (Sup. 1871)

Where a complaint charged that a railroad company promised to pay for goods which should be furnished to a subcontractor, an answer alleging that the railroad company was not indebted to the subcontractor sets forth no defense.—*Chicago, C. & L. R. Co. v. West*, 37 Ind. 211.

[c] (Sup. 1885)

A buyer cannot evade paying for goods sold to him solely upon the ground that they were charged to another person.—*Lance v. Pearce*, 101 Ind. 595, 1 N. E. 184.

[d] (Sup. 1887)

Where goods are ordered of one person and supplied by another, notice must be given to the purchaser in order to hold him liable on an implied promise. Such notice may, however, be given after delivery, before the goods are appropriated or converted; and if it is so given by letter or on the invoice, the purchaser cannot escape liability on the ground that he did not see it through his own inattention or that of his agent.—*Barnes v. Shoemaker*, 112 Ind. 512, 14 N. E. 367.

[e] (Sup. 1906)

A contract of sale may be valid and binding upon the purchaser, although made by him in the name of another.—*O. M. Cockrum Co. v. Klein*, 74 N. E. 529, 165 Ind. 627.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 26-30.

See, also, 35 Cyc. p. 41; note, 3 Am. St. Rep. 196.

§ 18. Consideration.

Agreement to permit foreclosure which is accomplished as consideration for bill of sale from mortgagee, see CONTRACTS, § 78.

Construction of contract as to price, see post, §§ 74-77.

Evidence, see post, § 52.

For warranty, see post, §§ 256-258.

Modification, see post, § 89.

Parol or extrinsic evidence to show nature of consideration, see EVIDENCE, § 419.

Pleading in action by buyer for breach, see post, § 411.

Restoration as condition precedent to rescission of contract, see post, § 104.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 31-38.

See, also, 35 Cyc. pp. 47-49.

§ 21. — Want or failure of consideration.

Pleading, see post, § 354.

[a] (Sup. 1871)

Where written accounts are sold, and there is no express stipulation warranting against insolvency, evidence, in an action for the price, that the accounts were worthless, is inadmissible.—*Shirts v. Irons*, 37 Ind. 98.

[b] (Sup. 1878)

If C. has executed to A. a note in lieu of a worthless note executed to A. by B., who is insolvent, and the sole consideration of C.'s note is that A. shall furnish to C. certain goods whereon C. can speedily realize profits enabling him to pay his note; but, on C.'s demand for such goods, A. refuses to comply, there is a failure of consideration constituting a defense to A.'s action against C. on C.'s note.—*Barnes v. Stevens*, 62 Ind. 226.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 33-38.

§ 22. Offer to sell, and acceptance thereof.

[a] (Sup. 1881)

Where one writes, offering to sell another a horse for a certain price, and the other replies that he might purchase the horse if it would suit him, which he is certain it will, this is not enough to show a contract.—*Stagg v. Compton*, 81 Ind. 171.

[b] (App. 1891)

In an action for the price of goods alleged to have been sold by plaintiff to defendant, it appeared that plaintiff, after sending the goods to defendant to be sold by him, sent him a proposition to sell to him at a price that was its fair market value; that defendant did not reply to the proposition, but kept the property. *Held*, that defendant, in keeping the property, presumably accepted plaintiff's proposition, and is liable for the price therein contained.—*Orme v. Cooper*, 1 Ind. App. 449, 27 N. E. 655.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 39-43; 11

CENT. DIG. Contracts, §§ 57, 71, 75.

See, also, 35 Cyc. pp. 50-55.

§ 23. Offer to buy or order for goods, and acceptance thereof.

[a] (App. 1898)

A vendor sold a car load of spokes to a vendee in 1895, and another in 1896, and about four months after the latter sale wrote to the vendee: "We have a car load of spokes on hand now. If you want them, send a man over and take them up, and we will pay his car fare to and from Ft. Wayne. Let us hear from you by return mail." To this the vendee replied: "As we are chuck full of cheap spoke stock, we will not be able to use yours just now. We think, however, that we can do so after September 1st,"—and about a month later wrote again that they would discontinue all purchases of wheel material, "and will not accept any on or after September 1, 1896. If you have any stock manufactured upon our order, please deliver same before that date." *Held*, that the correspondence does not constitute an order, nor show the existence of a standing order.—*Moody v. Standard Wheel Co.*, 50 N. E. 890, 20 Ind. App. 422.

[b] (App. 1899)

The acceptance of a proposal to buy a machine is not shown by the fact that the party to whom it was addressed transferred the proposal to another party, and sold him the machine.—*Sprinkle v. Trulove*, 54 N. E. 461, 22 Ind. App. 577.

[c] (App. 1908)

An order by defendant on plaintiff for books on specified terms is binding on no one unless accepted in a reasonable time.—*Rouse v. Rose*, 41 Ind. App. 308, 83 N. E. 253.

[d] (App. 1910)

Where defendant by letter asked the entry of its order for certain chains by plaintiff to be filled at certain times on specified terms, and plaintiff answered, noting the receipt of the order, and thereafter wrote advising defendant of the entry of such order, there was a complete and enforceable contract.—*Haskell & Barker Car Co. v. Allegheny Forging Co.*, 91 N. E. 975.

That plaintiff in compliance with defendant's order for chains shipped part of them showed a treatment by plaintiff of the order as accepted.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 44-48.

See, also, 35 Cyc. pp. 50-55.

§ 24. Option to buy, and exercise thereof.

Options to rescind sale, see post, § 91.

[a] (Sup. 1905)

Where, under a contract for the purchase of wheels, plaintiff agreed to purchase from defendant such quantity of 10,000 sets as it might want, the minimum quantity not to be less than 5,000 sets, each order given defendant above the minimum quantity constituted an acceptance pro tanto.—*Connersville Wagon Co. v. McFarlan Carriage Co.*, 76 N. E. 204, 166 Ind. 123, 3 L. R. A. (N. S.) 709.

[b] (App. 1905)

Conceding that a contract to order manufactured goods was lacking in mutuality, and unenforceable because not binding on the buyer, the manufacturer was nevertheless bound to furnish goods to the extent that they were in fact ordered under the contract before its withdrawal.—*Semon, Bache & Co. v. Coppes, Zook & Mutschler Co.*, 74 N. E. 41, 35 Ind. App. 351, 111 Am. St. Rep. 171.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 49-51.

See, also, 35 Cyc. p. 56.

§ 25. Option to sell, and exercise thereof.

Options to rescind sale, see post, § 91.

[a] (Sup. 1902)

An optional agreement to sell property, without any obligation to purchase or accept,

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may be enforced, if made on a proper consideration.—*Magic Packing Co. v. Stone-Ordean Wells Co.*, 64 N. E. 11, 158 Ind. 538.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 52.

See, also, 35 Cyc. p. 56.

§ 27. Written contracts in general.

Conditional sale, see post, § 460.

Parol evidence to show terms, see EVIDENCE, § 417.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 54–57.

See, also, 35 Cyc. p. 87.

§ 29. — Execution.

[a] (Sup. 1906)

A writing requesting defendant to ship plaintiff a described engine, bearing a notice to the effect that it was subject to the acceptance and approval of defendant at its home office, and signed by a certain person as agent for defendant, but not signed by plaintiff, did not amount to a contract of sale, even though it had been accepted and ratified by defendant.—*Huber Mfg. Co. v. Wagner*, 78 N. E. 329, 167 Ind. 98.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 56.

§ 34. Constructive or quasi contracts.

[a] (Sup. 1872)

One who had entered the military service during the late war, a short time before starting for the army, in which he died, said to a friend, in regard to a gun which he had loaned to that friend, "Well, if I never return, you may keep the gun as a present from me." Upon a suit by his administrator for the recovery of the gun, *held*, that the facts did not make a contract of sale.—*Smith v. Dorsey*, 38 Ind. 451, 10 Am. Rep. 118.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 61.

See, also, 35 Cyc. p. 60.

§ 35. Validity of assent in general.

[a] (App. 1903)

A complaint alleged that defendant, without the knowledge or consent of plaintiff, induced plaintiff's husband to execute to him a paper, which he represented was a bill of sale, and which conveyed to defendant all the husband's personal property, representing to the husband that defendant was surety for him on certain obligations, and promising to apply the proceeds of the property to the payment of the debts; that her husband was unfit, by reason of illness, to transact any business at the time; that he died a few days later; that thereafter defendant demanded of plaintiff the possession of the property; that she, ignorant of her rights and in a mentally distressed condition, delivered possession on condition that defendant should pay her husband's debts; and that defendant

had not paid the debts, but had wrongfully converted the property to his own use. *Held*, that such complaint did not show any unsoundness of mind of the husband or of the plaintiff, or undue influence over either of them.—*Warner v. Warner*, 66 N. E. 760, 30 Ind. App. 578.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 62, 64.

See, also, 35 Cyc. pp. 60–83.

§ 36. Mistake.

[a] (Sup. 1858)

Under a sale of all one's interest in a partnership account, to a stranger, in consideration, *inter alia*, that he assume the vendor's liability on those accounts, an error in those accounts, in the entire absence of all fraud, will not affect the vendee's liability.—*Abey v. Bennett*, 10 Ind. 478.

[b] (Sup. 1884)

In an action for breach of contract to deliver grain purchased of defendants, an answer setting up that the contract was in parol and afterwards memoranda thereof were made, and alleging that by mistake a proviso that plaintiff should furnish cars, which was intended to be inserted therein, was left out, and that the mistake was not discovered until after the memorandum was signed; and that such proviso was purposely and fraudulently left out of the memoranda, stated a valid defense in reference to the alleged omission in the memoranda.—*Dickson v. Lambert*, 98 Ind. 487.

[c] (App. 1898)

When the minds of the parties never meet upon a proposition of sale, through a mistake in the price quoted, there is no contract.—*Mummenhoff v. Randall*, 49 N. E. 40, 19 Ind. App. 44.

[d] (App. 1908)

Mutual assent is an essential to every contract, and any mistake of the parties by which they have different things in mind as the subject-matter, and where the terms of the contract are such that it will mean either thing, there is no meeting of the minds of the parties, and, if a contract for the delivery of "Indiana egg coal" would properly describe two grades, and the buyer had in mind the higher grade and the seller the lower grade, and each party believed that he was contracting for the kind of coal he had in mind, no contract was made.—*Indiana Fuel Supply Co. v. Indianapolis Basket Co.*, 41 Ind. App. 658, 84 N. E. 776.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 63, 64.

See, also, 35 Cyc. pp. 60–63.

§ 37. Misrepresentation and fraud by seller.

Affecting transfer of title, see post, § 219.

Defense in action for price, see post, § 347.

Distinction between warranty and misrepresentation of fraud, see post, § 251.

Evidence, see post, § 52.

Ground for rescission by buyer, see post, § 114.

In sales of patent rights, see PATENTS, § 196.

Offer to return goods as condition precedent to action for breach, see post, § 406.

Parol evidence to show, see EVIDENCE, § 434.

Pleading, see post, § 354.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 65-85.

See, also, 20 Cyc. pp. 45-62, 35 Cyc. pp. 63-75; note, 15 Am. Dec. 106.

§ 38. — In general.

[a] (Sup. 1844)

A willful and fraudulent representation by the seller of a fire engine, that it was as good as another designated engine, is not fraud in law, if the buyer was not deceived or misled by it.—*Town of Connersville v. Wadleigh*, 7 Blackf. 102, 41 Am. Dec. 214.

[b] (Sup. 1847)

Although an affirmation by a seller be false, it will not be considered fraudulent unless it was known to be false.—*Humphreys v. Comline*, 8 Blackf. 516.

[c] (Sup. 1858)

A party to a sale has no right to rely on the representations of another as to the market value of the article sold; it being presumed to be equally within the means of knowledge of both.—*Cronk v. Cole*, 10 Ind. 485.

[d] (Sup. 1859)

Representations touching the contracts already made with relation to a machine, by the vendor, and the income derived from it, and that such income was greatly increasing, concern matters of which the vendor must be cognizant, and which cannot therefore be taken as mere expressions of opinion, and of which the vendee must naturally be ignorant, so that he must be taken to have relied on the vendor's account of them; and falsity in them avoids the sale.—*Gatling v. Newell*, 12 Ind. 118.

Where, upon the sale of a patent right, general statements are made or opinions expressed upon facts equally within the knowledge or open to the reasonable inquiry of both, the falsity of these does not, as a matter of course, give the vendee the right to rescind the sale.—*Id.*

[e] (Sup. 1860)

A false representation by the vendor that he has the goods he professes to sell, whereby the purchaser is induced to pay for them, avoids the contract, even if it be otherwise good.—*Bales v. Weddle*, 14 Ind. 349.

[f] (Sup. 1861)

To entitle a buyer to defend successfully, on the ground of a fraudulent representation by the seller, the representation must be false, and must have been known to be false by the seller at the time it was made, and must be in regard to a material part of the contract and be re-

lied on by the buyer.—*Zehner v. Kepler*, 16 Ind. 290.

[g] (Sup. 1862)

Where fraud is averred to have consisted in false representations, they must go to a material fact, must have been made under such circumstances that the party seeking to avail himself of fraud had a right to rely on them, and he must have relied on them, and they must have been false to a material extent.—*Jenkins v. Long*, 19 Ind. 28, 81 Am. Dec. 374.

[h] (Sup. 1862)

Suit brought on a note by T. to M. for M.'s interest in a firm, which was put at \$3,640. M. told T. that he put in \$1,240 cash, that the firm had bought \$40,000 worth of goods and supposed they made 25 per cent., and that T. could inquire of the clerks and other partners. T. did not do so, doubting the value of the result. In a few days M. called on T. about the matter. T. said he was not in the notion of trading. M. said he need not hesitate about the amount, for it was every dollar there. T. replied that was just what he was hesitating about, but if he, M., said it was all there, he would trade. M. replied it was every dollar there. The trade was made. It proved that M. had put in \$1,240, and the firm had bought \$40,000 worth of goods; but, for some unexplained reason, M.'s interest was only worth about \$1,800. Held, that T. purchased, reasonably relying on M.'s representations on a material point, which were false, and a jury might infer that M. knew them to be so, and a verdict for the defendant must be affirmed.—*Matlock v. Todd*, 19 Ind. 130.

[i] (Sup. 1863)

Expressions of opinion as to utility or service of an article is not a representation of a material fact, and, when made on a sale, is not fraudulent.—*Estep v. Larsh*, 21 Ind. 190.

[ii] (Sup. 1868)

Where a misrepresentation as to the nature and quantity of property sold amounted only to an opinion of the seller, who did not suspect that the buyer was relying thereon, and it did not appear that the buyer, who relied on such representation, had been injured, there was no fraud.—*Curry v. Keyser*, 30 Ind. 214.

[j] (Sup. 1869)

If the buyer relies on a statement that he will make a good and profitable trade, it is his own folly, and not ground for rescission.—*Sievekink v. Litzler*, 31 Ind. 13.

[k] (Sup. 1870)

That a buyer had opportunity to inspect goods does not rebut his defense to a note for the price, that it was procured by false representations as to their cost.—*McFadden v. Robinson*, 35 Ind. 24.

[l] (Sup. 1871)

In an action by an assignee of notes given for the purchase of a mill and machinery, it was proper to refuse an instruction that if the seller knew that the machinery was out of order

and that it could not be discovered by ordinary care, and defendant believed the machinery was in good order, the silence of the seller would amount to a representation.—*Frenzel v. Miller*, 37 Ind. 1, 10 Am. Rep. 62.

[m] (Sup. 1884)

In an action on a note, given for certain machines, an answer that they were falsely represented to be "of great value and utility," is demurrable, as the representations were mere matters of opinion.—*McComas v. Haas*, 93 Ind. 276.

[n] (Sup. 1884)

In an action to recover for goods sold and delivered, an answer, attempting to defend on the ground of fraudulent representations was insufficient where it did not show or attempt to show damage to defendant.—*Vogel v. Demorest*, 97 Ind. 440.

[o] (Sup. 1888)

Though a sale of property be induced by fraud, the contract is not void, but only voidable. The title to the property passes to the fraudulent vendee subject to the right of the vendor on discovering the fraud to elect whether he will rescind the contract by returning or offering to return whatever of value he may have received, and reclaim his property, or whether he will retain the consideration and treat the bargain as subsisting. Until the vendor makes his election, the contract continues, and the title to the property remains in the purchaser as against all the world.—*Thompson v. Peck*, 18 N. E. 16, 115 Ind. 512, 1 L. R. A. 201.

[p] (App. 1891)

The mere fact that the seller is aware of a latent defect in an animal will not amount to fraud if he failed to disclose it, unless he made some statement or made use of some act or device calculated to deceive the buyer or induce him not to make the inquiry, but his mere silence is not such an act as will constitute fraud, and no warranty can be implied therefrom.—*Court v. Snyder*, 28 N. E. 718, 2 Ind. App. 440, 50 Am. St. Rep. 247.

[q] (Sup. 1906)

A buyer who is able to read cannot avoid his contract of purchase on the ground of fraud in the seller's misrepresenting to him the contents of such contract; he having an opportunity, but failed, to read the same.—*Price v. Hudleston*, 167 Ind. 536, 79 N. E. 496.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 65-77, 85.

See, also, 35 Cyc. pp. 63, 68, 70.

§ 40. — Quality or value.

[a] (Sup. 1853)

In an exchange of horses, A. asked B. what was the matter with his horse, and B. answered, that "the horse had the distemper a little." Held, that the statement in effect represented that the horse was not otherwise diseased.—*Hull v. Kirkpatrick*, 4 Ind. 637.

[b] (Sup. 1866)

A misrepresentation of a fact peculiarly within the vendor's knowledge, upon which the value of the property depends, may entitle the purchaser to rescind.—*Sieeking v. Litzler*, 31 Ind. 13.

[c] (Sup. 1870)

In the sale of a factory its manufacturing capacity and the amount of custom which it has had in the past are matters which the seller is bound in good faith not to knowingly misrepresent to the buyer, ignorant of the facts and relying on the representations of the seller.—*Hoffa v. Hoffman*, 33 Ind. 172.

[d] (App. 1894)

Where one induces a purchase of goods from himself by false statements that he is selling them at the cost price, he is guilty of a fraud, and cannot retain the money so obtained, as against the vendee.—*Miller v. Buchanan*, 10 Ind. App. 474, 37 N. E. 187, 38 N. E. 56.

[e] (App. 1901)

Where, on the sale of machinery, defendant promised to make it work up to a certain capacity, the failure to keep such promise does not constitute fraud, though defendant never intended to keep the promise.—*Ayres v. Blevins*, 62 N. E. 305, 28 Ind. App. 101.

[f] (Sup. 1908)

It is the duty of one selling personal property to disclose fully and fairly all known defects or infirmities not within the reach of ordinary observation, and failure to do so is a fraudulent concealment of the facts.—*Boyer v. State*, 160 Ind. 691, 83 N. E. 350.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 79-83.

See, also, 35 Cyc. pp. 71-73.

§ 41. — Application of doctrine of caveat emptor.

Application to delivery and receipt of goods, see post, § 167.

As affecting implied warranty, see post, § 269.

[a] (Sup. 1865)

Plaintiff purchased on a contract certain tobacco, a part of which only was manufactured at the time of the sale. It was all received and paid for without examination. The seller fraudulently put into the boxes inferior and damaged tobacco, by means of which it became spoiled. Held that, as the acceptance of the tobacco manufactured after the making of the contract was procured by fraud, the rule caveat emptor does not apply.—*McAroy v. Wright*, 25 Ind. 22.

[b] (Sup. 1866)

Where personal property sold at public auction is, at the time, remote from the place of sale, the purchaser, to whom this fact is unknown up to the moment of bidding, being ignorant of its condition, and having had no opportunity to examine it, has a right to rely upon the statements of the seller. The rule of caveat

emptor does not apply in such a case.—Overbay's Adm'r v. Lighty, 27 Ind. 27.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 84.

See, also, 35 Cyc. p. 68; note, 90 Am. Dec. 426.

§ 42. Misrepresentation and fraud by buyer.

As affecting transfer of title, see post, § 219.

Bona fide purchasers from buyer, see post, § 234.

Evidence, see post, § 52.

Ground for rescission by seller, see post, § 97.

Questions for jury, see post, § 53.

Recovery of goods, see post, § 316.

Rights of seller as to third persons, see post, § 221.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 86–100.

See, also, 20 Cyc. pp. 65, 66, 35 Cyc. pp. 75–82.

§ 43. — In general.

[a] (Sup. 1841)

Where a person represented to a legatee from whom he was about to purchase a legacy that he had been informed by one of the executors of the estate that the legacy was worth much less than it was, and thereby made on the mind of the legatee an impression which induced him to sell the legacy, worth more than \$13,000, to the person making the misrepresentation, for \$4,500, such misrepresentation was a good ground for relief in a court of equity.—McCormick v. Malin, 5 Blackf. 509.

[b] (Sup. 1863)

Where a person sells personal property, and the vendee pays therefor by transferring to the vendor forged promissory notes, knowing them to be forged, such sale will not be rendered absolutely void by such fraud, but only voidable.—Bell v. Cafferty, 21 Ind. 411.

[c] (Sup. 1876)

Where the seller of personal property is induced to part with his property, on the credit of the purchaser, not on account of false and fraudulent representations made to him by the purchaser, but on account of confidence in the purchaser, acquired in prior dealings between such parties, such sale is valid, and cannot be rescinded, nor such property recovered back, by such seller, on account of such fraud.—Gregory v. Schoenell, 55 Ind. 101.

[d] (Sup. 1882)

Where, in payment for property, the purchaser gave a note of an irresponsible person, knowing that the vendor supposed that it was signed by a wealthy individual of the same name, his silence is a fraud for which the vendor can rescind.—Parrish v. Thurston, 87 Ind. 437.

[e] To avoid a sale after goods have been taken into the possession of the buyer in the ordi-

nary course of business, there must have been some artifice or trick or some false pretenses or fraudulent suppression of the truth which enabled the purchaser to obtain possession of the goods, and it must appear that the latter intended at the time of each purchase not to pay for the goods, and there must have been a complete restoration of whatever of value was received.—(Sup. 1888) Thompson v. Peck, 18 N. E. 16, 115 Ind. 512, 1 L. R. A. 201; (App. 1895) Levi v. Bray, 39 N. E. 754, 12 Ind. App. 9; Holmes v. Henderson, 40 N. E. 151, 12 Ind. App. 698.

[f] (App. 1902)

A salesman sold several barrels of whisky for his principal, to be paid for on delivery; but the purchaser, on receipt of the bill, wrote to the seller, fraudulently stating that the salesman had agreed that the sale should be on credit, and inclosed a paper purporting to be a copy of a letter showing that the sale was on time; and the principal then stated that the salesman had reported a cash sale, and, as there was apparently a mistake, credit would be given, and the goods were turned over to the purchaser. The agent was absent when the principal received the letter from the purchaser. Held sufficient fraud on the part of the purchaser to authorize a rescission and recovery of the goods by the principal.—Rauh v. Waterman, 61 N. E. 743, 63 N. E. 42, 29 Ind. App. 344.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 86–92, 97–100.

See, also, 35 Cyc. pp. 75, 76, 79.

§ 44. — Intent not to pay.

Bona fide purchasers from buyer, see post, § 234.

Evidence, see post, § 52.

[a] (Sup. 1885)

A sale of goods to a purchaser, who has a secret intention of not paying for them, may be rescinded.—Curme, Dunn & Co. v. Rauh, 100 Ind. 247.

[b] (App. 1895)

Where one knowing himself to be insolvent purchases property from another, intending not to pay for it, and conceals his insolvency, the sale may be avoided for fraud, and the vendor maintain replevin for the property sold.—Waterbury v. Miller, 41 N. E. 383, 13 Ind. App. 197.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 93.

See, also, 20 Cyc. p. 48, 35 Cyc. pp. 79–81.

§ 45. — Insolvency or inability to pay, and concealment thereof.

Evidence, see post, § 52.

[a] A purchaser of goods who knows that he is insolvent, and fails to disclose such insol-

veny when buying goods on credit, not intending to pay for them, perpetrates on the vendor such a fraud as will entitle him to disaffirm the contract and sue for the possession of the goods.—(Sup. 1883) *Brower v. Goodyer*, 88 Ind. 572; (App. 1891) *Tennessee Coal, Iron & R. Co. v. Sargent*, 28 N. E. 215, 2 Ind. App. 458; (App. 1898) *Peninsular Stove Co. v. Ellis*, 51 N. E. 105, 20 Ind. App. 491.

[b] (App. 1895)

A debtor who has purchased goods may sell or mortgage the same for the purpose of giving a preference to a creditor, and such a preference is not a fraud against the seller, though the debtor knows that he is in failing circumstances and contemplates making an assignment, and though the effect of such sale may be to hinder or delay other creditors in the collection of their claims.—*Levi v. Bray*, 39 N. E. 754, 12 Ind. App. 9; *Holmes v. Henderson*, 40 N. E. 151, 12 Ind. App. 698.

The fact that a purchaser of goods knows that his debts exceed his assets does not of itself constitute such fraud as will justify the setting aside of the sale at the instance of the seller after the goods have come into the possession and under the control of the purchaser.—Id.

[c] (App. 1899)

Evidence that buyers were insolvent when goods were sold and delivered to them, apparently in the regular course of business; that they knew of their insolvency, and soon after mortgaged to a trustee their stock, including the goods referred to, to pay bona fide debts, giving greater preference to some creditors than others, but not preferring the sellers,—would not, alone warrant a conclusion that the purchase was fraudulent.—*West v. Graff*, 55 N. E. 506, 23 Ind. App. 410.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 94.

See, also, 35 Cyc. p. 81.

§ 46. — Representations as to financial condition in general.

Rights of seller as to third persons, see post, § 221.

[a] (Sup. 1876)

In an action by the seller, against the purchaser, to rescind a contract of sale of personal property, and to recover possession thereof, on account of alleged false and fraudulent representations, as to his solvency, made by the latter, to the former, to induce him to part with such property on the credit of the purchaser, the plaintiff must establish the facts that the alleged representations were made; that, at the time they were made, they were false, and that the purchaser knew them to be false; that they were such as would deceive a prudent man; that they were believed by the seller; and that they induced him to part with such property.—*Gregory v. Schoenell*, 55 Ind. 101.

[b] (App. 1891)

Where a purchaser, knowing himself to be insolvent, obtains goods on credit by falsely representing himself to be solvent, and then transfers the goods to another by means of a fraudulent and pretended sale, the seller may rescind the sale, and recover the goods from the fraudulent vendee.—*Levi v. Kraminer*, 2 Ind. App. 594, 28 N. E. 1028.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 95.

See, also, 35 Cyc. pp. 76-79; note, 87 C. C. A. 126.

§ 47. — Statements to and reports by mercantile agencies.

[a] (App. 1891)

Evidence of statements as to his financial condition, made by one of the defendants to a commercial agency, and by the latter communicated to plaintiffs, is admissible, as against such defendant, to show fraud.—*Furry v. O'Connor*, 1 Ind. App. 573, 28 N. E. 103.

[b] (App. 1895)

A statement made to a commercial agency by a partnership of its assets and liabilities, "as a basis for credit," in which a space for "loans from friends or relatives or any other obligations" is left blank, when in reality each of the partners had borrowed on his individual note from his wife money which had been put into the firm business, is not sufficient evidence of fraud to authorize the rescission of his contract by one who, in reliance on such statement, had sold and shipped goods to the partnership in the regular course of business.—*Vermont Marble Co. v. Smith*, 13 Ind. App. 457, 41 N. E. 973.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 96.

See, also, 35 Cyc. pp. 78, 79; note, 87 C. C. A. 126.

§ 48. Illegality.

Sales for future delivery, see GAMING, § 12.

[a] (Sup. 1865)

Mere knowledge of the seller that the purchaser intended to make an illegal use of the property did not render the contract invalid, if the seller had no intention of aiding or promoting such illegal purpose.—*Bickel v. Sheets*, 24 Ind. 1.

Where a thing is sold under such circumstances as to make the seller an accessory before the fact to a felony, he cannot recover the price.—Id.

[b] (App. 1906)

No recovery can be permitted on a complaint asserting rights under the act of 1901 (Acts 1901, p. 505; *Burns' Ann. St.* 1901, §§ 6637a, 6637b), prohibiting the sale of merchandise in bulk except under certain conditions.

since such statute is unconstitutional.—*Kingan & Co. v. Orem*, 38 Ind. App. 207, 78 N. E. 88.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 101-107; 11 CENT. DIG. Cont. § 464.

See, also, 35 Cyc. pp. 87-90; note, 32 Am. Rep. 122.

§ 49. Partial invalidity.

[a] (App. 1903)

The stipulations in a contract that buyers of the business of dealing in building materials will refrain for five years, and within a specified county, from bidding on public work, and that the sellers of the business will buy building materials from the buyers, and no one else, for a period of five years (the materials being needed for buildings, etc., in the specified county), are divisible, so that the invalidity of the former, even if conceded, would not render the latter void.—*Trentman v. Wahrenburg*, 65 N. E. 1057, 30 Ind. App. 304.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 108.

See, also, 35 Cyc. p. 90.

§ 50. Estoppel or waiver as to defects or objections.

Affecting right of rescission, see post, § 101.
Waiver of default or delay in delivery, see post, § 176.

Waiver of right to return goods, see post, § 168½.

[a] (Sup. 1870)

Where a full opportunity is afforded to a purchaser for examining property, which he is about to purchase, and which by the exercise of ordinary diligence and prudence he could examine as to its quantity, the question of the quantity being made to depend merely on the judgment, and he fails to exercise such diligence and prudence, he cannot after the sale complain that he has been deceived as to the quantity, or claim a deduction from the price on account of the quantity.—*Pattison v. Jenkins*, 33 Ind. 87.

[b] (App. 1891)

It is no defense to an action on a note that it was given for Bohemian oats fraudulently represented by the payee to be very valuable and extremely prolific, where the maker retains the oats.—*Regensburg v. Notestine*, 2 Ind. App. 97, 27 N. E. 108.

[c] (App. 1898)

Where purchasers of corporate property take possession and exercise acts of ownership over it, they cannot defeat a recovery on a non-negotiable note given in part payment therefor, assigned to a third party, on the ground that the sale was invalid.—*Clapp v. Allen*, 50 N. E. 587, 20 Ind. App. 263.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 109-114.

See, also, 35 Cyc. pp. 90, 91.

§ 51. Ratification of voidable contract.

[a] (Sup. 1863)

Whether fraud, inducing a contract of sale, amounts to a crime or not, the vendor, being himself innocent, still has the right to avoid or affirm the sale, upon the discovery of the fraud, so long as the property remains in the possession of the vendee or a purchaser from him with notice.—*Bell v. Cafferty*, 21 Ind. 411.

[b] (Sup. 1882)

A. bought goods of B. on credit, not intending to pay for them. Held, that B., by bringing an attachment suit, affirmed the sale.—*O'Donald v. Constant*, 82 Ind. 212.

[c] (App. 1896)

The renewal of the note for the purchase price would be a ratification of the original contract of sale, even if the same was fraudulent, if the facts were known to the maker at the time of such renewal.—*Long v. Johnson*, 44 N. E. 552, 15 Ind. App. 498.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 115-117.

See, also, 35 Cyc. p. 92.

§ 52. Evidence.

Parol or extrinsic evidence to contradict or vary contract, see EVIDENCE, §§ 400, 419.

[a] (Sup. 1850)

In a suit for goods sold and delivered, evidence that the defendant received the goods to sell, as the plaintiff's agent, and had sold them and received the price, is inadmissible.—*Lindley v. Downing*, 2 Ind. 418.

[b] (Sup. 1854)

In an action on a note of hand given for goods, brought by an assignee of the note against the maker, evidence of the inferior quality of the goods, the vendee being no judge of them, nor pretending to be, but confiding in the representations of the vendor, is admissible to show a partial failure of consideration.—*Bischof v. Lucas*, 6 Ind. 26.

[c] (Sup. 1859)

In the sale of patent rights, as in the sale of leaseholds, representations as to their moneyed value must be taken, so far as applicable, to refer to the value at the time when made; and hence, in a suit to rescind the contract of purchase, several years later, where the truth of those representations is in issue, evidence of the value of the property at the time of the trial is inadmissible.—*Gatling v. Newell*, 12 Ind. 118.

[d] (Sup. 1864)

In an action against a father for the price of a coffin which he had ordered for a son who had come of age and had a family of his own, evidence of the insolvency of the son is immaterial.—*Norris v. Dodge's Adm'r*, 23 Ind. 190.

[e] (Sup. 1881)

A letter written in reply to an offer to sell a horse, stating that "I would like to get it at once, if it would do me, which I am certain it will," is admissible in connection with parol evidence to show a sale of the horse.—*Stagg v. Compton*, 81 Ind. 171.

[f] (Sup. 1882)

Where the seller rescinds a sale for fraud, consisting in the failure of the buyer to notify him as to the inability of the maker to pay the note given for the purchase price, the buyer being aware that the seller supposed it was the note of a wealthy man of the same name as the maker, evidence that the signature compared with that of the wealthy person, and that only one man of that name lived in the county in which the seller lived, is admissible to show that the seller took the note believing it to be the note of the wealthy person.—*Parrish v. Thurston*, 87 Ind. 437.

[g] (Sup. 1883)

Where, in replevin for property claimed to have been bought by defendant under false representations as to his solvency, there is evidence of defendant's insolvency at the time he bought the property, it is proper to ask him what property he owned and what the amount of his debts were when he made the purchase.—*Brower v. Goodyer*, 88 Ind. 572.

Where a seller of goods brings replevin against the purchaser, alleging that they were obtained by fraud, the fraudulent intent need not be proved by direct evidence, but may be established by circumstances.—*Id.*

In an action by the seller against the buyer to recover goods obtained by fraud where there is evidence tending to show that defendant bought the goods not intending to pay for them, it is proper to ask him, when on the witness stand, what property he owned, what debts he owed, and kindred questions.—*Id.*

[h] (Sup. 1885)

In replevin by the seller against a mortgagee of the buyer, based on the theory that the buyer did not, when he purchased, intend to pay, a balance sheet made by him, showing the state of his business, also his list for taxation, both made shortly before the purchase, were admissible as tending to show his insolvency.—*Curme, Dunn & Co. v. Rauh*, 100 Ind. 247.

[i] (Sup. 1887)

In an action to recover goods obtained through fraudulent representations as to solvency, it appeared that defendant owed his wife and sister \$1,400, and he offered to show that they had agreed not to press their claims, or interfere with the payment of his commercial debts. *Held*, incompetent, as it did not relate to the time when the goods were bought; and it did not affect the question of his solvency, the debt being unpaid.—*Vogel v. Harris*, 112 Ind. 494, 14 N. E. 385.

[j] (App. 1893)

Where the complaint asked that defendant be compelled to restore money paid by plaintiff for stock in a gas company, alleging that plaintiff was induced to purchase the stock through false representations of defendant, an officer in such company, and defendant denied making the representations charged, and insisted that he told plaintiff the truth, the court properly refused to permit him to testify that he did not intend to deceive or defraud plaintiff, since such statement could not strengthen his evidence.—*Baldwin v. Marsh*, 6 Ind. App. 533, 33 N. E. 973.

[k] (App. 1896)

In an action for goods sold and delivered, the burden is on plaintiffs to prove an absolute sale.—*Levi v. Allen*, 43 N. E. 571, 15 Ind. App. 38.

[l] (App. 1902)

In an action on a contract for failure to deliver lumber before a certain date, as required by the terms of the contract if so ordered by the buyer, and the condition of the weather and the roads would permit of a delivery, a letter written after such date, containing an order for lumber under the contract, was not incompetent on the ground that the order was given after the date in the contract.—*Pape v. Ferguson*, 62 N. E. 712, 28 Ind. App. 208.

[m] (App. 1904)

In an action to recover money paid on rescission of a sale for fraud, evidence as to the market value of the goods at the time and place of delivery was immaterial.—*Weill v. Stone*, 69 N. E. 698, 33 Ind. App. 112, 104 Am. St. Rep. 243.

[n] (App. 1910)

Where fraud is pleaded as a defense to an action for the price of goods sold, it is not necessary to prove it by direct or positive evidence.—*Gandy v. Seymour Slack Stave Co.*, 90 N. E. 915.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 118-144, 1045.
See, also, 35 Cyc. pp. 83-85.

§ 53. Questions for jury.

[a] (Sup. 1881)

Where it is uncertain whether the parties to a contract meant it to be one of sale or bailment, it is proper to leave it to the jury to decide what interpretation the parties put on it in the light of the evidence of their circumstances and situation.—*Reissner v. Oxley*, 80 Ind. 580.

[b] (Sup. 1885)

Fraud of a purchaser in buying goods with the design of not paying for them is a question of fact for the jury.—*Curme, Dunn & Co. v. Rauh*, 100 Ind. 247.

[c] (App. 1891)

The evidence showed that the goods sued for were sold by plaintiff to defendants upon the latter's representation that they were doing well in business, and that a month later defendants made an assignment which showed that their assets would not pay half their debts. *Held*, that the evidence should have been submitted to the jury, since the inference might be made therefrom that defendants obtained the goods by fraud.—*Tennessee Coal, Iron & R. Co. v. Sargent*, 2 Ind. App. 458, 28 N. E. 215.

[d] (App. 1909)

Evidence, in an action by the purchaser of a portion of the crop, *held* sufficient to make the question of the execution of the contract for the jury.—*Farmers' Nat. Bank of Sheridan v. Coyner*, 88 N. E. 856.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 145-151.

See, also, 35 Cyc. p. 86.

II. CONSTRUCTION OF CONTRACT.

In sales of patent rights, see PATENTS, § 202.

Of warranty, see post, §§ 276-279.

Operation and effect of contract, see post, §§ 197-239.

§ 59. Construing instruments together.

[a] (Sup. 1885)

Where an order for a windmill recited that if the seller accepted the order, it should be with the distinct understanding, and as a part of the contract, that if the mill did not work well for 60 days after erection, and the seller could not make it work well, he would remove it, and that a defect in any one article used on the job should effect the price and purchase of that article only, but the seller's agent indorsed thereon that the condition of the sale was the erection of the mill, and, if after 90 days the mill suited the buyer, he agreed to settle on the conditions named in the order, the order and acceptance should be construed together, and when so construed meant that if the mill should not suit the purchaser because of any defect or failure to perform which the seller on notice failed to remedy, then the buyer was to be relieved from the obligation of keeping the mill.—*Flint v. Cook*, 1 N. E. 633, 102 Ind. 391.

[b] (App. 1908)

A contract between a stone company and a construction company, for the furnishing of stone, as required by a contract between such companies and a city, should be read into the city's contract, except where the contracts are inconsistent.—*Western Const. Co. v. Romona Olilic Stone Co.*, 41 Ind. App. 229, 80 N. E. 856.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 159.

See, also, 35 Cyc. p. 97.

§ 61. Executory or executed contracts.

As determining transfer of title, see post, §§ 197-218.

Question for jury, see post, § 88.

[a] (Sup. 1865)

A. agreed with B. to sell and deliver to B. his wool clip, at a stipulated price per pound, part of which was paid in hand. B. was to come to A.'s house on a particular day, and go thence with A. to the town of R., where the wool was to be weighed, and where A. was to receive it and pay the residue of the price. *Held*, that the contract was an executory one.—*Straus v. Ross*, 25 Ind. 300.

[b] (Sup. 1871)

A contract reciting the sale of certain clover seed of a new crop to be delivered at a future day is executory.—*Russell v. Witt*, 38 Ind. 9.

[c] (App. 1902)

Whether, in a particular case, there is an actual sale, or only an executory contract of sale, depends on the intention of the parties, which is to be ascertained from the terms of the contract.—*Warner v. Warner*, 66 N. E. 760, 30 Ind. App. 578.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 162-170.

§ 62. Entire or severable contracts.

[a] (Sup. 1872)

Where a contract is made to supply a purchaser with a specified quantity of goods, of a certain quality and price, it is an entire contract; and the purchaser is not obliged to accept a part without the whole.—*Smith v. Lewis*, 40 Ind. 98.

[b] (Sup. 1878)

Where there is a contract for the sale of a bill of goods, it is an entire contract, and the buyer is not obliged to accept a part.—*Hausman v. Nye*, 62 Ind. 485, 30 Am. Rep. 199.

[c] (App. 1904)

Where a contract for the sale of skins set out several distinct items to be delivered, and the price of each to be paid, the contract was severable, so as to entitle the buyer to rescind the contract for fraud as to part of the items and recover the price paid therefor.—*Weill v. Stone*, 69 N. E. 698, 33 Ind. App. 112, 104 Am. St. Rep. 243.

[d] (App. 1909)

A contract for specially made goods, in car load lots, to be delivered at different times as ordered, is a severable contract.—*Jennings v. Shertz*, 88 N. E. 729.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 171-179.

See, also, 35 Cyc. pp. 113-118; note. 30 C. A. 470.

§ 65. Dependent or independent stipulations.

[a] (Sup. 1907)

A contract for the sale of goods fixed the time for payment for each installment delivered, and imposed on the seller the obligation of furnishing the goods from time to time at prices specified. *Held*, that the buyer, in an action for the failure of the seller to supply goods, could not insist that the time fixed for the payment was not of the essence of the contract, and did not authorize the seller, on the buyer failing to pay within the time fixed, to cancel the contract.—*Ohio Valley Buggy Co. v. Anderson Forging Co.*, 108 Ind. 593, 81 N. E. 574.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 180.

See, also, 35 Cyc. p. 112.

§ 67. Subject-matter.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 182-202; 11 CENT. DIG. Contracts, § 892.

See, also, 35 Cyc. pp. 98-100.

§ 68. — Description in general.

[a] (Sup. 1834)

Where the owners of specific articles and groceries sold them by bill of sale, describing them and naming or referring to a certain wagon and horses and gears as well as other articles, a bill of sale by the vendees to another referring to the first bill of sale and adding all the articles enumerated, groceries, etc., the description was broad enough to include such wagon, horses, and gears; the words "all the articles enumerated" and "groceries," etc., necessarily including all the property, when taken in conjunction with the whole contract of the sale and transfer.—*Henderson v. Blake*, 1 Blackf. 554.

[b] (Sup. 1883)

A contract for the sale of "all the corn on 200 acres on my farm now growing" is not void for uncertainty because it fails to describe the farm.—*Thomas v. Mathis*, 92 Ind. 560.

[c] (Sup. 1891)

Where the owner of timber land contracts to sell a certain number of staves to be manufactured by him, a provision in the contract that the title of all staves "bought" by him shall vest in the buyers, who made advances on account of their purchase, until the contract is complied with, does not give the buyers title to staves manufactured by him from his own timber.—*Fordice v. Gibson*, 129 Ind. 7, 28 N. E. 303.

[d] (App. 1901)

A contract for the sale of a tile factory spoke of only one "mill," though there were two on the premises, one of which was outside the factory. On the question as to which mill was intended, it was shown that the purchasers knew that there were two mills, and were told by the seller that he would not sell

the outside mill, and when they came to "clean" up the seller moved it to one side without objection. He also got permission to set tables connected therewith in one corner of a shed out of their way, and took other attachments there to entirely away from the factory. The purchasers also put in a new clay crusher, instead of the one attached to the outside mill. They did not use the latter, or exercise any control over it, for more than 15 months, and then only by permission of the seller on their request. *Held*, that it was not a part of the tile factory within the meaning of the contract.—*Thomas v. Troxel*, 59 N. E. 683, 26 Ind. App. 322.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 182, 184-186.

See, also, 35 Cyc. p. 98.

§ 69. — Specific articles or goods.

[a] (Sup. 1862)

Where one contracts to sell and deliver to another a specified number of fattened hogs, "to be of his best hogs, weighing two hundred pounds and upward," the purchaser is not obliged to receive any but hogs fattened and prepared for the market by the seller himself.—*Daggy v. Cox*, 19 Ind. 142.

[b] (Sup. 1863)

Where a contract is made for the delivery of a certain number of a particular lot of hogs it cannot be discharged by the delivery of the like number of any other hogs, although of equal quality and weight, unless performance in this respect is waived by the parties.—*Lowry v. Cooper*, 21 Ind. 269.

[c] (Sup. 1866)

By a written contract the lease of a hotel and all the furniture in the hotel and used in running it was sold. It was stipulated that the sale did not include the private furniture of the seller in his family rooms, nor the furniture in boxes which had not been unpacked nor stores and supplies on hand. *Held*, that the contract of sale construed in connection with the circumstances of the parties and their conduct in the making of the contract must be held to include all articles of furniture purchased for the hotel whether fully prepared at the time for present use or placed in the store room to be afterwards prepared and used in operating the hotel, such as linens, toweling, carpets, etc., in the piece.—*Bell's Adm'r v. Golding*, 27 Ind. 173.

[d] (Sup. 1867)

In a suit to recover back money advanced on a contract for the purchase of a certain number of the best hogs fattened by the seller, which were to be of a certain average weight, the seller on the trial offered to prove that when the hogs were tendered and the buyer refused to receive them because they did not come up to the weight required by the contract, he (the seller) then offered to procure and deliver immediately other hogs that would meet

the requirements of the contract, which offer the buyer refused. *Held*, that the evidence was properly excluded, because the seller was not entitled, under the contract, to procure hogs not fattened by himself to fill the contract, especially when the hogs were not actually tendered at the time and place.—*Hiatt v. Harris*, 28 Ind. 379.

Where the thing intended to be bought and sold was ascertained and identified at the time of the making of the bargain, the vendor must deliver the identical thing so fixed on and ascertained, and cannot fulfill his contract by tendering or delivering anything else of a corresponding nature.—*Id.*

[e] (Sup. 1871)

Where a contract recites the sale of clover seed of a new crop to be delivered on a future day, no particular seed passes by the agreement, but any merchantable article within the description will discharge the obligation.—*Russell v. Witt*, 38 Ind. 9.

[f] (Sup. 1882)

A contract for the sale of a number of cars of ice may be performed by the delivery of ice purchased by the seller after the contract was made, so that, in an action by the seller for breach by the buyer's failing to accept, the fact that plaintiff had no ice when the contract was made is no defense.—*Schreiber v. Butler*, 84 Ind. 576.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 183.

See, also, 35 Cyc. p. 99.

§ 71. — Quantity, and ascertainment thereof.

Ascertainment as prerequisite to transfer of title, see post, § 200.

Effect of modification of contract, see post, § 94.

Implied warranty of quantity, see post, § 275.

Performance of contract, see post, § 164.

Rights as against third persons, see post, § 226.

[a] (App. 1893)

Where a car load of whitewood varies from 35,000 to 60,000 feet, a contract to furnish whitewood "at the rate of 1½ car loads per month for six consecutive months," and containing an itemized statement specifically describing a certain number of pieces of wood, calls for nine car loads of wood, in the proportions named, each car not to contain less than 35,000 feet.—*Indianapolis Cabinet Co. v. Herrmann*, 7 Ind. App. 462, 34 N. E. 579.

[b] (App. 1895)

Defendant wrote to certain brokers that it had "about" three car loads of cans for sale. The brokers knew that defendant was only a packer of vegetables, and did not deal in cans for profit. The brokers sold for defendant to plaintiff, who was a packer, three car loads of cans, but defendant was only able to deliver two car loads. Plaintiff purchased in market,

at a higher price, 66,000 cans, required by him. A car load of cans is about 70,000. *Held*, that defendant was liable for the excess paid by plaintiff for the cans he was required to purchase.—*Kirwan v. Van Camp Packing Co.*, 12 Ind. App. 1, 39 N. E. 536.

[c] (App. 1900)

A contract for the sale of "5 M. each, letter heads," etc., "at \$12.00 per M., and hangers" at 22 cents each, is to be construed as a matter of law to require the sale of 5,000 hangers.—*Beck & Pauli Lithographing Co. v. Evansville Brewing Co.*, 58 N. E. 859, 25 Ind. App. 662.

A contract required plaintiff to manufacture and sell to defendant "5 M. each, letter heads," etc., "at \$12.00 per M., and hangers" at 22 cents each. The defendant contended that there was no agreement as to the number of hangers. The hangers were required to be lithographed in special designs, and the plaintiff manufactured 5,000, which were delivered to defendant, who used 500, and stored the remaining 4,500; but he did not offer to return them, or make any complaint concerning the number, until suit was brought to recover the price, eight years thereafter. *Held* sufficient to show that the parties understood the contract to require 5,000 hangers to be furnished.—*Id.*

[d] (App. 1905)

Contemporaneous writings by which a certain quantity of goods were definitely ordered to be shipped currently between certain dates, and by which the order was accepted with the express understanding that none of the orders were to be shipped, except as might be specified and ordered by plaintiff from time to time as its requirements might demand, requires plaintiff to take the goods, except in case its requirements should not demand them. It could not, without liability to defendant, order the goods from somebody else.—*Semon, Bache & Co. v. Coppes, Zook & Mutschler Co.*, 74 N. E. 41, 35 Ind. App. 351, 111 Am. St. Rep. 171.

FOR CASES FROM OTHER STATES.

SEE 43 CENT. DIG. Sales, §§ 189-196.

See, also, 35 Cyc. p. 99.

§ 72. — Quality or value, and determination thereof.

Implied warranty of quality, fitness or condition, see post, §§ 265-273.

Mistake as to quality, see ante, § 36.

Performance of contract, see post, §§ 163-167.

[a] (Sup. 1864)

A. agreed to receive from B. between 55 and 70 pork hogs, to be delivered to him at his pork house. *Held*, that slaughtered hogs were to be delivered, and that the hogs purchased were those owned by B. at the time of making the contract, and, if he did not then own a sufficient number, which could at the time of delivery be made to fulfill the terms of the contract, that then A. was released.—*Alexander v. Dunn*, 5 Ind. 122.

[b] (Sup. 1860)

A contract to furnish a certain quantity of "good merchantable wood" is performed by the delivery of wood of a quality, taking the whole lot together, such as is generally sold in the market; it not being necessary that every stick should be of the best quality.—Blake v. Hedges, 14 Ind. 566.

[c] (Sup. 1882)

In the absence of any contrary stipulation in a contract for the sale of ice, its quality is to be determined at the place of shipment.—Schreiber v. Butler, 84 Ind. 576.

[d] (App. 1908)

An agreement by defendants, in connection with a contract to sell goods for plaintiff on commission that, if any goods ordered of plaintiff should remain unsold at a certain time, defendants would buy and pay for them at certain prices, one year after that time, if requested, does not apply to goods remaining in defendants' hands at the agreed time, which had been delivered to them in an unsalable condition.—Hollowell v. Smith Agricultural Chemical Co., 41 Ind. App. 361, 83 N. E. 772.

[e] (App. 1908)

Where defendant's agent on being solicited for a coal order, and being asked by plaintiff's salesman what he would pay, stated he had been buying "Indiana egg, double screened coal, absolutely clean, for \$1.75," and, after a telephone conversation with plaintiff's office, the salesman stated to defendant's agent "We will put it in here for \$1.75," an order given for "Indiana egg coal" pursuant to such negotiations requires defendant to furnish double screened coal.—Indiana Fuel Supply Co. v. Indianapolis Basket Co., 41 Ind. App. 658, 84 N. E. 776.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 197-202; 11 CENT. DIG. Contracts, § 892.

§ 74. Price, expenses, and costs of transportation.

Amount of price as affecting implied warranty, see post, § 266.

Ascertainment of price as prerequisite to transfer of title, see post, § 226.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 203-213.
See, also, 35 Cyc. pp. 101-109.

§ 76. — Market price.

[a] (App. 1894)

Where a resident of Indiana orders lumber of a wholesale dealer in a distant state, to be shipped to Indiana, and the order is silent as to the price, the market value at the place of business of the seller, and not the market value at the place of delivery, determines the price.—Deither v. Ferguson Lumber Co., 9 Ind. App. 173, 35 N. E. 843, 36 N. E. 765.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 205, 207.
See, also, 35 Cyc. p. 104.

§ 77. — Ascertainment under provisions of contract.

[a] (Sup. 1851)

A. sold to B. a quantity of flax seed, and took the following receipt: "Received of A. 101 bushels of flaxseed, to be paid for 12½ cents below the Cincinnati prices, when called for. August 26, 1846." A. indorsed on the receipt: "Received on the within \$42 in cattle, June, 1847. Demanded April 1, 1847." Held, that this instrument was only an acknowledgment of the receipt of the flaxseed, with a promise to pay for it on demand at the specified reduction from the Cincinnati price, and that the demand referred only to the time of payment, not to the price, which should be regarded as fixed by the price at Cincinnati at the time the flaxseed was delivered and the receipt given.—Mason v. Beard, 2 Ind. 505.

[b] (App. 1900)

In a contract for the delivery of paper, the court cannot, in construing it, read into it the word "net" after the words "53,000 pounds book paper," as that term has a fixed and definite meaning in commercial transactions.—Everett v. Indiana Paper Co., 57 N. E. 281, 25 Ind. App. 287.

[c] (Sup. 1904)

Plaintiff contracted to sell defendant the output of its glass factory during a certain season, at a discount of a certain per cent. lower than the lowest price made by the A. Glass Co., plaintiff to have the right to end the agreement if the price of glass fell 90 per cent. below an existing price list, and either party being authorized to cancel it on a week's notice; "payment for glass is to be made * * * promptly on receipt of same." Held, that the price of each shipment of glass was to be determined by the prices of the A. Co. existing at the time of its receipt, and was not affected by a subsequent reduction during the season.—Matthews Glass Co. v. Burk, 70 N. E. 371, 162 Ind. 608.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 208-212.
See, also, 35 Cyc. pp. 102-109.

§ 79. Place of delivery.

[a] (Sup. 1853)

Where, under a contract for sale and delivery of goods, no place of delivery is designated, delivery should be made where seller had them at the time of the sale or at the seller's usual place of business.—Bailey v. Ricketts, 4 Ind. 488.

[b] (Sup. 1858)

A contract was to deliver certain hogs sold at any pork-packing house in M. designated by the vendee. Held, in an action for the

vendor's failure to perform, that a designation by the assignee of the vendee was good.—*Mewherter v. Price*, 11 Ind. 199.

[c] (Sup. 1873)

Where a contract for the sale and delivery of hogs provides that they shall be weighed and paid for at certain scales, it will be inferred that the place of delivery is the scales.—*Kirkpatrick v. Alexander*, 44 Ind. 595.

[d] (Sup. 1877)

A party's delivery of a lot of hogs at a specified weighing place, on the 16th day of August, and the removal of them by him before noon of that day to a place a quarter of a mile distant, where they were not visible from the weighing place, was not a valid delivery under a contract to deliver them at such weighing place during "the first half of August," etc.—*Kirkpatrick v. Alexander*, 60 Ind. 95.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 214-216.

§ 80. Place of payment.

Effect of custom, see CUSTOMS AND USAGES, § 16.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 228.

§ 81. Time of delivery.

Delay in delivery, see post, §§ 171-176.

Performance of contract, in general, see post, § 150.

[a] (Sup. 1854)

A. having purchased 500 hogs of B., it was agreed that 300 of them be delivered, if A. should want them, after November 25, 1850, but B. was to have the privilege of not delivering 200 until December 1, 1850, but was to deliver them on that day, or as soon after as A. might require. Timely notice was to be given, so that the hogs could be slaughtered in time for delivery. A. gave notice to B. December 11, 1850, that he was ready to receive and pay for the hogs. *Held*, that A.'s agreement was not to take the hogs whenever, after December 1st, B. saw fit to deliver them, but only after he had given notice that he was ready to receive them, and that after December 1, 1850, at any reasonable time during the hog-killing season, he might give notice, and that B. must be ready to respond to it, and that notice given by A. December 11, 1850, was reasonable and timely.—*Peak v. Hollingsworth*, 5 Ind. 120.

[b] (Sup. 1855)

Under a written contract to deliver 50 hogs "at any time between the 10th and 20th of November, 1852," both days should be excluded; and a demand made on the 19th to deliver the hogs on the 20th would not support the action.—*Cook v. Gray*, 6 Ind. 335.

[c] (Sup. 1859)

Goods were ordered to be sent by the first boat. *Held*, this meant the first boat by which it was possible safely to send them, and that a sending by the first general boat was sufficient, though a boat had before been sent by a few shippers who specially chartered her.—*Johnson v. Chambers*, 12 Ind. 102.

[d] (Sup. 1862)

A. agreed to deliver to B. a certain number of hogs, of a certain weight, between the 1st and 15th of December, 1857, at the option of B., who was to notify A. of the particular day in this interval when he wished the delivery, only providing that A. should not be held liable for any deficiency in this number caused by the breaking out of cholera among his hogs. B. notified A. to deliver, on December 2d. A. tendered hogs of a weight not up to contract on December 6th, which B. rejected. On December 10th, A. bought hogs of a third party, and tendered them. These were up to the contract weight, but B. refused to receive them. *Held* that, owing to the shortness of the hog season and the uncertainty of proper weather for the pork business, B. was not bound to accept the second lot of hogs offered by A., after his unreasonable delay to deliver after notice.—*Murphy v. Toner*, 19 Ind. 228.

[e] (Sup. 1863)

Where the time and place of delivery are fixed by the contract, a tender of the property to be delivered, to be valid, must be made a reasonable time before sunset on the given day, and must be continued until that time, unless the party who is to receive the property tendered appear sooner; and, if he be present, a tender to him at any time during the day is good.—*Larimore v. Hornbaker*, 21 Ind. 430.

[f] (Sup. 1863)

A vendor of lumber on a contract to deliver "on or before August 1st" has the whole 1st day of August to deliver in.—*Adams v. Dale*, 29 Ind. 273.

[g] (Super. 1872)

Where materials, the payment for which has been secured at a distant date, are demanded, the manufacturer is entitled to a reasonable time to ascertain the character of the security before delivering the goods.—*Farman v. Ratcliff*, Wils. 145.

[h] (Sup. 1876)

A contract of sale provided that the seller would deliver to the buyer a specified number of hogs at a designated place "at the option of the" buyer, "at any time" during a specified period. *Held*, that it was the duty of the buyer to notify the seller as to what time during such period such delivery should be made in order to make the seller liable for failure to deliver the hogs.—*Posey v. Scales*, 55 Ind. 282.

[i] (Sup. 1882)

A contract for the sale of a number of car loads of ice to be shipped "as required," with-

out stating who was to require the shipment, may, in order to uphold the contract, be properly construed as requiring shipments at the buyer's order.—*Schreiber v. Butler*, 84 Ind. 376.

[j] (App. 1896)

Where the vendor failed to deliver goods within the time agreed upon, the vendee is not liable on the contract, time being of the essence thereof.—*Ellinger v. Comstock*, 13 Ind. App. 696, 41 N. E. 351.

[k] (App. 1896)

Where defendants agreed in writing to furnish 1,200,000 brick for a sewer which plaintiff was building for the city, "delivery to commence about April 1st at the rate of no less than 300,000 brick per month," the extrinsic fact that plaintiff's contract with the city called for completion of the sewer by August 1st, and that this was known to defendant, if read into the contract of sale, would not justify the court in construing such contract as an agreement to furnish 300,000 brick early enough in each month to enable plaintiff to lay them within the same month, but would at most require the delivery of the whole amount in time to complete the sewer by August 1st.—*Consolidated Coal & Lime Co. v. Mercer*, 16 Ind. App. 504, 44 N. E. 1005.

[l] (Sup. 1904)

Where a contract for the sale of paving bricks required shipments to begin "about October 20, 1900," time was not of the essence of the agreement.—*O'Brien v. Iligley*, 70 N. E. 242, 102 Ind. 316.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 217-223.

§ 82. Time of payment and terms of credit.

Default or delay in payment, see post, §§ 194, 196.

Sale on credit as transfer of title, see post, § 203.

[a] Where a contract of sale of property is silent as to the time of payment, the law implies that payment shall be made on delivery of the property.—(Sup. 1840) *Robinson v. Marney*, 5 Blackf. 329; (1885) *Terwilliger v. Murphy*, 104 Ind. 32, 3 N. E. 404.

[b] (Sup. 1857)

Where, in a contract of sale, no day of payment is fixed, the inference is that the vendee agreed to pay within a reasonable time.—*Wright v. Maxwell*, 9 Ind. 192.

[c] (Sup. 1857)

Where a party agrees to deliver property on a day and at a place named in the contract of sale, to be paid for on delivery, such delivery and payment are concurrent acts, to be done at the same time.—*Johnson v. Powell*, 9 Ind. 568.

[d] (Sup. 1882)

Where a contract for the sale of goods is silent as to the time or terms of payment, a promise of immediate payment is implied.—*Rous v. Walden*, 82 Ind. 238.

[e] (App. 1892)

Defendants agreed to buy and plaintiffs to sell 4,000 barrels, to be delivered at defendants' mill by January 1st. It was further agreed that defendants should buy of plaintiffs all the barrels they should use for one year from the date of the contract, the barrels to be "first class," and the agreed price to be paid in cash. *Held*, that there was an executory contract to sell, rather than an absolute sale; and when any quantity of barrels was delivered and accepted pursuant thereto, plaintiffs were entitled to full payment at the contract price for the number so delivered, though the entire number mentioned in the contract was not delivered at the time specified.—*Neal v. Shewalter*, 5 Ind. App. 147, 31 N. E. 848.

[f] (App. 1901)

A contract to purchase a partnership stock of goods when an inventory of the assets and liabilities of the firm shall have been taken and matters adjusted, makes the taking of the inventory and adjustment a condition precedent to the liability of the buyer for the purchase price.—*Bressler v. Kelly*, 72 N. E. 613, 34 Ind. App. 235.

[g] (Sup. 1907)

At common law, where goods are to be delivered and paid for in installments, time is considered as of the essence of the contract.—*Ohio Valley Buggy Co. v. Anderson Forging Co.*, 168 Ind. 593, 81 N. E. 574.

[h] (App. 1907)

A sale for spot cash is a sale in which the money is immediately paid.—*First Nat. Bank v. Goldsmith*, 40 Ind. App. 592, 82 N. E. 799.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 229-233; 11 CENT. DIG. Cont. § 989.

See, also, 35 Cyc. p. 117.

§ 85. Conditions and provisos.

Conditional sales, see post, §§ 450-481.

[a] (Sup. 1859)

Where a contract for the delivery of 10,000 bushels of corn specified that 2,600 bushels of the corn was already in pens, and was put at the purchaser's risk as to damage by rain, it was *held* that it could not be implied that the purchaser accepted the corn in pens as being 2,600 bushels, and that all loss or damage caused otherwise than by rain must be borne by the vendor.—*Ricketts v. Hays*, 13 Ind. 151.

[b] (Sup. 1884)

An agreement by a seller of goods to ship them, to notify the buyer of the shipment, and to give him "all proper information touching the goods and all matters appertaining there-

to," does not require the seller to insure, nor to give any information concerning insurance.—*Bartlett v. Jewett*, 98 Ind. 206.

[c] (App. 1896)

A seller of a harvester, on its failure to do good work, agreed to repair it so it could do good work at the next harvest, the agreement providing that the purchaser should give notice two days before he wished to start the machine. The seller made certain repairs, and informed the purchaser that the machine was all right. *Held*, that after such assurance no necessity existed for the purchaser to give the notice provided for in the agreement.—*Plano Manuf'g Co. v. Kesler*, 15 Ind. App. 110, 43 N. E. 925.

[d] (App. 1908)

Where parties contract for the sale of stone, to be inspected and accepted or rejected by a third party, not under the control of either of the contracting parties, and such third party fails to act, the contract is discharged.—*Western Const. Co. v. Romona Oolitic Stone Co.*, 41 Ind. App. 229, 80 N. E. 856.

[e] (App. 1909)

A provision, in a contract for the sale of machinery, that the price, which was deposited with a third person, was to belong to the seller when the machinery had been delivered in the condition set out in the contract, "and to the acceptance of said" purchaser, and that, until the purchaser "shall have received and accepted" it, the sum specified was to remain the property of the purchaser, the refusal of the purchaser to accept terminated the contract, unless his refusal to accept is made in bad faith.—*Holtz v. Gaidry*, 87 N. E. 997.

[f] (App. 1910)

Plaintiff offered to sell defendants, subject to arrival, one car load of refined powdered white arsenic from a lot "we have engaged for November shipment from Europe to New York," for arrival there early in December, at a specified price per hundred, which offer defendants accepted in terms. *Held*, that the words "subject to arrival" referred to the goods which were the subject of the contract, implying a condition that, unless the goods did arrive, the seller was not responsible for nondelivery and the purchaser not liable for the price; and hence, the goods never having been shipped from Europe because of the European seller's breach of contract, defendant could not recover damages for plaintiff's failure to deliver.—*Penn-American Plate Glass Co. v. Harshaw, Fuller & Goodwin Co.*, 90 N. E. 1047.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 236-238.

See, also, 35 Cyc. pp. 110-112.

§ 86. Assignment of contract.

Contract of conditional sale, see post, § 475.

Rights and liabilities of seller as to assignee, see post, §§ 219-225.

[a] (Sup. 1874)

A. delivered a wagon to B., under a contract by which the latter agreed to pay a certain weekly rent, without demand, with the right to purchase at a stipulated price within a given time, and, in case of his election so to do, all rent paid should be credited on the price, but, in case of a failure to pay the rent, A. was entitled to terminate the contract and take possession. B., while in arrear for rent, sold the wagon to C., who agreed to pay the residue of the purchase money, but A. refused, and demanded the wagon. *Held*, that the contract between A. and B. was assignable, and that the sale to B. operated as an equitable assignment thereof.—*Blair v. Hamilton*, 48 Ind. 32.

[b] (App. 1899)

An executory contract for the sale of a machine with a warranty is not assignable by the person named therein as seller.—*Sprinkle v. Trulove*, 54 N. E. 461, 22 Ind. App. 577.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 157.

§ 87. Evidence to aid construction.

Parol or extrinsic evidence to contradict or vary written contract, see EVIDENCE, §§ 400, 410.

Separate or subsequent oral agreement affecting written contract, see EVIDENCE, §§ 439-445.

[a] (App. 1894)

Where an order for lumber is silent as to the price, a copy of a price list received by the buyer from the seller before the sale is admissible, in an action for the value of the lumber, to show the terms of the sale.—*Diether v. Ferguson Lumber Co.*, 9 Ind. App. 173, 35 N. E. 843, 36 N. E. 765.

[b] (Sup. 1904)

Plaintiff having contracted to sell glass to defendant during a season, at prices depending on those to be fixed by the A. Glass Co., circular letters purporting to be addressed by such company to its customers, shown to be the means by which it informed its customers of its prices, received in the regular course of business, and recognized and acted on by such company, are admissible in an action for the price of glass sold by plaintiff to defendant.—*Matthews Glass Co. v. Burk*, 70 N. E. 371, 162 Ind. 608.

[c] (App. 1908)

Where a contract for the sale of coal was silent as to whether steam or domestic coal should be furnished, domestic coal being the higher grade, that the coal was bought and sold for the purpose of generating steam does not show conclusively that the higher grade was not contemplated by the contract.—*Indiana Fuel Supply Co. v. Indianapolis Basket Co.*, 41 Ind. App. 658, 84 N. E. 776.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 239-247, 1046.

See, also, 120 Cyc. pp. 120-122.

§ 88. Questions for jury.

[a] (Sup. 1856)

A. sold a crop of corn to B., agreeing to harvest it and give notice to B., which he did. *Held*, that the question whether the corn was harvested and notice given in reasonable time was for the jury.—*Meek v. Spencer*, 8 Ind. 118.

[b] (Sup. 1875)

Whether a contract is a bargain and sale or an executory agreement for a sale depends on the intention of the parties, to be gathered from all the terms and stipulations of the contract, and is generally a question of fact.—*Lester v. East*, 49 Ind. 588.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 248-250.

See, also, 35 Cyc. p. 123.

III. MODIFICATION OR RESCISSION OF CONTRACT.

Cancellation of written contracts in equity, see CANCELLATION OF INSTRUMENTS.

Consideration for modification of warranty, see post, § 257.

Recovery of price paid on rescission of contract, see post, § 391.

(A) BY AGREEMENT OF PARTIES.

Novation, see NOVATION, § 1.

§ 89. Modification by subsequent agreement.

[a] (App. 1896)

Where defendant sold plaintiff a harvesting machine, and on its failure to do good work agreed that if it did not do good work in the next harvest it would furnish another one, such agreement was based on a sufficient consideration.—*Plano Manuf'g Co. v. Kesler*, 15 Ind. App. 110, 43 N. E. 925.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 251, 252, 259.

See, also, 35 Cyc. pp. 124, 125.

§ 90. Merger in subsequent contract.

[a] (App. 1897)

The preliminary negotiations for the sale of a machine are merged in a written contract subsequently entered into.—*Burk v. Keystone Mfg. Co.*, 48 N. E. 382, 19 Ind. App. 556.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 253.

See, also, 35 Cyc. p. 126.

§ 91. Option to rescind.

[a] (App. 1905)

A contract to order goods from defendant provided that plaintiff would take the same currently, as specified on order, between certain dates, subject to plaintiff's privilege to change sizes from those specified, and to can-

cel, in the event of an emergency, such portions of the order as had not been taken in work by defendant. It further provided, "Prices guaranteed against decline, and in the event of receiving lower quotations, you [defendant] to have the privilege of meeting same or else to cancel such portions of order that have not been taken in work, and likewise the balance of this contract." *Held*, that the privilege of cancellation was not dependent on defendant's wish, but upon a decline of prices, evidenced by the receipt of lower quotations by defendant, and an election on its part not to meet the decline.—*Semon, Bache & Co. v. Coppes, Zook & Mutschler Co.*, 74 N. E. 41, 35 Ind. App. 351, 111 Am. St. Rep. 171.

Where a contract gives the seller the right of cancellation on condition that articles contracted for decline in price, and he shall decline to meet such price, the contract is binding, and the option is unavailing where the price of the articles advance.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 254-256.

See, also, 35 Cyc. pp. 127, 128.

§ 92. Agreement to rescind.

Application of statute of frauds to contracts for rescission, see FRAUDS, STATUTE OF, § 84.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 257, 259.

See, also, 35 Cyc. p. 128.

§ 93. Abandonment of rights.

[a] (Sup. 1867)

When, on a refusal by the buyer to complete a contract of sale and an abandonment by him of the property, the seller retakes possession of the property, treating it as his own, and sells the same, without notice to the buyer of an intention to sell for his account, it is a rescission of the contract.—*Redmond v. Smock*, 28 Ind. 365.

[b] (Super. 1874)

A. purchased from B. three casks of wine, but, it being of an inferior quality, A. refused to receive it, and so notified B. A. finally took the wine from the station, and stored it in the cellar, separate from his other stock, subject to B.'s order, notifying B. *Held*, that by his acquiescence in the refusal to receive the wine, and subsequent demand therefor, the right of possession and title remained in B.—*Bauer v. Stumph, Wils.* 514.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 258.

§ 94. Operation and effect.

Transfer of title, see post, § 218.

[a] (Sup. 1890)

A contract for the sale of 12 car loads of goods, to be shipped in certain cars, was afterwards changed so as to provide that the

goods should be shipped in larger cars. *Held*, that this change did not increase the amount to be delivered beyond that necessary to fill 12 of the smaller cars.—*O'Ferrall v. Vancamp*, 124 Ind. 336, 24 N. E. 134.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 260.

See, also, 35 Cyc. p. 126.

(B) RESCISSION BY SELLER.

By buyer, see post, §§ 112-130.

Conditional sales, see post, § 479.

Rights as to third persons, see post, § 221.

Stoppage in transitu, see post, §§ 293-297.

§ 95. Right to rescind.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 261-265.

See, also, 35 Cyc. pp. 131-134; note, 54 Am. Rep. 614; note, 18 Am. St. Rep. 362.

§ 97. — Invalidity of contract.

Parol evidence to show fraud in contract, see EVIDENCE, § 434.

[a] (Sup. 1883)

Where goods are obtained by purchase effected through the fraudulent representations of the vendee, the vendor may rescind the contract on the discovery of the fraud and reclaim the goods.—*Brower v. Goodyer*, 88 Ind. 572.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 262.

See, also, 35 Cyc. p. 130.

§ 98. — Breach of contract or condition in general.

[a] (Super. 1873)

A. contracted to sell B. all the brick he should make and burn, except the last kiln, at certain prices for each kiln. After A. had burned one kiln, he delivered the same to B., who accepted them on the contract; but, before the second kiln was ready for delivery B. informed A. that, if such kiln had more lime in it than the first, he must get another purchaser for it, but that he wanted to see it before it was sold, as he would take the good portions of it. The second kiln had in fact more lime in it than the first; this being due to the lime in the clay, and not from any fault or fraud of A. B. knew at the time of the contract where the clay was to be obtained. *Held*, that A., after receiving notice from B. that he would take only the good portions of the second kiln, was entitled to treat the whole contract as broken by B.—*Quwack v. Cruse*, Wils. 320.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 263; 11 CENT.

DIG. Contracts, § 1178.

See, also, 35 Cyc. pp. 131-134.

§ 99. — Nonpayment of price.

[a] (Sup. 1907)

A contract for the sale of goods fixed the time for payment for each installment of goods delivered. The buyer failed to pay for installments within the time fixed. *Held*, that the seller was entitled to exercise his right to rescind the contract.—*Ohio Valley Buggy Co. v. Anderson Forging Co.*, 168 Ind. 593, 81 N. E. 374.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 264.

See, also, 35 Cyc. p. 133.

§ 101. Estoppel or waiver.

[a] (Sup. 1907)

A seller, in a contract of sale fixing the time for payment for each installment of goods delivered, does not, by accepting payment for installments after the expiration of the time fixed for the payment, and after his notification to the buyer of his election to rescind the contract for breaches due to the failure to pay within the time prescribed, waive his right to insist on a cancellation of the contract.—*Ohio Valley Buggy Co. v. Anderson Forging Co.*, 168 Ind. 593, 81 N. E. 574.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 267, 268.

See, also, 35 Cyc. p. 140.

§ 102. Conditions precedent.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 269-273.

See, also, 35 Cyc. pp. 144-146.

§ 104. — Restoration of consideration.

[a] (Sup. 1846)

The vendor of goods, though defrauded in the sale by the vendee, cannot treat the sale as a nullity, while he willingly holds in his hands a valuable consideration which he received for the goods.—*Johnson v. McLane*, 7 Blackf. 501, 43 Am. Dec. 102.

[b] (Sup. 1888)

Defendant's assignor purchased the first bill of goods from plaintiffs 16 months before his failure, and other bills at various times thereafter. He gave his notes in settlement of some of the accounts, a part of which notes had been paid, and the other accounts remained open. Some of the goods purchased had been sold. *Held*, that plaintiffs could not ignore the sale, and replevy the goods unsold, while retaining the money and notes, though the purchaser may have known that he was insolvent when he purchased the goods.—*Thompson v. Peck*, 115 Ind. 512, 18 N. E. 16, 1 L. R. A. 201.

[c] (Sup. 1888)

A note given as part consideration for property fraudulently obtained is properly allowed as a credit where it is not produced or accounted for, though there is no evidence that it was ever

paid.—*Johnson v. Culver*, 116 Ind. 278, 19 N. E. 129.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 271-273.

See, also, 35 Cyc. p. 144; note, 21 L. R. A. 206.

§ 108. Acts constituting rescission.

[a] (Sup. 1888)

Where the possession of property has been wrongfully obtained by means of a voidable contract, and the vendor has received nothing of value, the bringing of an action to reclaim the property is, ordinarily, a disaffirmance of the contract.—*Thompson v. Peck*, 115 Ind. 512, 18 N. E. 16, 1 L. R. A. 201.

[b] (App. 1891)

Where a seller of goods received nothing for them, the bringing of an action to reclaim them is a sufficient disaffirmance of the sale.—*Mahoney v. Gano*, 2 Ind. App. 107, 27 N. E. 315.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 277-279; 11 CENT. DIG. Cont. § 1192.

See, also, 35 Cyc. p. 154.

(C) RESCISSION BY BUYER.

By seller, see ante, §§ 95-108.

Pleading in action for price, see post, § 354.

§ 112. Right to rescind.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 286-294.

See, also, 35 Cyc. pp. 135-139.

§ 114. — Invalidity of contract.

What constitutes fraud invalidating contract, see ante, §§ 37-41.

[a] (Sup. 1869)

The fact that, after the sale of a one-half interest in a portable mill was completed, the buyer was not permitted to collect money or examine the books, could not entitle him to rescind the contract.—*Sieveking v. Litzler*, 31 Ind. 13.

To constitute a rescission of a contract of sale by a purchaser on the ground of fraud, two things (among others) must appear—that the party promptly declared his intention to rescind, on the discovery of the fraud; and that the fraud was one which resulted in damage to him.—Id.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 288.

See, also, 35 Cyc. p. 130.

§ 116. — Breach of contract or condition in general.

[a] (Sup. 1869)

The failure of the seller to keep a mere promise to be performed after the sale is com-

plete is not a ground for rescission.—*Sieveking v. Litzler*, 31 Ind. 13.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 290.

See, also, 35 Cyc. p. 135.

§ 117. — Failure to deliver.

[a] (Sup. 1858)

When a contract for the sale of a chattel is broken by the failure of the vendor to deliver it, and the purchaser has paid the price in advance, he may elect to rescind the contract, and recover the money advanced, with interest.—*Dobenspeck v. Armel*, 11 Ind. 31.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 291.

See, also, 35 Cyc. p. 136.

§ 120. — Breach of warranty.

[a] (Sup. 1876)

A breach of a warranty of personal property which was unconditionally sold, in the absence of fraud, gives to the purchaser no right to rescind the contract, but an action on such a warranty either by way of an original action or by recoupment.—*Marsh v. Low*, 55 Ind. 271.

[b] (Sup. 1884)

A breach of warranty does not entitle the buyer to rescind the sale.—*Hoover v. Sidener*, 98 Ind. 290.

[c] (App. 1894)

Where property has been unconditionally sold with a warranty, in the absence of fraud, the purchaser cannot, because of breach of the warranty, without consent of the seller, rescind the contract, and recover back the purchase money as money paid on a consideration which has failed, or defend against the collection of the purchase money on that ground, but this rule is not applicable to a case where the seller agreed to take back the property and cancel the purchase-money notes in case the article sold failed to fulfill the warranty, and under such circumstances, the purchasers having offered to return the article and demanded a cancellation of the notes, which was refused, the purchasers then had the right to treat the sale as rescinded and set up the facts pleaded as an answer of failure of consideration of the notes sued on.—*Ohio Thresher Engine Co. v. Hensel*, 36 N. E. 716, 9 Ind. App. 328.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 294.

See, also, 28 Cyc. p. 44, 35 Cyc. p. 138.

§ 122. Conditions precedent.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 302-312.

See, also, 35 Cyc. pp. 146-149.

§ 124. — Restoration of goods.

[a] One who would rescind a purchase because of the seller's fraud must return or offer to return the goods.—(Sup. 1864) *Love v. Oldham*.

22 Ind. 51; (1884) Vogel v. Demorest, 97 Ind. 440.

[b] (Sup. 1870)

Where goods are sold to a person apparently of sound mind, who is not known by the seller to be otherwise, and who has not been adjudged non compos mentis by the proper proceeding, and the contract is bona fide, the contract cannot be set aside, after the purchaser receives and uses the goods, because of the unsoundness of the purchaser's mind, nor can payment be refused either by the alleged lunatic or his representatives.—Wilder v. Weakley's Estate, 34 Ind. 181.

[c] (Sup. 1874)

A buyer cannot rescind for fraud without offering to return the goods.—De Ford v. Urbain, 48 Ind. 219.

[d] (Sup. 1881)

In an action on a note given for the sale of a plan for the organization of an insurance company, an answer assuming that there was a consideration for the note and seeking to avoid its payment, and alleging that it was fraudulently procured without an averment that the property was returned or offered to be returned or that it was of any value, must be treated as an answer seeking to avoid a contract procured by fraud, and not as a plea of no consideration.—Cates v. Bales, 78 Ind. 285.

A purchaser of property cannot retain it, if of any value, and yet rescind the contract for fraud.—Id.

[e] (Sup. 1895)

To effect a rescission of sale, and recover back the purchase price of letters patent declared to be invalid, it is only necessary that the vendee offer to return the letters.—Sandage v. Studebaker Bros. Manuf'g Co., 142 Ind. 148, 41 N. E. 380, 34 L. R. A. 363, 51 Am. St. Rep. 165.

FOR CASES FROM OTHER STATES.

SEE 43 CENT. DIG. Sales, §§ 303-312.

See, also, 35 Cyc. pp. 146-149.

§ 128. Acts constituting rescission.

[a] (Sup. 1872)

Where personal property is sold, and notes of a firm in which the vendor is a partner surrendered to him in payment, and by a subsequent contract between the vendor and his firm the notes are canceled, and afterwards, the partnership having become bankrupt, the contract of sale is rescinded, and also the contract between the vendor and the firm, and the purchaser under the contract of sale agrees to file a claim against the estate of the bankrupt partnership, which one partner agrees to see paid if he lives, the rescission of the contract of sale is complete, although the notes delivered by the purchaser have not been returned to him; they having been destroyed.—Nash v. Caywood, 30 Ind. 457.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 318, 320, 321.

See, also, 35 Cyc. p. 154.

§ 129. Partial rescission.

[a] (Super. 1873)

A. contracted to sell B. all the brick he should make and burn, except the last kiln, at certain prices for each kiln. After A. had burned one kiln, he delivered the same to B., who accepted them on the contract, but, before the second kiln was ready for delivery, B. informed A. that, if such kiln had more lime in it than the first, he must get another purchaser for it, but that he wanted to see it before it was sold, as he would take the good portions of it. The second kiln had in fact more lime in it than the first, this being due to the lime in the clay, and not from any fault or fraud of A. B. knew, at the time of the contract, where the clay was to be obtained. Held, that B., having given notice that he would not comply with the contract as a whole, had no rights under the contract by his offer to examine the kiln and take the good portions of the brick.—Quwack v. Cruse, Wils. 320.

The vendee under a contract of sale which is executory and entire cannot repudiate it in respect to a part of the goods, and at the same time enforce it in respect to the remainder.—Id.

[b] (Sup. 1886)

Where a purchaser is entitled to a rescission of a contract for the purchase of an engine for failure to comply with a warranty, he may also rescind as to a belt which is a part of the engine equipment, although such belt is not defective, and evidences as to its return to the vendor is admissible.—National Bank & Loan Co. v. Dunn, 6 N. E. 131, 106 Ind. 110.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 295; 11 CENT.

DIG. Contracts, § 1194.

See, also, 35 Cyc. p. 139.

§ 130. Actions for rescission.

Construction and operation of findings of court, see TRIAL, § 404.

Evidence of similar fact, see EVIDENCE, § 129.

[a] (Sup. 1889)

In a suit by the buyer to rescind an executed contract for the sale of one-half of a portable mill, an averment that the seller never intended that the buyer should derive any benefit from the mill, or exercise any control over it, could add no force to the complaint.—Sieving v. Litzler, 31 Ind. 13.

[b] (App. 1904)

The complaint, in an action to rescind a contract of sale on the ground of fraud, alleging that the articles shipped were inferior in quality to those specified in the contract and were not marketable, is sufficient in the absence of a motion to make more specific.—Weill v.

Stons, 33 Ind. App. 112, 99 N. E. 698, 104 Am. St. Rep. 243.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 322-324.

See, also, 35 Cyc. pp. 150, 157.

IV. PERFORMANCE OF CONTRACT.

Breach of contract as ground for rescission, see ante, §§ 110, 117, 120.

Conditional sales, see post, § 476.

(A) TITLE AND POSSESSION OF SELLER.

As to third persons after sale, see post, §§ 219-220.

Defense in action for breach of contract, see post, § 372.

Implied warranty of title, see post, § 203.

Rights of bona fide purchasers, see post, § 234.

Transfer of title as between parties to sale, see post, §§ 107-218.

§ 136. Adverse claims to property.

[a] (Sup. 1876)

Where a vendor of personal property has notice of an action of replevin brought by a claimant of such property, and stands by and sees the property taken from the purchaser, he cannot afterwards compel the purchaser to pay the price.—*Marshall v. Duke*, 51 Ind. 62.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 332.

See, also, 35 Cyc. p. 100.

(B) BILLS OF SALE

Absolute bill of sale as mortgage, see CHATTEL MORTGAGES, § 34.

Parol or extrinsic evidence to contradict or vary, see EVIDENCE, §§ 391, 419.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 330-349.

See, also, 34 Cyc. pp. 161-163.

(C) DELIVERY AND ACCEPTANCE OF GOODS.

Affecting lien for price, see post, § 313.

Affecting validity of contract as to creditors, see FRAUDULENT CONVEYANCES, § 138.

As transfer of title, see post, § 201.

Construction of contract as to place for delivery, see ante, § 79.

Construction of contract as to time for delivery, see ante, § 81.

Failure to deliver as ground for rescission, see ante, § 117.

Recovery by buyer of goods purchased, see post, §§ 389-403.

Recovery by seller of goods delivered, see post, §§ 316-330.

Restoration of goods as condition precedent to rescission of contract, see ante, § 124.

Rights of buyer as to third persons, see post, § 226.

To satisfy statute of frauds, see FRAUDS, STATUTE OF, §§ 80, 90.

§ 150. Obligation to deliver in general.

[a] (Sup. 1825)

Where plaintiff delivered wheat to defendant at his mill to be exchanged for flour, and defendant put the wheat into the common stock, and the mill was accidentally destroyed by fire, plaintiff had a good cause of action against the defendant on refusal to deliver the flour.—*Ewing v. French*, 1 Blackf. 353.

[b] (Sup. 1859)

Defendant sold corn to be delivered on a boat at his warehouse on a day certain. Before that day, the time for delivery was indefinitely extended by agreement. Four days afterwards defendant notified plaintiff that he was ready for delivery whenever plaintiff would send a boat and requested immediate payment, which was thereupon made. Plaintiff sent no boat, and three days afterwards the corn was burned. The corn had been measured and set apart. *Held*, that the measuring and setting apart of the corn and the payment in full of the sum to be paid on delivery completed the sale.—*Scott v. King*, 12 Ind. 203.

[c] (Sup. 1872)

Plaintiff sold to defendant a boat and cargo lying at a certain place in the river, the delivery to be made at another place on the first rise of the river. *Held*, that under such contract plaintiff was liable in damages for want of ordinary care and diligence under his contract to deliver.—*Temple v. Aders*, 38 Ind. 506.

[d] (Sup. 1875)

In the case of a sale, the buyer can claim the goods specified, and they are at his risk.—*Lester v. East*, 49 Ind. 588.

[e] (Sup. 1877)

Where hogs were sold for future delivery during the first half of August, the buyers had to the last moment before noon of the 16th day of the month to say whether the hogs filled the contract and to decide whether they should receive them, and the failure of the seller to deliver before the 16th day of the month was equivalent to notice that the seller had elected to deliver the hogs on that day.—*Kirkpatrick v. Alexander*, 60 Ind. 95.

[f] (Sup. 1884)

In the absence of a special contract, the seller of goods is not bound to insure or to impart information on the subject of insurance.—*Bartlett v. Jewett*, 98 Ind. 203.

[g] (App. 1894)

In an action on an accepted draft on the consignment of a carload of fruit, it appeared that the consignor shipped the fruit during the cold season in a common box car, and the fruit was frozen in transit; that consignor could have shipped the fruit in a refrigerator car, so

as to prevent freezing, and that consignee did not know the condition of the fruit when he accepted the draft. *Held*, that the consignor was negligent in so shipping the fruit, and could not recover its value.—*Wilson v. Western Fruit Co.*, 11 Ind. App. 89, 38 N. E. 827.

The shippers of goods on delivering them to a carrier must use reasonable diligence and care to see that they were safely packed in proper manner to secure a safe carriage, and the risk of their negligence was not imposed on the consignee by the mere delivery to the carrier.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 350, 351, 354-356.

See, also, 35 Cyc. p. 164.

§ 153. Tender or offer by seller.

Condition precedent to action for breach, see post, § 371.

Condition precedent to action for price, see post, § 345.

Pleading, see post, § 353.

[a] (Sup. 1873)

A complaint to recover damages for a failure to accept hogs contracted to be delivered "the first half of August, 1871," the hogs to be weighed and paid for at certain scales, alleging that the plaintiff had the hogs at the scales on the morning of the 16th day of August, 1871, and in the forenoon of said day, and weighed the hogs, and was ready to deliver the same in the forenoon of the 16th, etc., not showing any notice to the defendant of the time of delivery, was bad, because it did not show that the plaintiff had the hogs at the scales and was ready to deliver them there till noon of the 16th day of August, 1871.—*Kirkpatrick v. Alexander*, 44 Ind. 595.

[b] (Sup. 1877)

Where a contract provided for the delivery of live stock "during the first half of August," at a specified place, the fact that it was not delivered before the 16th day of August was equivalent to notice that it would be made on that day.—*Kirkpatrick v. Alexander*, 60 Ind. 95.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 358-366.

See, also, 35 Cyc. pp. 169-171; note, 2 L. R. A. (N. S.) 529.

§ 155. Acts constituting delivery.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 367-385.

See, also, 35 Cyc. pp. 187-202.

§ 156. — In general.

[a] (Sup. 1860)

If, in any suit on a contract for the delivery of an article, defendant prove delivery at the time, and it be not shown that he afterwards sold the article, or appropriated it to his own use, or that he otherwise agreed to a re-

scission, a rescission is not established; and if defendant be not in fault, plaintiff cannot recover money advanced. To defeat such suit, it need not be shown that defendant set the article apart, and abandoned it to plaintiff, or kept it delivered up to the time of suit, though it might be necessary to enable defendant to recover the price of the article.—*Blake v. Hedges*, 14 Ind. 566.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 367-371.

See, also, 35 Cyc. p. 187.

§ 160. — Access of and removal by buyer.

[a] (App. 1903)

Where machinery for which the buyer gives his notes is purchased on the farm of a third person, with the intention that it was sold as it was and where it was, and after the sale the buyer removes a portion of it, leaving the remainder because he wanted it there, the delivery is complete, entitling the seller to the purchase price.—*Avery Mfg. Co. v. Emsweller*, 67 N. E. 946, 31 Ind. App. 291.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 375.

See, also, 35 Cyc. p. 192.

§ 161. — Delivery to or through carrier or other intermediary.

Transfer of title, see post, §§ 201, 202, 219.

[a] (Sup. 1885)

When goods are sold upon an order from a buyer living at a distant place, and the seller undertakes to ship them, it is his duty to deliver them to the carrier properly consigned; and where he consigns them to himself, there is no delivery.—*Sohn v. Jervis*, 101 Ind. 578, 1 N. E. 73.

[b] (App. 1898)

Where a buyer, by his order to the sellers, accepted a car load of wheat at a specified price, to be billed to the buyer's order, and the sellers delivered the car of wheat to the usual carrier, caused it to be billed to the buyer's order, and sent the bill of lading to the buyer, who received it, the transaction was an executed sale.—*Dill v. Mumford*, 49 N. E. 861, 19 Ind. App. 609.

[c] (App. 1905)

Where a contract of sale provides that the goods shall be shipped f. o. b. at a certain place and addressed to the buyers, a delivery of the goods to the carrier free on board the car at the place designated, addressed to the buyers as provided for in the contract, with notice of shipment to them, is in effect a delivery to the buyers.—*Kilmer v. Moneyweight Scale Co.*, 76 N. E. 271, 36 Ind. App. 568.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 377-380.

See, also, 35 Cyc. pp. 193-198.

§ 162. — Symbolical or constructive delivery.

As against third persons, see post, § 226.
Transfer of title, see post, §§ 201, 202.

[a] (Sup. 1850)

Merchants in another state purchased from A. and B., who were in the warehouse business in this state, a certain amount of pork. The vendor gave written memoranda of the sales and receipts for the money paid, whereupon A. and B. agreed in writing to deliver said pork at T., to the order of said merchants, as soon as navigation opened. *Held*, that the indorsement and delivery of the documents to a merchant in New York, in consideration of advances of money in the usual course of trade, transferred to him the legal possession of the property, and made him an actual purchaser to the extent of his advances.—*Pierce v. Gibson*, 2 Ind. 408.

[b] (App. 1903)

Where goods cannot be conveniently delivered manually, or are not in the personal custody of the seller, actual delivery is dispensed with and constructive delivery will suffice.—*Avery Mfg. Co. v. Emsweller*, 67 N. E. 946, 31 Ind. App. 201.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 376, 381–385.
See, also, 35 Cyc. p. 199.

§ 163. Delivery of installments.

[a] (App. 1900)

A contract to sell defendant a certain quantity of ice each month from April 1 to November 1, 1896, at a fixed price per ton, is free from uncertainty; and hence a contention that defendant was only liable to pay for ice actually delivered is untenable, though the parties made monthly settlements on that basis.—*Gardner v. Caylor*, 56 N. E. 134, 24 Ind. App. 521.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 386–388.
See, also, 35 Cyc. p. 210.

§ 164. Quantity delivered, and effect of excess or deficiency.

Ascertainment of quantity as necessary to transfer title, see post, § 200.

Waiver of defects by acceptance of goods, see post, § 180.

[a] (Sup. 1839)

The plaintiff having contracted with the defendant to deliver him, on a certain day, 40 hogs, weighing on an average 180 pounds, at a certain price per cwt. tendered to the defendant, on the day, 40 hogs, weighing on an average of 195 pounds, which the defendant refused to receive. *Held*, that the defendant was liable to the plaintiff for a breach of the contract.—*Houston v. Miner*, 5 Blackf. 89.

[b] (Sup. 1851)

Where a party, under a special contract for the sale and delivery of chattels, fails in its

complete performance, but his part performance is a benefit to the party receiving it, who retains such benefit after the expiration of the time for the completion of the contract, an action of quantum valebat or quantum meruit may be supported for the chattels delivered.—*Epperly v. Bailey*, 3 Ind. 72.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 386–390.
See, also, 35 Cyc. pp. 202–213.

§ 165. Quality, fitness, and condition of goods.

Instructions in action for price, see post, § 364.

Mistake in contract, see ante, § 36.

Pleading defects as to quality in action for price, see post, § 354.

Representations constituting warranty, see post, § 261.

Waiver of defects by acceptance of goods, see post, §§ 179, 180.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 391–402.
See, also, 35 Cyc. pp. 214–243.

§ 166. — In general.

[a] (Sup. 1857)

In a sale by sample, the articles sold must, on delivery, correspond with the sample, or it may be rejected.—*Gatling v. Newell*, 9 Ind. 572.

[b] (Sup. 1858)

In an action by the assignee of a promissory note given for the price of sheep, an answer alleging that the parties were dealers in sheep and represented themselves to be acquainted with their diseases, and fraudulently and falsely represented that the sheep purchased were sound, when in fact they had foot rot, which was conveyed to 5,000 other sheep belonging to the purchaser, with which they were allowed to run, and he was damaged accordingly, sets up a good defense.—*Rose v. Wallace*, 11 Ind. 112.

[c] (Sup. 1859)

In an action by the assignee of a note, executed to one who completed an engine and boiler for use in the sawmill for a special purpose, and the boiler of which exploded solely by reason of unsoundness, it was no reply to the answer setting up the unsoundness to allege that the makers were ignorant of the defects.—*Page v. Ford*, 12 Ind. 46.

[d] (Sup. 1885)

Where the price of an article is fixed by contract, that price governs, and evidence of the market value of the property is incompetent.—*Sohn v. Jervis*, 101 Ind. 578, 1 N. E. 73.

[e] (App. 1891)

Where there is no willful misrepresentation or artful device to disguise the character or conceal the defects of the thing sold, the buyer is bound by the contract, though the seller got a decided advantage in the trade, and

gave a defective article.—*Court v. Snyder*, 28 N. E. 718, 2 Ind. App. 440, 50 Am. St. Rep. 247.

Where a sale is executed, the buyer takes the thing sold with all the defects, if there be neither warranty nor fraud.—*Id.*

[f] (Sup. 1906)

Where goods received by a purchaser are not substantially the goods described in his contract, he has a right to refuse them, and will incur no liability under the contract until the seller delivers or tenders the goods he engaged to deliver.—*Price v. Huddleston*, 167 Ind. 536, 79 N. E. 496.

[g] (App. 1910)

The quality of an article sold is a part of its description, the seller being bound to furnish articles corresponding with that description.—*Gandy v. Seymour Slack Stave Co.*, 90 N. E. 915.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 391-400, 402.

See, also, 35 Cyc. pp. 214, 216, 223, 234.

§ 167. — Application of doctrine caveat emptor.

As affecting implied warranty, see post, § 269.

[a] (Sup. 1907)

Where a dealer sold a cable, for a specific purpose, which was wound in a coil and wrapped so that the buyer did not have an opportunity to examine the same for defects, the maxim caveat emptor does not apply.—*Oil Well Supply Co. v. Watson*, 168 Ind. 603, 80 N. E. 157, 15 L. R. A. (N. S.) 868.

Where chattels are sold generally for all purposes for which they are adapted, and the seller is not the manufacturer or producer, and the property is in existence and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim of caveat emptor applies, though defects exist in the property which are not discoverable on examination.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 401.

See, also, 35 Cyc. p. 215.

§ 168. Inspection and approval in general.

As prerequisite to transfer of title, see post, § 200.

Estoppel or waiver, see post, § 176.

Implied warranty as affected by inspection, see post, § 270.

Rights as against third persons, see post, § 226.

Waiver of rights by acceptance of goods, see post, § 179.

[a] (App. 1908)

Where a contract between defendant and a city for the construction of a pump pit was referred to as part of defendant's contract with plaintiff for the furnishing of stone for the

work, which expressly provided that the inspection and acceptance or rejection of the stone furnished by plaintiff should take place on delivery on board the cars on arrival, while the contract with the city authorized inspection of rejection even after the stone had been put in the wall, the place of inspection as between plaintiff and defendant was governed by their contract, and not by the contract with the city.—*Western Const. Co. v. Romona Oolitic Stone Co.*, 41 Ind. App. 229, 80 N. E. 856.

A contract for the sale of stone, giving the buyer the right of inspection on board cars at the place of delivery, is materially violated by hauling the stones from the cars to the building in which they are to be placed, before inspection.—*Id.*

In contracts for the sale of goods to be shipped by the seller to the buyer, it is the duty of the buyer to inspect and accept, or reject, the goods within a reasonable time, and for the purpose of inspection the buyer has the right to receive the goods and do whatever is necessary to make a proper inspection; but the parties may, by contract, provide for a different rule as to inspection.—*Id.*

In ordinary contracts for the sale of goods, it is the duty of the buyer to inspect and accept or reject the goods within a reasonable time, and for the purpose of inspection the buyer may receive the goods and do whatever is necessary to make a proper inspection, which acts will not constitute an acceptance nor preclude him from rejecting the goods if found defective.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 403-408.

See, also, 35 Cyc. pp. 225-229.

§ 168½. Sale on trial or approval, and contracts for sale or return.

Instructions in action for price, see post, § 264.

[a] (Sup. 1874)

On February 10, 1869, a written contract was executed whereby B. purchased of T. certain water wheels to be used in the mill of B., the latter to have the privilege of running the wheels 30 days, and, if they did not work to his entire satisfaction, he had the right to return the same, at his mill, after such 30 days' trial, he notifying the vendor of his dissatisfaction, and in that case the latter was to pay freight and the expenses of putting in and taking out the wheels. The vendor also warranted the wheels to give the same power, under any head of water, as certain other wheels named, which warranty was to extend to September 1, 1869. *Held*, that the right to reject the wheels was limited to 30 days after commencing the use of them. It did not extend to the time of the expiration of the warranty.—*Barlow v. Thompson*, 46 Ind. 384.

[b] (Sup. 1885)

Where a contract for a purchase of a windmill provided that if the mill did not work

well for 60 days after erection, and the seller on notice did not remedy the defect, the buyer was not bound, the buyer was not entitled arbitrarily to reject the mill on the ground that it did not suit him in the absence of a defect.—*Flint v. Cook*, 1 N. E. 633, 102 Ind. 391.

[c] (App. 1891)

In an action to recover for a windmill sold and delivered, where the contract provides that, if a machine is not satisfactory, the vendee shall give notice thereof to the vendor within 90 days, it is proper to instruct the jury that the time when the mill-owners erected the mill was a question of fact, "but it should be deemed erected when properly placed in position to perform the work intended, even though in some parts it was not yet strictly and skillfully adjusted."—*Cook v. Flint*, 2 Ind. App. 41, 28 N. E. 200.

In an action for the price of a mill, it was proper to refuse to permit defendant to prove by a witness that he had a conversation with defendant 90 days next after the erection of the mill, in which he notified witness, who, it was claimed, was an agent of plaintiffs or at least of the person who had negotiated the sale of the mill, that the mill did not and would not work, and would have to be taken away and fixed, and that he requested witness to tell the principal agents of plaintiffs that the machine was not in working order, and to come and fix it or take it away, it not appearing that witness was at the time the agent of plaintiffs, if ever he had been such before, and the contract providing that, if the mill did not work well, defendant was to notify plaintiffs.—*Id.*

Where a contract provides that, if a machine is not satisfactory, the vendee shall give notice thereof to the vendor within 90 days, it is proper to exclude testimony concerning conversations had with local agents after that time; and the fact that repairs were made afterwards is not a waiver of the provisions of the contract.—*Id.*

[d] (App. 1895)

If the vendor's selling agent was present when the machine sold was tested and failed to make it do the work properly, no other or further notice was necessary.—*J. F. Seiberling & Co. v. Tatlock*, 41 N. E. 841, 13 Ind. App. 345.

[e] (Sup. 1899)

Where a contract of sale of machinery provided for a test, that vendee prevented the test is a waiver of performance in that respect.—*Smith v. Barber*, 53 N. E. 1014, 153 Ind. 322.

[f] (App. 1899)

A buyer of a rock crusher, agreeing to return it, if it failed to do certain work as represented, cannot retain it, and sue for damages occasioned by its failure to do such work.—*F. C. Austin Mfg. Co. v. Clendenning*, 52 N. E. 708, 21 Ind. App. 459.

[g] (App. 1899)

One agreeing to buy a heater of a kind described to be delivered free on board cars, to be "accepted, with the understanding that the heater is [the seller's] property until accepted and paid for," may reject any heater after such delivery.—*Colles v. Lake Cities Electric Ry. Co.*, 53 N. E. 256, 22 Ind. App. 86.

[h] (Sup. 1905)

Where the seller of a horse, which he had agreed to take back if unsatisfactory, objected to taking him back, on the ground that he was in bad condition, an objection that the tender back was premature was waived.—*Rosenthal v. Rambo*, 76 N. E. 404, 165 Ind. 584, 3 L. R. A. (N. S.) 678.

[i] (App. 1905)

Plaintiff shipped a refrigerator to defendant on trial, and, on notice that it was unsatisfactory, plaintiff directed defendant to return it; and defendant had it crated for shipment, and removed to the railway depot. Plaintiff refused to pay the expense of crating and hauling, and defendant had the refrigerator removed to a place of storage. *Held*, in replevin by plaintiff to recover the refrigerator, that as defendant was entitled to retain it until the charges for crating and hauling to the depot were paid, he was also entitled to recover the expense of storage and removal to the storage warehouse.—*Cincinnati Butchers' Supply Co. v. Steinmetz*, 73 N. E. 950, 35 Ind. App. 228.

[j] (App. 1906)

Where a contract for the sale of a windmill provided that the buyer should have 60 days in which to keep or reject the property, the rule that the buyer is bound to exercise his option to reject within a reasonable time was inapplicable.—*Allyn v. Burns*, 76 N. E. 636, 37 Ind. App. 223.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 409-421.

See, also, 35 Cyc. pp. 234-239.

§ 171. Excuses for default or delay in delivery.

Pleading in action by buyer for breach, see post, § 412.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 425-435.

See, also, 35 Cyc. pp. 243-247.

§ 173. — Prevention by acts of buyer.

[a] (Sup. 1853)

In an action on a written contract, whereby defendant agreed to deliver to plaintiff a specified quantity of merchantable corn, defendant pleaded that when the contract was made plaintiff agreed in writing that, in consideration that defendant would deliver the corn, he would pay defendant the price stated and furnish a thresher to thresh the corn, and that he failed and refused to furnish the thresher, whereby defendant was disabled from performing his con-

tract. *Held*, that the plea was sufficient.—*Bembridge v. Stoddard*, 4 Ind. 587.

[b] (*Sup.* 1871)

Where a contract to sell and deliver clover seed contained an agreement that bags should be furnished by the purchaser of the seed, no obligation rested upon the seller unless the bags were furnished within the time fixed for delivery of the seed, and no demand for the bags was required; and the fact that the seller had not the seed on hand at any time did not excuse the tender of the bags, as he might have purchased the seed and thus have discharged his contract.—*Russell v. Witt*, 38 Ind. 9.

[c] (*App.* 1910)

In an action for the balance of the price of onions sold, a judgment for plaintiff is justified where it is shown that the most of the onions were delivered to, and accepted and paid for by, defendant, and those remaining undelivered were sacked at the request of defendant prior to the date for delivery, but plaintiff was not directed when to haul the same to the station.—*S. Bash & Co. v. Sible*, 90 N. E. 1035.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 431-433.

See, also, 35 Cyc. pp. 249-253.

§ 175. — Refusal of buyer to receive.

[a] (*Sup.* 1870)

Where, by the terms of a contract between A. and B., the former was to deliver to the latter on a railroad switch, at a certain place, within a specified time, certain lumber which B. was to there receive and measure as it should be delivered, and for which he was to pay a stipulated price to A., it was a sufficient defense to a suit by B. against A. to recover money advanced by the former to the latter under the contract in excess of the price of the lumber delivered, and damages for the failure of A. to deliver a portion of said lumber, that A. was ready and willing to deliver the lumber according to the contract, of which fact he notified B., but that B. notified A. that he need not deliver the lumber at said place unless he would permit B. to ship it to a certain other place and there to measure and receive it, and that A. had been at all times, and then was ready and willing to deliver said lumber according to the terms of the contract, but that he had been prevented from so doing by the refusal of B. to measure and receive it according to the contract.—*Sage v. Brown*, 34 Ind. 464.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 435.

See, also, 35 Cyc. p. 251.

§ 176. Estoppel or waiver in general.

Affecting transfer of title, see post, § 201.

Waiver by acceptance of goods, see post, §§ 170, 180.

[a] (*Sup.* 1862)

The defendant contracted to sell and deliver to the plaintiff a certain number of hogs, well-fatted and merchantable, and "to be our best hogs, weighing 200 lbs. and upwards." To make up the number, the defendant added to hogs of his own other hogs, bought by him for this purpose. They were, however, weighed before the plaintiff's agent, and not objected to by him; and the plaintiff agreed to take them if the defendant would take in part payment certain certificates of deposit. The defendant refused so to do, and thereupon the plaintiff refused to take the hogs as not filling the contract, and brought suit thereon. *Held*, that the defendant had failed to comply with the contract, and that no waiver by the plaintiff of his rights thereunder was shown, and that judgment for defendant should be reversed.—*Daggy v. Cox*, 19 Ind. 142.

[b] (*Sup.* 1870)

The seller of property exhibited a schedule of it to the buyer and proposed to sell. The buyer went to the premises for the purpose of examining the property and satisfying himself as to the same. After doing so, or after having had an opportunity of doing so, he proposed other terms, offering a sum in gross for the entire property, including the articles named in the schedule, and the seller accepted the offer. A note was given for part of the purchase money. In an action on the note, *held*, that the maker could not set up as a failure of consideration that the property named in the schedule was of less quantity than the schedule represented. The buyer had a fair opportunity of examining for himself.—*Pattison v. Jenkins*, 33 Ind. 87.

[c] (*Super.* 1873)

A. contracted to sell to B. all the brick he should make and burn, except the last kiln, at certain prices for each kiln. After A. had burned one kiln, he delivered the same to B., who accepted them on the contract; but, before the second kiln was ready for delivery, B. informed A. that, if such kiln had more lime in it than the first, he must get another purchaser for it, but that he wanted to see it before it was sold, as he would take the good portions of it. The second kiln had in fact more lime in it than the first; this being due to the lime in the clay, and not from any fault or fraud of A. B. knew at the time of the contract where the clay was to be obtained. *Held*, that the lime in the brick of the second kiln did not justify B. in refusing to take any portion of the brick.—*Quwack v. Cruse*, Wils. 320.

[d] (*Sup.* 1881)

The giving of new notes in renewal of some given for a defective machine, on the agreement that it should be made good, is not a waiver of the right to a counterclaim for the defects.—*Case v. Grim*, 77 Ind. 565.

[e] (*App.* 1894)

The consignee of fruit which is frozen and worthless on its arrival, owing to the negli-

gence of the consignor in shipping it, is not liable for retaining the valueless fruit.—*Wilson v. Western Fruit Co.*, 11 Ind. App. 89, 38 N. E. 827.

[f] (Sup. 1904)

Where a manufacturer of paving bricks agreed to begin deliveries under a sale about October 20, 1900, and the delay in failing to make the first shipment until November 1st resulted from the buyer's delay in furnishing the security called for by his contract, and by the seller's inability to procure cars, but such shipment was received without objection, and afterwards the buyer's only complaint was that the shipments were too frequent, the buyer could not object that the bricks were not delivered in time.—*O'Brien v. Higley*, 70 N. E. 242, 162 Ind. 316.

Where loss sustained by a paving contractor in hauling and unloading defective bricks from the cars was solely due to his failure to inspect the bricks before taking them from the cars, he was not entitled to set off such loss in a suit for the price of the bricks.—*Id.*

[g] (App. 1908)

A stone company, by continuing to ship stone under the terms of a contract with a construction company, is not estopped to insist on the terms thereof, where it objected to the violation of a contract and insisted upon compliance therewith.—*Western Const. Co. v. Romona Oolitic Stone Co.*, 41 Ind. App. 229, 80 N. E. 856.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 430-444.

See, also, 35 Cyc. pp. 239-243.

§ 177. Obligation to accept in general.

[a] (App. 1909)

Where, under a contract by manufacturers to specially cut and separately stack staves and load them on cars, they cut and stacked the staves, awaiting shipping orders, they performed all they were required to, and the buyer could not, by withholding shipping orders, escape liability under the contract.—*Jennings v. Shertz*, 88 N. E. 729.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 445-450.

See, also, 35 Cyc. pp. 256, 257.

§ 178. Acts constituting acceptance.

[a] (App. 1893)

Defendant, knowing that plaintiff sent him the goods in fulfillment of his order, on inspection notified plaintiff that the quality was not as ordered, whereupon plaintiff told him it was, and that he should so accept the goods. Defendant then took possession of the goods, and sold them. *Held*, that he had accepted them.—*Pottlitzer v. Wesson*, 8 Ind. App. 472, 35 N. E. 1030.

[b] (App. 1900)

Where a wholesaler sells goods to a retailer under a contract providing that the goods and the proceeds of a resale thereof shall be held in trust for the wholesaler, as collateral security for the price of the goods, and the retailer sells the goods, a conclusion of law that the retailer is indebted to the wholesaler in the amount of the goods so resold is correct, whether the contract be construed as retaining title in the wholesaler, so as to constitute the resale a conversion, or whether title be considered as passing to the retailer; the purchase money remaining unpaid.—*Hildebrand v. Sattley Mfg. Co.*, 57 N. E. 594, 25 Ind. App. 218.

[c] (App. 1908)

A city's engineer, having charge of the construction of a pump pit, with authority under the city's contract to reject stone intended for the work at any time, was appointed by agreement of the parties as inspector of the stone which the contractor purchased for the work from plaintiff, but refused to inspect the stone on arrival on the cars as required by the contractor's contract of purchase. After this refusal defendant removed the stone to the place of construction, piled it up, and left it until it was inspected later, when a large quantity of it was rejected. *Held*, that the contract provision requiring inspection on the cars was of the essence of the contract, and that defendant's acts in removing the stone without inspection was a waiver of such provision, and constituted an acceptance of the stone.—*Western Const. Co. v. Romona Oolitic Stone Co.*, 41 Ind. App. 229, 80 N. E. 856.

Where a contract for the sale of stone for public work required inspection by the city's engineer on delivery on the cars, but the engineer refused to make such inspection, whereupon the buyer removed the stone without inspection, and the city engineer rejected a large part thereof, the seller was not estopped to insist that such removal constituted an acceptance of the stone by its act in appealing from the decision of the engineer or in continuing to ship stone under the contract with knowledge that the engineer would not inspect it on the cars.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 451-455.

See, also, 35 Cyc. pp. 258-260.

§ 179. Effect of acceptance.

As waiver of breach of warranty, see post, § 288.

[a] (Sup. 1820)

When work is performed, articles manufactured, or any commodity furnished by one man for another, and a certain price is fixed on by the parties, and the purchaser accepts the work, or receives the articles or commodity without objection at the time, he is liable to an action for the price agreed on; and it is no

defense for him to allege that the work or articles are not so good as contracted for, nor can he, by special plea or otherwise, object to their quality or value.—*Fellows v. Stevens*, 1 Blackf. 508.

The act of a contract purchaser in receiving without protest what is delivered under the contract, to the amount bargained for, amounts to a waiver of any difference in quality between what he had a right to demand and what he had actually received.—*Id.*

[b] (*Sup.* 1859)

In the absence of fraud or warranty, where a purchaser accepts and receives goods, he thereby not only waives defects, but is concluded thereby, so that he cannot recover thereafter for any patent and known defect.—*Ricketts v. Hays*, 13 Ind. 181.

[c] (*Sup.* 1871)

Where one who had ordered a tombstone by parol approved the work and materials and had it placed in his possession, he cannot thereafter defend an action for the price on the ground that the work done and materials furnished did not exactly conform to the contract.—*Barkalow v. Pfeiffer*, 38 Ind. 214.

[d] (*Sup.* 1878)

One who contracts for first-class brick, but voluntarily accepts an inferior article, is bound to pay the reasonable value of the brick accepted.—*Hadley v. Prather*, 64 Ind. 137.

[e] (*Sup.* 1883)

Where the vendor of lumber failed to deliver it at the time specified in the contract, and failed to send an invoice and bill of lading, the vendee by taking possession of the lumber assumed the burden of ascertaining the quantity and waived its right to an invoice and bill of lading, enabling the vendor to sue on the contract as if an invoice had been furnished.—*Ohio Falls Car Company v. Menzies*, 90 Ind. 83, 46 Am. Rep. 195.

[f] (*App.* 1898)

A buyer who, after being informed of a mistake in a price quotation of merchandise shipped to him, and of the figure the seller intended to quote, receives and disposes of the merchandise, will be liable at the price intended to be quoted.—*Mummenhoff v. Randall*, 49 N. E. 40, 19 Ind. App. 44.

[g] (*Sup.* 1904)

Where a buyer of paving bricks received them from the cars, and accepted them without objection, he could not thereafter object, in a suit for the price, that he was compelled to turn and reset a number of the bricks because of slight defects, which was the result of his own negligence and unskillful methods in laying them.—*O'Brien v. Higley*, 70 N. E. 242, 162 Ind. 316.

[h] (*App.* 1908)

Where, in an action for the price of stone shipped under a contract, the evidence showed

an acceptance of the stone by the buyer as a compliance with the contract, the buyer could not recover on a counterclaim for damages alleged to have been caused by defects in the quality and condition of the stone.—*Western Const. Co. v. Romona Oolitic Stone Co.*, 41 Ind. App. 229, 80 N. E. 856.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 456-468.

See, also, 35 Cyc. p. 260; note, 54 L. R. A. 718.

§ 180. Partial delivery and acceptance.

Entire or separable character of contract, see ante, § 62.

Transfer of title, see post, § 201.

[a] (*Sup.* 1883)

Where a contract for the sale of lumber provides for delivery of portions thereof at specified times, accompanied by bills of lading, the acceptance of a portion of the lumber delivered after the time fixed, and not accompanied by bill of lading, is a waiver of the conditions concerning the time of delivery and bill of lading.—*Ohio Falls Car Co. v. Menzies*, 90 Ind. 83, 46 Am. Rep. 195.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 460-472.

See, also, 35 Cyc. p. 243.

§ 181. Evidence.

[a] (*Sup.* 1886)

In an action for goods sold and delivered, the delivery need not in all cases be established by direct evidence.—*Lance v. Pearce*, 101 Ind. 595, 1 N. E. 184.

[b] (*App.* 1894)

On an issue as to whether a contract calling for the delivery of merchantable stone on board the cars at the quarry was complied with, it is proper for the jury to consider that the stone froze and burst on its arrival at the place to which it was shipped.—*Cleveland Stone Co. v. Monroe County Oolitic Stone Co.*, 11 Ind. App. 423, 39 N. E. 172.

[c] (*App.* 1895)

As a purchaser of goods cannot be required to accept a less or other quantity than specified in the contract, where the seller, in an action for the price, relies on the contract, he must prove that he performed the whole of it, by delivering the exact quantity.—*J. A. Coats & Sons v. Huffine*, 13 Ind. App. 182, 41 N. E. 465.

[d] (*Sup.* 1902)

A stipulation that purchasers of property would give a mortgage on delivery, and pay the freight to the place of delivery, must be presumed to have been waived by the sellers, or complied with, where the property was delivered without objection, all the notes executed by the purchasers paid excepting the last, and the property left in the purchaser's

possession.—*Kenney v. Bevilhelmer*, 64 N. E. 215, 158 Ind. 653.

[c] (Sup. 1903)

In an action for goods sold and delivered, it is not necessary to show an acceptance by the buyer, it being sufficient if the seller has performed such acts as would have vested the title in the buyer had he accepted the goods.—*Rastetter v. Reynolds*, 60 N. E. 612, 160 Ind. 133.

[f] (App. 1910)

In an action for the price of goods sold, the burden is on plaintiff to show delivery of goods described in the contract.—*Gandy v. Seymour Slack Stave Co.*, 90 N. E. 915.

FOR CASES FROM OTHER STATES.

SEE 43 CENT. DIG. Sales, §§ 473-491.

See, also, 35 Cyc. pp. 230-233, 261.

§ 182. Questions for jury.

Delivery as against third persons, see post, § 233.

[a] (App. 1895)

In an action for the price of 5,000 cards of needles ordered by defendant, there was evidence that the exact number of cards were delivered to the carrier; that they remained in the freight house at defendant's town more than nine months, when defendant paid the freight, and took them to another building for the purpose of ascertaining whether the packages contained the full amount; that the carrier's agent could not say that they were in the same condition when taken away as when they arrived; that the cards were packed in paper boxes, each of which was wrapped with cord, and all were packed in two wooden boxes, neither of which bore any marks of having been opened; that one of the paper boxes was found open, and its contents scattered among the others; and that the lot, when opened, was 46 cards short. *Held*, that whether 5,000 cards were shipped by plaintiff, and whether defendant accepted any portion of them, were questions for the jury.—*J. A. Coats & Sons v. Huffine*, 13 Ind. App. 182, 41 N. E. 465.

FOR CASES FROM OTHER STATES.

SEE 43 CENT. DIG. Sales, §§ 492-495.

See, also, 35 Cyc. pp. 234, 262.

(D) PAYMENT OF PRICE.

Actions for price, see post, §§ 340-365.

Affecting right of stoppage in transitu, see post, § 297.

Affecting waiver or estoppel, see ante, § 176.

As against third persons, see post, § 226.

As transfer of title, see post, § 202.

As waiver of breach of warranty, see post, § 288.

Conditional sales, see post, § 409.

Construction of contract as to price, see ante, §§ 74-77.

Construction of contract as to time for payment of term of credit, see ante, § 82.

Evidence in action for price, see post, § 359.

Nonpayment as ground for rescission, see ante, § 99.

Payment as dependent stipulation, see ante, § 65.

Payment as waiver of breach of warranty, see post, § 288.

Recovery by buyer of price paid, see post, §§ 390-396.

Transfer of title as to third persons, see post, § 219.

To satisfy statute of frauds, see FRAUDS, STATUTE OF, §§ 94, 95.

§ 185. Tender.

[a] (Sup. 1885)

Where a buyer went to the seller's house, he having no other place of business, at the specified time, prepared to make tender, and not finding him at home made careful search for him, and a few days thereafter actually made tender, which was refused, there was a good tender.—*Mathis v. Thomas*, 101 Ind. 119.

A buyer of goods who makes a valid tender of the purchase money, which is refused by the seller, who repudiates the contract, is not bound to make a second tender.—*Id.*

FOR CASES FROM OTHER STATES.

SEE 43 CENT. DIG. Sales, § 498.

See, also, 35 Cyc. p. 271.

§ 186. Payment in full.

[a] (Sup. 1888)

Part payment of the purchase price of goods sold is earnest money, and binds the bargain.—*Weir v. Hudnut*, 18 N. E. 24, 115 Ind. 525.

FOR CASES FROM OTHER STATES.

See 35 Cyc. p. 270.

§ 189. Mode and sufficiency of payment.

Affecting remedy for recovery of price, see post, § 340.

FOR CASES FROM OTHER STATES.

SEE 43 CENT. DIG. Sales, §§ 504, 505.

See, also, 35 Cyc. pp. 267-272.

§ 190. — In general.

[a] (Sup. 1888)

Whatever the parties to a contract for the sale of goods agree shall constitute part payment will be regarded by the courts as part payment if the thing agreed on is of some value.—*Weir v. Hudnut*, 18 N. E. 24, 115 Ind. 525.

FOR CASES FROM OTHER STATES.

SEE 43 CENT. DIG. Sales, § 504; 11 CENT. DIG. Contracts, § 1207.

See, also, 35 Cyc. p. 267.

§ 191. — Notes or other obligations, and payment thereof.

Accrual of action for breach of contract, see post, § 374.

Conditional sales, see post, § 469.

Performance of conditional sale, see post, § 476.

Transfer of title, see post, § 202.

[a] (App. 1902)

In an action on a contract for failure to deliver lumber as provided by its terms, plaintiff may prove that he executed certain notes in payment of the lumber as required by the contract, and that he paid the notes when due; the evidence showing a compliance with the contract on plaintiff's part.—*Pape v. Ferguson*, 62 N. E. 712, 28 Ind. App. 298.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 505.

See, also, 35 Cyc. p. 269.

§ 194. Effect of default or delay.

[a] (Sup. 1860)

Upon an agreement to execute notes in payment of the price of goods sold, they must be executed within a reasonable time, or the whole sum becomes due forthwith.—*Hays v. Weatherman*, 14 Ind. 341.

[b] (Sup. 1860)

Where the buyer of personal property agrees to pay for the same on delivery, the seller may demand the price, and withhold the property unless it is paid; but he is not bound to do so, but may deliver the same and compel the payment of the price afterwards.—*Kirby v. Studebaker*, 15 Ind. 45.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 508.

See, also, 35 Cyc. p. 272.

§ 196. Waiver of default or delay.

Affecting transfer of title, see post, § 202.

[a] (Sup. 1885)

Although negotiation between the seller and purchaser is by letter, if nothing is said about the time of payment and no usage is shown, the sale is presumed to be for cash; that is, on condition of immediate payment, and whether that condition is waived by a delivery of the goods is a question for the jury, to be determined by the acts of the parties and all the circumstances of the case.—*Curme, Dunn & Co. v. Rauh*, 100 Ind. 247.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 510.

See, also, 35 Cyc. p. 273.

V. OPERATION AND EFFECT.

Liability of buyer for injuries from negligence of seller, see NEGLIGENCE, § 14.

Of warranty, see post, §§ 276-279.

Right of seller to have receiver appointed, see RECEIVERS, § 12.

Title and rights of purchasers at sales of property of decedents, see EXECUTORS AND ADMINISTRATORS, § 167.

(A) TRANSFER OF TITLE AS BETWEEN PARTIES.

Effect on right to receiver, see RECEIVERS, § 12.

§ 197. Executory contracts in general.

[a] (Sup. 1875)

In an executory agreement for a sale, the goods remain the property of the seller till the contract is executed.—*Lester v. East*, 49 Ind. 588.

In case of an executory agreement, the buyer does not become the owner of the goods, cannot claim them specifically and they are not at his risk, and his remedy on the contract, if there be a breach of it, is confined to an action for damages.—*Id.*

[b] (App. 1897)

In a sale, the subject of the contract becomes the property of the buyer the moment the contract is concluded, whether the goods are delivered to the buyer, or remain in the possession of the seller. In the executory contract, the goods remain the property of the seller until the contract is executed. In case of sale the buyer can claim the specific goods, and they are at his risk. In case of an executory contract, the purchaser does not become the owner. They are not at his risk. His remedy, if there be a breach, is confined to an action for damages.—*Branigan v. Hendrickson*, 46 N. E. 560, 17 Ind. App. 198.

[c] (App. 1902)

In case of an executory contract of sale, the goods remain the property of the seller until the contract has become executed.—*Warner v. Warner*, 66 N. E. 760, 30 Ind. App. 578.

[d] (App. 1909)

Where any act remains to be taken before a sale is complete, title remains in the seller, but the intention of the parties as to whether a contract is executed is one of fact, to be determined from the terms of the agreement and the actions of the parties, and such intention must control; and, in determining what constitutes a change of position, due regard must be had to the character of the property, the nature of the transaction, the position and relations of the parties to the sale, and the intended use of the property.—*Farmers' Nat. Bank of Sheridan v. Coyner*, 88 N. E. 856.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 512, 513.

See, also, 34 Cyc. p. 274.

§ 198. Specific articles or goods.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 516-560.

See, also, 35 Cyc. pp. 277-290.

§ 200. — Acts to be done before passage of title in general.

[a] (Sup. 1857)

If, by the terms of an agreement for the sale of personalty, any material act connected

with the subject-matter of the contract remains to be done before delivery, the property does not vest in the buyer until the performance of that act.—*Moffatt v. Green*, 9 Ind. 198.

[b] (Sup. 1865)

A contract wherein one party agrees to come to the other's house at a certain future day for merchandise, and then go with him to a town to weigh the merchandise, to be thereafter delivered to the former on payment of a balance for the price not paid at the execution of the contract, is executory, and hence does not vest the former with title to the merchandise at the time of its execution.—*Straus v. Ross*, 25 Ind. 300.

[c] (Sup. 1875)

A contract for the sale of a certain number of good, corn-fed hogs, to average a certain weight gross, to be weighed at one place and delivered at another, at or within a certain time in the future, and to be then paid for at a certain price per 100 pounds, the hogs being a lot at the time of the contract being fed by the seller, and including some to be thereafter received of another person, where the hogs were never weighed or delivered to the buyer, did not pass the title in the hogs to the purchaser.—*Lester v. East*, 49 Ind. 588.

[d] (Sup. 1881)

Under a contract for the sale of wood, providing that the purchaser should measure before paying for it, such measurement, or some other definite act of acceptance, was necessary to pass the title.—*Pittsburgh, C. & St. L. R. Co. v. Noel*, 77 Ind. 110.

[e] (Sup. 1882)

Where anything remains to be done to goods which are the subject of a contract of sale to put them in a deliverable condition or to determine the price, by weighing or measuring, the performance of such things is a condition precedent to passing of title.—*Bertelson v. Bower*, 81 Ind. 512.

Where a sale was of all the spring lambs which belonged to the seller, title then passed to the purchaser inasmuch as there was no necessity for any act of separation.—*Id.*

[f] (Sup. 1882)

Where a growing crop is sold, and some act remains to be done, such as delivery or payment, the title does not pass. The contract is executory.—*Dixon v. Duke*, 85 Ind. 434.

[g] (Sup. 1889)

Plaintiff contracted with defendant for lumber of certain quality and dimensions, to be sawed by defendant and piled in his yard, subject to plaintiff's order at any time. The latter was to pay for it when piled, and it was to be loaded on cars whenever plaintiff should so order. Provision was made that until the lumber was loaded on cars defendant should insure it against loss by fire, and that until then plaintiff would not be responsible for any loss so occurring. No provision was made for an in-

spection of the lumber. *Held*, where invoices of lumber sawed and piled in defendant's yard, separate from other lumber, were sent to plaintiff, with the statement that the same was subject to his order, and the plaintiff paid for it, and directed its shipment, the defendant promising to make such shipment, that the title to the lumber passed to plaintiff, without any inspection or measurement by the latter, and before delivery on cars.—*Martz v. Putnam*, 117 Ind. 392, 20 N. E. 270.

[h] (App. 1897)

An agreement that the seller of hogs shall retain possession and feed them till a certain date; that, before delivery, they shall be weighed at certain scales, and the balance of the price be paid; and that, if any of them become sick before time for delivery, the buyer shall at once receive them or release all claim there-to,—is an executory contract, and passes no title.—*Branigan v. Hendrickson*, 17 Ind. App. 198, 46 N. E. 560.

[i] (App. 1904)

Where a contract for the sale of skins fixed the prices f. o. b. Ft. Wayne, Ind., to be paid 90 per cent. by draft and the balance on receipt of stock, subject to buyer's inspection and count, though the title to the property passed to the buyer on shipment from Ft. Wayne, it was subject to his right to reject the goods for noncompliance with the contract on examination and delivery in Boston.—*Weill v. Stone*, 69 N. E. 698, 33 Ind. App. 112, 104 Am. St. Rep. 243.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 524-528.

See, also, 35 Cyc. pp. 281-289.

§ 201. — Delivery and acceptance.

As against third persons, see post, § 226.

As to third persons, see post, § 219.

[a] (Sup. 1853)

A parol contract definitely fixing the price, the time of payment, and designating the particular article sold, vests the property in the buyer, and places it at his risk from the moment the bargain is closed, without any actual payment or present delivery.—*Henline v. Hall*, 4 Ind. 189.

[b] (Sup. 1859)

The defendant sold wheat to be delivered on board a boat lying at his warehouse on a day certain. Before that day the time for delivery was indefinitely extended by agreement. Four days afterwards he notified the plaintiff that he was ready to deliver whenever the plaintiff would send a boat, and requested immediate payment, which was thereupon made. The plaintiff sent no boat, and three days afterward the wheat was burned. In a suit for non-delivery the defendant set up the above facts as showing that the property had passed before the fire, and the answer was held bad on demurrer. He then amended by adding averments that the plaintiff had failed to send a boat within a reasonable time, and that, at the time of pay-

ment in full, the wheat had been measured and set apart, and so remained until the fire, and was not removed by reason of the want of diligence of the plaintiff. *Held* that, if the contract required delivery on board before the property passed, that condition had been waived by the payment.—*Scott v. King*, 12 Ind. 203.

[c] (Sup. 1865)

The fact that a vendor of goods fails to deliver a portion of them does not affect the vendee's title to the remainder.—*Keen v. Preston*, 24 Ind. 395.

[d] (Sup. 1870)

Plaintiff purchased a quantity of flour to be manufactured by a certain mill, and by parol agreement sold the flour to B. for cash on delivery. Afterwards a freight company, which owned no means of transportation, gave B. an instrument styled a "bill of lading," dated before the flour had been manufactured, by which the company acknowledged the receipt of the flour and agreed to transport it. *Held*, that the instrument could not be considered a bill of lading such as would by its indorsement transfer the property.—*Union R. & Transp. Co. v. Yeager*, 34 Ind. 1.

[e] (Sup. 1875)

As between vendor and vendee, no delivery is necessary to vest the property in the vendee.—*Lester v. East*, 49 Ind. 588.

In a sale the thing which is the subject of the contract becomes the property of the buyer the moment the contract is concluded without regard to whether the goods are delivered to the buyer or remain in possession of the seller.—*Id.*

[f] (Sup. 1876)

Under a contract for the sale of a quantity of wine, the seller delivered to a carrier, to be transported to the buyer, wine, which on its arrival the buyer refused to accept, because it was not of the quality contracted for. The buyer, after corresponding with the seller, took the wine from the carrier and stored it in his cellar, subject to the order of the seller. The buyer died, and his successor in business sold the wine to other persons. *Held*, that the property in the wine did not pass to the buyer, the administrator of whose estate would not be liable therefor to the seller.—*Bishplinghoff v. Bauer*, 52 Ind. 519.

[g] (Sup. 1881)

A. agreed to buy all B.'s spring lambs, B. to pasture them till called for. *Held*, that a loss, not B.'s fault, while the lambs were thus pastured, was A.'s loss.—*Bertelson v. Bower*, 81 Ind. 512.

[h] (Sup. 1882)

Where property is sold on condition that the price shall be paid before delivery, and the vendee wrongfully obtains possession of the property without paying the price, he cannot transmit a good title to a purchaser.—*Evansville & T. H. R. Co. v. Erwin*, 84 Ind. 457.

Where plaintiff sold a car load of wheat under an agreement that the price should be paid before the buyer took possession, in spite of which the buyer wrongfully procured the issuance of a bill of lading without paying the price and afterwards sold the bill of lading, the purchaser thereof obtained no title to the wheat.—*Id.*

[i] (Sup. 1884)

Delivery to a carrier as a general rule is a full discharge of the duties of the seller, and from that time the goods are for most purposes considered as having passed into the ownership and possession of the purchaser.—*Bartlett v. Jewett*, 98 Ind. 206.

[j] (App. 1903)

In a contract of bargain and sale, the goods which are the subject of the contract become the property of the buyer as soon as the contract is concluded, whether the goods are then delivered, or remain in the possession of the seller.—*Warner v. Warner*, 66 N. E. 700. 30 Ind. App. 578.

[k] (App. 1910)

To effect a complete sale of personalty, delivery is essential; but a symbolic delivery is sufficient where the seller is not in possession of the thing sold, or it is of such nature that it is not susceptible of manual delivery.—*Heyns v. Meyer*, 91 N. E. 973.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 520-541.

See, also, 35 Cyc. pp. 302-321; notes, 22 L. R. A. 415, 2 L. R. A. (N. S.) 1078; notes, 26 Am. St. Rep. 451, 120 Am. St. Rep. 808.

§ 202. — Payment of price.

As against third persons, see post, § 226.

As to third persons, see post, § 219.

[a] (Sup. 1853)

A parol contract definitely fixing the price and the time of payment, and designating the particular article sold, vests the property in the buyer, and places it at his risk from the moment the bargain is closed, without any actual payment or present delivery.—*Henline v. Hall*, 4 Ind. 189.

[b] (Sup. 1857)

Leaving personal property in the hands of a third party by consent, to be delivered upon the payment of the price, is a sale, and vests the property in the vendee.—*Wright v. Maxwell*, 9 Ind. 192.

[c] (Sup. 1857)

Where goods are sold on condition of being paid for on delivery, and a delivery is made without exacting performance of the condition, the presumption is that the condition is waived and that he complete title vests in the purchaser.—*Moffatt v. Green*, 9 Ind. 198.

[d] (Sup. 1861)

Where the condition of a sale was the delivery of a note with surety, and, upon objection made, the party offering the note altered it by inserting the words "with interest," it was *held* that the surety was discharged, and therefore, the vendee not complying with the condition, the title to the property did not pass.—Kountz v. Hart, 17 Ind. 329.

[e] (Sup. 1882)

In case of a sale for cash on delivery, the transfer of the bill of lading to the purchaser before payment, though ordinarily constituting delivery, does not divest the vendor's title.—Evansville & T. H. R. Co. v. Erwin, 84 Ind. 457.

[f] (Sup. 1884)

Where goods are sent "C. O. D." the title does not pass until they are accepted and paid for.—Lanman v. McGregor, 94 Ind. 301.

[g] (Sup. 1885)

Where goods are sold for cash, a delivery in expectation of immediate payment passes no title until such payment is made.—Curme, Dunn & Co. v. Rauh, 100 Ind. 247.

[h] (App. 1895)

A contract reciting that the first party "has this day sold and conveyed" to the second party his stock of goods; that the vendee agrees to give in part payment thereof one note, made by R., and the balance in two equal installments, at three and six months from date, to be evidenced by the vendee's note; that the goods in salable condition are to be invoiced at cost, while those shelfworn are to be invoiced at such price as the vender and a person selected by the vendee shall agree upon, etc.,—is an executory contract, under which title is not to vest till the goods have been invoiced and the notes delivered; and until then the vendee, though he may have made full tender of performance on his part, cannot maintain replevin against the vendor.—Platter v. Acker, 13 Ind. App. 417, 41 N. E. 832.

[i] (App. 1902)

A person purchasing goods under a contract requiring the purchase price to be paid on delivery acquires no title to the goods or right of possession till the payment of the purchase price.—Rauh v. Waterman, 61 N. E. 743, 63 N. E. 42, 29 Ind. App. 344.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 542-551.

See, also, 35 Cyc. pp. 322-331; note, 22 Am. St. Rep. 866.

§ 203. — Sale on credit.**[a] (Sup. 1849)**

A sale of cattle was made. The purchaser paid a portion of the price, and took away a part of the cattle. He was to return in a few days, pay the residue of the money, and take the remaining cattle. *Held* that, although the right of property passed by the sale, the right of

possession did not until the payment of all the price.—Bradley v. Michael, 1 Ind. 551, Smith, 346.

[b] (Sup. 1871)

Where one received sheep upon his agreement that he would deliver a part of the wool annually, and pay for the sheep at the end of four years, and that, if the annual amount of wool was not delivered, the whole price, as well as the wool, should become due, *held*, that the sheep were at his risk. On their dying early in the term, though without fault of the purchaser, and from a contagious disease which was upon them at the date of the sale, the whole price became due.—Smith v. Dallas, 35 Ind. 255.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 552-556.

See, also, 35 Cyc. p. 323.

§ 206. — Consignment for sale.**[a] (App. 1896)**

Where goods are sent to a party under an arrangement with a salesman to be sold by such party, the goods, however, to remain the property of the party sending them until sold, the party to whom they are sent is not liable to the sender for goods unsold.—Levi v. Allen, 43 N. E. 571, 15 Ind. App. 38.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 560.

See, also, 35 Cyc. p. 290.

§ 207. Goods or articles not ascertained.

As against third persons, see post, § 226.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 561-570.

See, also, 35 Cyc. pp. 291-302.

§ 208. — In general.**[a] (Sup. 1886)**

Where grain is received by a dealer under a contract, express or implied, to pay the person delivering it the market price whenever he demands it, and such grain is mixed with other of like quality, in bins from which shipments are made daily, the dealer, in the absence of anything to the contrary, becomes the owner of the grain, and is liable to pay for it whenever called upon.—Lyon v. Lenon, 106 Ind. 567, 7 N. E. 311.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 561.

See, also, 35 Cyc. p. 291.

§ 213. — Appropriation by buyer.**[a] (App. 1909)**

Where grain is sold, and a larger amount than is sold is set aside and designated for the purchaser, he has the right to make the separation, and the title passes, so that he may sue for the wrongful conversion of the grain, even be-

fore the separation has been made.—*Farmers' Nat. Bank of Sheridan v. Coyner*, 88 N. E. 856.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 570.

See, also, 35 Cyc. p. 297.

§ 214. Articles or goods to be produced or manufactured.

[a] (Sup. 1891)

Under contracts for the sale of articles to be manufactured expressly for a certain person, title passes only on completion according to the contract, and delivery or tender of delivery.—*Fordice v. Gibson*, 28 N. E. 303, 129 Ind. 7.

B. made a written contract with defendants, agreeing to sell them a certain number of staves, of his "first manufacture," to be delivered f. o. b. cars at a certain point. *Held*, that title to the first staves manufactured did not on their manufacture pass at once to defendants without delivery, or some act designating them as the staves intended to be delivered.—*Id.*

[b] (App. 1909)

A sale of a crop to be grown passes no title until the crop is grown, and notice given to the purchaser, or some act taken by the seller designating it as the article sold; but, if there are attendant circumstances from which the intention may be inferred that the property shall pass at another or different time, or under other and different circumstances, that intention will control.—*Farmers' Nat. Bank of Sheridan v. Coyner*, 88 N. E. 856.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 571-573.

See, also, 35 Cyc. pp. 299-302; note, 62 Am. Dec. 65; note, 40 Am. Rep. 173.

§ 215. Bill of sale or other instrument of conveyance.

[a] (Sup. 1860)

Personal property may be conveyed without a writing, if possession accompany the conveyance.—*McTaggart v. Rose*, 14 Ind. 230.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 574-579

See, also, 35 Cyc. pp. 335-337.

§ 218. Reconveyance by buyer to seller.

[a] (App. 1895)

If rescission of a contract of sale is completely agreed on and executed, no actual delivery is necessary to repass the title to the vendor.—*Leffler v. Watson*, 13 Ind. App. 176, 40 N. E. 1107, 41 N. E. 467.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 580-585.

See, also, 35 Cyc. pp. 338, 339.

(B) RIGHTS AND LIABILITIES OF SELLER AS TO THIRD PERSONS.

Conditional sales, see post, § 480.

Execution on interest of seller under contract of sale, see EXECUTION, § 42.

Fixtures as between seller of chattels and mortgagee of land, see FIXTURES, § 20.

Parties to action for price, see post, § 351.

Right of stoppage in transitu, see post, § 294.

Rights of seller as against assignee of fraudulent buyer, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, § 176.

§ 219. Title and rights in general.

Question for jury, see post, § 225.

[a] (Sup. 1865)

Where the seller of staves delivered a part of them but failed to deliver the remainder those delivered were not on account of the non-delivery of the remainder subject to execution as the property of the seller.—*Keen v. Preston*, 24 Ind. 395.

[b] (Sup. 1876)

Where on account of fraud practiced by the vendee, a sale of personal property might have been rescinded and possession of the property recovered by the vendor, but the latter with full knowledge of such fraud accepted security for the payment of the purchase price of the property and allowed the vendee to retain the possession thereof until it was levied on by an officer holding a writ against the property of the vendee, the vendor will be deemed to have acquiesced in and ratified the sale.—*Gregory v. Schoenell*, 55 Ind. 101.

[c] (Sup. 1881)

Maps purchased from A. by a township trustee, for the school township, were received at a railroad station, and the agent there notified the trustee of their arrival. *Held*, that this vested the ownership of the maps in the school township, subject only to the right of the trustee to refuse to receive them, on account of the delay in their delivery, or for some other sufficient reason, and relieved the railroad company of any further obligation to A. arising out of their shipment.—*Moral School Tp. v. Harrison*, 74 Ind. 93.

[d] (Sup. 1889)

Under a contract by which the vendor agrees to deliver building materials of a specified quality on the cars at a place named, to be used by the vendee in the erection of a court house, to be paid for when received and accepted as satisfactory by the supervising architect, the title to such materials, placed on the cars as agreed, consigned to the vendee, and carried to the city where they were to be used, in the absence of evidence that they were inferior to the agreed quality, or objected to by the architect as unfit, is in the vendee, and they are liable to a levy under an execution against

him, while still on the cars.—*Rechtin v. McGary*, 117 Ind. 132, 10 N. E. 731.

[c] (App. 1896)

Where the purchaser of goods used no artifice nor made any misrepresentations either as to his habits or financial condition, the fact that his liabilities exceeded his assets at the time of the purchase, or that he was a man of reckless habits, will not justify the seller in setting aside the sale, and in replevying the goods from one to whom they were transferred for the benefit of certain preferred creditors.—*Sweet v. Campbell*, 14 Ind. App. 570, 43 N. E. 236.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 588–603.

See, also, 35 Cyc. p. 840; note, 55 L. R. A. 631.

§ 221. Purchasers from buyer.

[a] (Sup. 1884)

The purchaser from the vendee of goods sold C. O. D. does not acquire title as against the vendor until the price is paid.—*Lauman v. McGregor*, 94 Ind. 301.

[b] (Sup. 1889)

Where plaintiffs sold certain logs and lumber to one M., who falsely represented himself to be the agent of defendant, the intention of plaintiffs being to vest the title to the property in defendant, the latter acquired no title to the property on subsequently purchasing the same from M.—*Peters Box & Lumber Co. v. Lesh*, 119 Ind. 98, 20 N. E. 201, 12 Am. St. Rep. 367.

[c] (App. 1891)

Where a purchaser, knowing himself to be insolvent, obtains goods on credit by falsely representing himself to be solvent, and then transfers the goods to another by means of a fraudulent and pretended sale, the seller may rescind the sale, and recover the goods from the fraudulent vendee.—*Levi v. Kraminer*, 2 Ind. App. 504, 28 N. E. 1028.

An insolvent bought goods on credit by concealing his insolvency, and a few weeks later transferred them in satisfaction of a judgment. The amount due on the judgment was more than the value of the goods, but the judgment creditor took the goods in full satisfaction of his claim, made the insolvent's wife a present of \$1,000, and transferred the goods to the insolvent's brother-in-law, who thereupon employed the insolvent as his clerk to sell the goods. *Held*, that the evidence justified the jury in finding that all the parties were guilty of fraud in obtaining the goods.—*Id.*

[d] (App. 1895)

Plaintiffs sold goods to one who afterwards countermanded the order, but not until the goods had been shipped, whereupon plaintiffs asked that the consignee hold the goods subject to their order. The consignee took possession of the goods, and sold them to defendant. *Held*, that defendant acquired no better title than his vendor had, which was that of bailee for plain-

tiffs.—*Leffler v. Watson*, 13 Ind. App. 176, 40 N. E. 1107, 41 N. E. 467.

[e] (App. 1910)

Where a contract for the sale of a stock of goods stipulated that the transferees assumed and agreed to pay "the outstanding bills for said place," the promise to pay was clear and explicit, and, under the maxim that "that is certain which can be rendered certain," it was competent for the jury to find for the transferor, and against the transferees in an action against them for the price of goods sold to the transferor before the sale.—*Boyce v. Royal Stove & Range Co.*, 91 N. E. 32.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 604, 605, 607, 608.

See, also, 35 Cyc. p. 342.

§ 224. Conversion of or injuries to property.

[a] (Sup. 1894)

Where the members of defendant firm conspired with defendant D. to purchase goods on credit of the firm, and to conceal the proceeds, and, in furtherance of such conspiracy, purchased goods from plaintiffs, and D. converted to his own use money and goods so obtained, he was liable to a personal judgment for the amount thereof.—*Doherty v. Holiday*, 137 Ind. 282, 32 N. E. 315, 36 N. E. 907.

[b] (App. 1899)

The remedy of a buyer for the refusal of the seller to measure and grade the timber (which he had reserved the right to do) which he had contracted to sell is for a breach of the contract, so that if the buyer takes possession of the timber without the seller's consent and contrary to his directions, and sells it to one having knowledge of the facts, both are liable to the original seller for a conversion.—*Nickey v. Zonker*, 33 N. E. 478, 22 Ind. App. 211.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 612–614.

§ 225. Actions between seller and third persons.

[a] (Sup. 1857)

In an action to recover possession of a horse, it appeared that A. had sold the horse to B., and in exchange received two other horses. There was a *fi. fa.* out against B.'s property at the time of the exchange; but of this B. had no knowledge. Afterwards B. made an assignment, including the horse, to his partner, C., for the benefit of creditors. He delivered the horse to C., but received him back, and kept him at livery. A. sold the two horses received from B. to D., in whose hands they were taken on the *fi. fa.* and sold. A. made compensation to D., and brought this suit against C. *Held*, that the questions as to the title of C. and the fraudulent intent were for the jury.—*Nutter v. Harris*, 9 Ind. 88.

[b] (Sup. 1889)

Where plaintiffs had shipped certain property to defendant, at the request of one M., who had falsely represented himself as its agent, from S. to F., at which latter place defendant had purchased the property of M., plaintiffs were entitled to recover the value of the property at F. from defendant, less any additional value given to it by labor bestowed upon it in good faith before demand was made, under Rev. St. § 572, providing that in actions to recover personal property judgment may be given for the value thereof, and for damages for detention; and the fact that defendant paid the freight from S. did not alter the rule.—*Peters Box & Lumber Co. v. Lesh*, 119 Ind. 98, 20 N. E. 291, 12 Am. St. Rep. 307.

[c] (App. 1901)

Where defendant's assignor purchased goods from plaintiff, and in settlement of a balance due thereon executed a note, which plaintiff accepted in payment, and credited the account in the sum thereof, the latter cannot maintain replevin for such of the goods as remained unsold, on the ground that they were fraudulently obtained, while retaining the money and the note.—*John H. Hibben Dry Goods Co. v. Hicks*, 59 N. E. 938, 26 Ind. App. 646.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 615-625.

(C) RIGHTS AND LIABILITIES OF BUYER AS TO THIRD PERSONS.

Execution on interest of buyer under contract of sale, see EXECUTION, § 42.

Fixtures as between buyer of chattels and mortgagee of land, see FIXTURES, § 20.

Purchasers of mortgaged property, see CHATTEL MORTGAGES, §§ 223-225.

Rights as to exemptions, see EXEMPTIONS, § 88.

§ 226. Title and rights in general.

Question for jury, see post, § 233.

[a] (Sup. 1834)

A., being indebted to B. in the sum of \$72, agreed to sell him a horse for \$45, or such sum as C. should determine, and the horse was accordingly delivered to B., but C., refused to fix the price. B. kept the horse three days, and offered him for sale, when he was levied on by virtue of an execution against A. *Held*, that the horse was not subject to the execution; the previous sale of him to B. at \$45 being complete.—*Hollingsworth v. Bates*, 3 Blackf. 340.

[b] (Sup. 1846)

A., being in Illinois, bought there of B., the owner, a certain fanning mill, which was in C.'s possession in Indiana. The buyer paid the price at the time of sale, and took the seller's order on C. for the mill. *Held*, that the sale, though actual possession was not given,

passed the property in the mill to the buyer, and gave him a sufficient possession to maintain trespass against a person for taking it from C. after such sale.—*Legg v. Leyman*, 8 Blackf. 148.

[c] (Sup. 1870)

A. contracted with B. to deliver the latter a certain number of hoop poles at a stipulated price at a certain railroad station by the last of November; B. to advance money to A. from time to time to enable him to buy the poles, and B. to pay for the poles on final delivery. A portion of the poles were delivered on the contract, and B. advanced to A. money on the contract more than sufficient to pay for the poles delivered. The remainder of the poles were placed by A. at said station, at a place pointed out by B., with those already delivered, and in the latter part of November A. notified B. that the poles were ready for delivery, and requested him to receive and pay for them, which B. declined to do, saying that he was not ready to ship them. Late in December A. told B. that, if the latter did not come and receive and pay for the poles, the former would not keep them longer, and B. promised to receive them in ten days. In the latter part of the following January A. gave B. written notice to receive and pay for the poles within eight days, or he would sell them to get the money due him on the contract. In the following March A. sold for their full value to C. said remainder of the poles, not counted to B. as required by the contract; B. not having offered at any time until after said sale to receive and pay for them. *Held*, that replevin by B. against C. for the poles so purchased by the latter would not lie.—*Kirkpatrick v. Snyder*, 33 Ind. 169.

[d] (Sup. 1876)

The fact that one has purchased goods from another and received them as his will not, if they were the property of a third person, relieve the purchaser from liability to pay such third person for such goods.—*Marshall v. Beeber*, 53 Ind. 83.

[e] (Sup. 1876)

A purchaser of goods from a thief gets no title, whether the theft was a larceny at common law or by statute.—*Breckenridge v. McAfee*, 54 Ind. 141.

[f] (Sup. 1883)

A sale of 310 car wheels, constituting part of a lot of 1,100 wheels, without separation or designation of those which it is intended to sell does not pass any title as against creditors of the vendor.—*Commercial Nat. Bank v. Gillette*, 90 Ind. 268, 46 Am. Rep. 222.

[g] (Sup. 1885)

A deed from a father to his daughter reserved certain wheat then growing on the premises. The grantee did not appear to understand the fact, but made no showing sufficient to obtain a reformation of the deed. *Held*, that

a receipt for a small amount, subsequently executed to her by her grantor in full for all his household goods and other property on said farm, did not convey to her the title of the wheat as against an execution against said grantor, she supposing at the time of such receipt that she already owned the wheat.—*Holderman v. Miller*, 102 Ind. 356, 1 N. E. 719.

[h] (Sup. 1889)

Where plaintiff contracted with defendant for lumber of certain quality and dimensions, to be sawed and piled in his yard subject to plaintiff's order at any time, and an invoice of the lumber sawed and piled in the yard separate from other lumber was sent to plaintiff with the statement that the same was subject to his order, and plaintiff paid for it and directed its shipment, defendant promising to make the shipment, the title passed to plaintiff without any inspection or measurement of the latter and before delivery on the cars, and, defendant having made an assignment, for the benefit of creditors, his assignee was not entitled to the lumber.—*Martz v. Putnam*, 20 N. E. 270, 117 Ind. 392.

[i] (App. 1910)

In general, a seller can vest no better title in the buyer than that possessed by himself.—*Lett v. Eastern Moline Plow Co.*, 91 N. E. 978.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 620-645; 21 CENT. DIG. Execution, § 60.

See, also, 35 Cyc. p. 340.

§ 228. Subsequent purchasers from seller.

[a] (Sup. 1891)

Where one contracts to sell a certain number of staves, and has delivered nearly the full number, the buyers cannot, by virtue of the contract, take more than the balance remaining due, out of a lot transferred by the seller to a third person.—*Fordice v. Gibson*, 129 Ind. 7, 28 N. E. 303.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 647.

See, also, 35 Cyc. p. 342.

§ 230. Creditors of seller.

Sale pending execution, see EXECUTION, § 115.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 650.

§ 233. Actions between buyer and third persons.

[a] (Sup. 1862)

A. sold to plaintiff 20 tons of ship stuff, to be paid for on delivery. Plaintiff paid \$200 toward the price, and afterwards A. sold to C., G. & Co., all the remaining ship stuff in the building, and made to them delivery of the whole, specifying the amount thereof belonging to the plaintiff. The employes of the plaintiff

and of C., G. & Co. were employed one day in setting apart the amount belonging to plaintiff, when the defendant levied upon it on execution against A. *Held*, that there was at least sufficient evidence of a delivery to the plaintiff to require the question to be left to the jury.—*Cloud v. Moorman*, 18 Ind. 40.

[b] (App. 1892)

Plaintiff purchased goods which had been levied upon to satisfy a judgment against the seller, with knowledge thereof. The property subsequently being attached by the same officer at the suit of another creditor of the seller, plaintiff brought replevin against the officer. *Held*, that the action would not lie without first satisfying the judgment, and the action, not being authorized at its commencement, could not be sustained by the subsequent satisfaction of the judgment.—*Brown v. Loesch*, 3 Ind. App. 145, 29 N. E. 450.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 653-656.

See, also, note, 17 Am. St. Rep. 288.

(D) BONA FIDE PURCHASERS.

From buyer under conditional sale, see post, § 473.

Mortgagees as bona fide purchasers, see CHATTEL MORTGAGES, § 139.

Of partnership property, as affecting rights of creditors of partnership, see PARTNERSHIP, § 183.

Of property subject to landlord's lien, see LANDLORD AND TENANT, § 252.

Of property subject to lien in general, see LIENS, § 15.

Operation and effect of gift as to bona fide purchasers, see GIFTS, § 44.

Purchasers of goods subject to lien for rent, see LANDLORD AND TENANT, § 252.

Subsequent purchaser from seller fraudulently retaining possession, see FRAUDULENT CONVEYANCES, § 145.

§ 234. Nature and grounds of protection in general.

[a] A sale by a bailee of property to an innocent purchaser without notice confers no right of property.—(Sup. 1825) *Kitchell v. Vanadar*, 1 Blackf. 356, 12 Am. Dec. 249; (1848) *Ingersoll v. Emerson*, 1 Ind. 76, Smith. 77.

[b] Where there has been a sale and delivery sufficient in law to vest the property in the first purchaser, and make a good title, if not tainted with fraud, the bona fide vendee of such purchaser, buying and obtaining possession before such contract has been rescinded, will acquire a perfect title against the first vendor.—(Sup. 1863) *Bell v. Cafferty*, 21 Ind. 411; (1864) *Harris v. Mercer*, 22 Ind. 329.

[c] (Sup. 1864)

A person who buys a horse which has been stolen, and afterwards sells him in good faith,

and without any knowledge of the theft, is liable to the owner for its value, and no demand need be made before the commencement of an action.—*Robinson v. Skipworth*, 23 Ind. 311.

[d] (Sup. 1876)

By a larceny of goods, the thief acquires no title thereto, and can confer none on a person to whom he sells the same. And such person is liable to the owner of such goods for their value without regard to his innocence or good faith.—*Breckenridge v. McAfee*, 54 Ind. 141.

[e] (Sup. 1883)

The vendee of property, which the vendor had no title to or authority to sell, is not protected against the claim of the true owner, though he purchases in good faith and for a valuable consideration.—*Payne v. June*, 92 Ind. 252.

[f] (Sup. 1885)

If one who has bought chattels with intent not to pay for them sells them to one who has no notice of the fraudulent intent, the latter takes a good title.—*Curme, Dunn & Co. v. Rauh*, 100 Ind. 247.

[g] (Sup. 1886)

Where one is induced by a trick to deliver the possession of his cattle to a person representing himself to be the agent of a well-known firm, under the supposition and agreement that the sale is to the firm, and such pretended agent is a stranger to the firm, there is no sale, and the original owner may maintain trover against a good-faith purchaser from such pretended agent, or his vendee.—*Alexander v. Swackhamer*, 105 Ind. 81, 4 N. E. 433, 5 N. E. 908, 55 Am. Rep. 180.

[h] (App. 1895)

Though a sale of goods is induced by fraud, the title vests in the vendee, subject to the right of the vendor, on discovering the fraud, to rescind the sale, and, until the vendor elects to rescind, the title to the property remains in the vendee, and a sale by him for value to a third person who is ignorant of the fraud vests a good title in the latter, even against the original vendor.—*Levi v. Bray*, 39 N. E. 754, 12 Ind. App. 9; *Holmes v. Henderson*, 40 N. E. 151, 12 Ind. App. 698.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 657-677, 679, 680.

See, also, 35 Cyc. p. 345; note, 103 Am. St. Rep. 980.

§ 235. Notice.

[a] (Sup. 1883)

One who has knowledge of facts sufficient to put him on inquiry as to the title of a proposed seller is chargeable with knowledge of all matters which he could have learned by reasonable inquiry.—*Kuhns v. Gates*, 92 Ind. 66.

[b] (App. 1891)

Where a person obtains goods from a third person who had secured them from the true owner by fraud, to charge such person with notice, it is sufficient to prove that the circumstances known to him were such as ought reasonably to have excited his suspicion and led him to inquiry.—*Mahoney v. Gano*, 2 Ind. App. 107, 27 N. E. 315.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 681-685.

See, also, 35 Cyc. pp. 346-351.

§ 236. Consideration.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 686-691.

See, also, 35 Cyc. pp. 351-355.

§ 239. — Pre-existing debt.

[a] (App. 1895)

In *replevin* it appeared that, a firm being indebted to plaintiff, one of the firm's representatives told plaintiff, when he was pressing the firm for a settlement, that the firm was solvent, and plaintiff then asked the firm to buy some more goods, which they declined to do. Some time afterwards, at the solicitation of plaintiff's salesmen, the firm bought the goods in question, which were mingled with their other goods, and the whole stock was three months afterwards mortgaged to defendant to secure a debt equal to its full value, which was substantially all due when plaintiff was told the firm were solvent, defendant having no notice of plaintiff's claim to the goods. Defendant took a bill of sale in satisfaction of his mortgage. *Held*, that a judgment for plaintiff was error.—*Levi v. Bray*, 12 Ind. App. 9, 39 N. E. 754; *Holmes v. Henderson*, 12 Ind. App. 698, 40 N. E. 151.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 688-691.

See, also, 35 Cyc. p. 353; note, 36 L. R. A. 161.

VI. WARRANTIES.

Amount of recovery by seller on breach of warranty, see post, § 344.

Application of statute of frauds, see FRAUDS, STATUTE OF, § 45.

Authority of agent, see PRINCIPAL AND AGENT, § 104.

Authority of officer or agent of corporation, see CORPORATIONS, § 410.

In sales of standing timber, see LOGS AND LOGGING, § 3.

On assignment or sale of bill or note, see BILLS AND NOTES, § 326.

On exchange of property, see EXCHANGE OF PROPERTY, § 12.

On sale of corporate stock, see CORPORATIONS, § 120.

Questions for jury, see post, § 445.

Ratification of agent's warranty, see PRINCIPAL AND AGENT, § 106.

Variance between allegations and proof relating to, see PLEADING, § 394.

§ 247. Warranty distinguished from other grounds of liability.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 707-710.

See, also, 35 Cyc. pp. 367, 368.

§ 248. — In general.

[a] (Sup. 1859)

Where the contract does not specify the goods, but only the quality of the goods to be delivered, there is no warranty that the goods shall be of the quality mentioned; and the failure to comply with the contract is not a breach of warranty, but of contract.—*Ricketts v. Hays*, 13 Ind. 181.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 707.

See, also, 35 Cyc. p. 367.

§ 249. — Stipulations part of contract of sale.

[a] (Sup. 1862)

In a suit on a note the defendant answered that it was given for wool received under the following written contract: "I have this day sold to B. and H. 4,000 fleeces of wool, etc., wool to be washed on the sheep, to be put up in good merchantable order, etc., and delivered in S., at, etc., on the 20th July, 1857. Received on the above contract \$175. Balance to be paid in cash, on delivery of the wool, except \$1,000, for which the note sued on was to be given;" that the wool delivered was not up to contract quality; and that defendant relied on the contract as a warranty, and charged a breach in the poor quality of the wool. *Held*, that the contract contained no warranty, but an agreement to deliver washed wool.—*McConnell v. Jones*, 19 Ind. 328.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 708.

See, also, 35 Cyc. p. 368.

§ 251. — Misrepresentation or fraud.

[a] (Sup. 1872)

A transaction cannot be characterized as a warranty and a fraud at the same time; a warranty rests upon a contract, while fraudulent representations have no element of contract in them, but are essentially a tort.—*Rose v. Hurley*, 39 Ind. 77.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 710.

See, also, 35 Cyc. p. 368.

§ 255. Parties.

[a] (Sup. 1868)

A joint owner of personal property is not bound by the false representations or false warranty of the other joint owners, unless ex-

pressly authorized by him.—*Holmes v. Wood*, 32 Ind. 201.

[b] (Sup. 1882)

In an action by A. to recover the price of a reaper sold to B., under a contract reserving to B. all rights under a warranty indorsed thereon by C., whereby it was agreed that the machine should be taken back if defective, B. could enforce the warranty as to a return, as if it had been signed by A.—*Musselman v. Wise*, 84 Ind. 248.

[c] (App. 1900)

Where three joint contractors executed notes in payment for an ice machine, and thereafter a fourth person acquired an interest in the machine, and the four signed a note in renewal of one of the old notes, such fourth person is a party to the contract of warranty, and entitled to enforce it jointly with the others.—*York Mfg. Co. v. Bonnell*, 57 N. E. 590, 24 Ind. App. 667.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 715, 716.

See, also, 35 Cyc. pp. 369, 370.

§ 256. Consideration.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 717, 718.

See, also, 35 Cyc. p. 371.

§ 257. — In general.

[a] (Sup. 1884)

A complaint in an action for breach of warranty in the sale of a machine which alleges that, as a part of the seller's contract for the sale and delivery of the machine for the price agreed on, it executed and delivered to the buyer a written warranty, shows a sufficient consideration for the warranty.—*Johnston Harvester Co. v. Bartley*, 94 Ind. 131.

[b] (App. 1894)

Where a machine was ordered on a written warranty, but before it was accepted, or the notes for its price delivered, the parties made a parol agreement involving a change in the warranty, such change required no new consideration.—*Ohio Thresher & Engine Co. v. Hensel*, 9 Ind. App. 328, 36 N. E. 716.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 717.

See, also, 35 Cyc. p. 371.

§ 258. — Warranty subsequent to contract of sale.

[a] (Sup. 1871)

A warranty made after a contract of sale of personal property is completed is inoperative, unless there is some new consideration to sustain it.—*Summers v. Vaughan*, 35 Ind. 323, 9 Am. Rep. 741.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 718.

See, also, 35 Cyc. p. 371.

§ 259. Making and requisites of express warranty.

Instructions, see post, § 446.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 719-739.

See, also, 35 Cyc. pp. 372-390.

§ 260. — In general.

[a] Where there is a bill of sale, or agreement in writing respecting the sale, an action will not lie on a parol warranty.—(Sup. 1856) McClure v. Jeffrey, 8 Ind. 79; (1871) Johnson v. McCabe, 37 Ind. 535.

[b] (Sup. 1867)

In an action for the breach of a warranty and for deceit in the sale of a horse, the court correctly refused to charge that, "the law does not require that defendant should have actual and positive knowledge at the time of the trade that the horse was diseased, but, if the jury believe that such facts and circumstances did exist within the knowledge of defendant as would put a man of ordinary prudence on his guard in relation to the horse being diseased, defendant was bound at his peril to disclose such facts and circumstances to plaintiff while he made the trade, and failing, to do so, if it turns out that the horse was diseased at the time of the trade, the seller is as much liable as if he had had actual knowledge, and failed to disclose it.—Jones v. Quick, 28 Ind. 125.

[c] (Sup. 1878)

A purchaser of a sawmill, engine, and other attachments, whose vendor warranted the property to be clear of all incumbrances, and that the purchaser was to have immediate possession, also expressly warrants such property the same as it was warranted by the vendor in the original bill of sale, where, upon a subsequent sale thereof by the purchaser, he indorses on the bill of sale stipulations that he transfers "the within property as herein described" to his vendee, and that "property and conditions are all as above described."—Long v. Anderson, 62 Ind. 537.

[d] (App. 1894)

In an action on a note given for the purchase price of a cow, defendant may introduce parol evidence of a warranty in the contract of sale.—Crist v. Jacoby, 38 N. E. 543, 10 Ind. App. 688.

[e] (Sup. 1900)

Where plaintiff sold defendant an engine, and warranted it, in writing, "to do as good or better, and as fast or faster, work as any other machinery of the same size, and manufactured for a like purpose," and the warranty expressly provided that no person had any authority to add to or abridge or change it in any manner, the fact that the engine was sold to defendant for the purpose of doing all kinds of work connected with a farm,—especially for the purpose of furnishing power to a separator in threshing grain,—did not extend the written warranty so as to constitute a warranty that the engine

would do the work for which it was sold, since the written warranty expressly provided that it could not be extended.—Reeves & Co. v. Byers, 58 N. E. 713, 155 Ind. 535.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 719-726.

See, also, 35 Cyc. p. 372.

§ 261. — Statements constituting warranty.

Questions for jury, see post, § 445.

[a] (Sup. 1837)

While the want of sight in one eye of a horse is a breach of a warranty of soundness, a statement that the horse's eyes are as good as any horse's eyes in the world does not of itself amount to a warranty.—House v. Fort, 4 Blackf. 293.

The mere affirmation of the soundness of a horse, when exposed for sale, is not a warranty, unless so intended by the parties; and such intention must be proved to the satisfaction of the jury.—Id.

[b] (Sup. 1846)

If wool sold in sacks be marked on the sacks and described in the invoice, by the authority of the seller, as being of a certain quality, there is a warranty by the seller that the wool is of that quality.—Richmond Trading & Mfg. Co. v. Farquar, 8 Blackf. 89.

[c] (Sup. 1867)

To constitute a warranty, it is not necessary that the word "warrant" should be used.—Jones v. Quick, 28 Ind. 125.

A representation by the seller as to the quality of the article sold is a warranty, if so intended by the parties.—Id.

[d] (Sup. 1867)

A contract to "furnish a steam boiler suitable to the engine," and a delivery under such contract of a boiler, amount to a warranty that it is suitable for the purpose proposed.—Street v. Chapman, 29 Ind. 142.

[e] (Sup. 1878)

A written statement in a bill of sale of a horse, signed by the vendor, that "he is sound to the best of my knowledge," is a mere representation, and not a warranty.—Myers v. Conway, 62 Ind. 474.

[f] (Sup. 1889)

Where the proposal of the sellers of machinery which was accepted was to furnish certain machinery for a 100-barrell mill, with a specific description of the various articles which the sellers proposed to sell, it was not a warranty that the machinery would manufacture any particular grades of flour.—Conant v. National State Bank, 22 N. E. 250, 121 Ind. 323.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 727-735.

See, also, 28 Cyc. p. 44, 35 Cyc. pp. 381-390; note, 15 L. R. A. 795.

§ 262. — Reliance by buyer on statements.

[a] (Sup. 1847)

The oral affirmation of a person as to the quality of an article sold by him, where the buyer had an opportunity of inspection, is not a warranty, unless it be so intended by the parties.—*Humphreys v. Comline*, 8 Blackf. 516.

[b] (Sup. 1867)

In an action for a breach of warranty in a sale of personal property, the following rules are applicable to cases where the property alleged to have been warranted is exposed to the inspection of the party contracting for it: (1) No particular form of words is necessary to make a warranty, though the word "warrant" is generally used. Any assertion of the seller in respect to the property, if intended by the seller and understood by the buyer as a warranty, must be considered as such, whether the word "warrant" was made use of or not. (2) When a warranty is relied on, the question with the jury should always be: Do the words proven fairly show that they were intended and understood by the parties at the time of the sale or exchange as a warranty? If they do, then they must be so considered.—*Jones v. Quick*, 28 Ind. 125.

[c] Where the seller of personal property which is unsound warrants it to be sound, the purchaser has a right to rely on the warranty, though he may have had an opportunity to examine the property.—(Sup. 1873) *First Nat. Bank of Kansas City v. Grindstaff*, 45 Ind. 158; (App. 1891) *Postel v. Oard*, 27 N. E. 584, 1 Ind. App. 252.

[d] (Sup. 1882)

The buyer may recover for breach of an express warranty in the sale of goods, though he was not induced by the warranty to make the purchase, and did not rely thereon.—*Shordan v. Kyler*, 87 Ind. 38.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 736-739.

See, also, 35 Cyc. p. 376.

§ 263. Implied warranty of title.

[a] There is no implied warranty of title in the sale of a chattel, where the vendor is not in possession.—(Sup. 1850) *Lackey v. Stouder*, 2 Ind. 376; (1861) *Norton v. Hooten*, 17 Ind. 365.

[b] (Sup. 1875)

Upon sale of a chattel, a warranty of title is implied.—*Marshall v. Duke*, 51 Ind. 62.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 746, 749-751, 763.

See, also, 35 Cyc. p. 393; note, 36 L. R. A. 92; note, 62 Am. Dec. 460.

§ 264. Implied warranty of identity or genuineness.

On sale of note, see *BILLS AND NOTES*, § 326.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 752, 753.

See, also, 35 Cyc. p. 396.

§ 265. Implied warranty of quality, fitness, or condition.

Breach, see post, § 284.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 743, 746, 747, 754-779.

See, also, 35 Cyc. pp. 397-411; note, 14 L. R. A. 492; notes, 1 Am. Dec. 84, 2 Am. Dec. 220, 6 Am. Dec. 113, 43 Am. Dec. 680, 55 Am. Dec. 328; note, 24 Am. Rep. 104; note, 102 Am. St. Rep. 607.

§ 266. — In general.

[a] (Sup. 1860)

A. contracted at a price certain for all the wheat B. might raise on his farm. *Held*, that there was no implied warranty as to the quality or quantity of the wheat.—*Davis v. Murphy*, 14 Ind. 158.

[b] (Sup. 1880)

Where perishable goods are sold to be shipped to a distant market, a warranty is implied that they are properly packed and fit for such shipment, but not that they will continue sound for any particular or definite period. The implied warranty will not cover unforeseen contingencies.—*Mann v. Everston*, 32 Ind. 355.

[c] (Sup. 1877)

A manufacturer of a particular kind of sawmills, having brought suit against a purchaser of one of such mills, delivered upon a contract to furnish the same at a specified price, the defendant answered, alleging a breach of an implied warranty (1) in that such mill "would not saw and work in as good and efficient a manner as ordinary" sawmills do; (2) in that, by reason of certain alleged defects, such "sawmill was wholly unfit for the purpose of sawing lumber"; and (3) in that, after having been "set up with care, and in accordance with the directions given by the plaintiff," it would not saw as ordinary sawmills do. *Held*, on demurrer, that there was no warranty that such mill would saw and work as well as "ordinary" sawmills, or that it would saw all kinds of lumber, but only the kind which that particular kind of mill would saw.—*Robinson Mach. Works v. Chandler*, 56 Ind. 575.

[d] (App. 1891)

In an action for the price of a horse the buyer alleged that at the time of the sale the horse was sick with an internal disease, which was not discoverable with the utmost diligence, and from which it died in a few months; that the seller purposely concealed the existence of the disease in order to obtain a better price, and the more effectually to do this employed an auctioneer to make the sale; that the latter was not instructed not to warrant the horse, and while the sale was in progress told the buyer, in response to an inquiry, that it was

sound, and free from disease. There was no allegation that the seller was present, or that he knew anything of the auctioneer's warranty. *Held*, that the facts pleaded were insufficient to establish an implied warranty, and a demurrer was properly sustained.—*Court v. Snyder*, 2 Ind. App. 440, 28 N. E. 718, 50 Am. St. Rep. 247.

A sale of an article for a sound price implies no warranty.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 743, 746, 747, 754-759.

See, also, 35 Cyc. p. 397.

§ 267. — Exclusion by contract or express warranty or refusal to warrant.

[a] (Sup. 1900)

Where defendant purchased an engine of plaintiff, and received a written warranty that it would do the work for which it was manufactured as good and as fast as any machinery of the same size and manufactured for a like purpose, there can be no implied warranty that the engine was reasonably fit for the purpose for which it was made and sold, since, where there is an express written warranty, implied warranties are excluded.—*Reeves & Co. v. Byers*, 58 N. E. 713, 155 Ind. 535.

[b] (App. 1907)

Where an article is sold under a written contract containing warranties of its quality, workmanship, or performance, all oral and implied warranties are merged in the writing.—*Sullivan Machinery Co. v. Breeden*, 40 Ind. App. 631, 82 N. E. 107.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 760, 761.

See, also, 35 Cyc. pp. 392, 393.

§ 268. — Knowledge by party of defects.

[a] (Sup. 1850)

A. sold to B. a flatboat. At the time of sale it was sunk, so that neither party could know in what condition it was as regarded navigation. The price paid was less than half that which was usually paid for first-rate boats of equal size. B. carried half a load on the boat to the place of destination safely. *Held*, that this was not within any of the classes of cases in which the law raised an implied warranty that the article sold was fit for the purposes for which it was purchased.—*Burns v. Fletcher*, 2 Ind. 372.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 762, 764, 765.

See, also, 35 Cyc. pp. 409-411.

§ 269. — Application of doctrine of caveat emptor.

Instructions, see post, § 446.

[a] (Sup. 1861)

The common-law rule of "caveat emptor" is subject to the exception that a warranty of title in the vendor is implied in a contract of sale; but this exception is limited to cases where the vendor is at the time in the possession of the thing sold.—*Norton v. Hooten*, 17 Ind. 365.

[b] So far as an ascertained specific chattel already existing, which the buyer has inspected, is concerned, the rule of "caveat emptor" admits of no exception by implied warranty of quality.—(Sup. 1875) *Bowman v. Clemmer*, 50 Ind. 10; (App. 1891) *Postel v. Oard*, 27 N. E. 584, 1 Ind. App. 252.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 746.

See, also, 35 Cyc. p. 406; note, 90 Am. Dec. 426.

§ 270. — Inspection by buyer.

Instructions, see post, § 446.

[a] (App. 1910)

The buyer is bound to inspect goods offered for delivery under contract before acceptance if he desires to save his rights in case the goods are inferior in quality, there being no warranty of quality in such case which survives acceptance.—*Gandy v. Seymour Slack Stave Co.*, 90 N. E. 915.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 766-768.

See, also, 35 Cyc. p. 410.

§ 271. — Sale by sample.

[a] (Sup. 1877)

A manufacturer, who for a fair price undertakes with a purchaser to manufacture an article for a particular purpose, impliedly warrants that it will reasonably perform all the operations and purposes that articles of the particular kind contracted for would perform, but not that it will perform what articles of a different kind, though of the same general class, would perform.—*Robinson Mach. Works v. Chandler*, 56 Ind. 575.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 769-771.

See, also, 35 Cyc. p. 405; note, 70 L. R.

A. 653; note, 7 Am. Dec. 125.

§ 273. — Fitness for purpose intended.

[a] (Sup. 1847)

If the manufacturer of an article sells it at a fair market price, knowing the purchaser designs to apply it to a particular purpose, he impliedly warrants it to be fit for that purpose, at least against all defects not open and visible to the purchaser's inspection.—*Brenton v. Davis*, 8 Blackf. 317, 44 Am. Dec. 769.

[b] (Sup. 1847)

In the sale of molasses in barrels at the market price to a grocer to retail, where the

quality of the molasses is not examined, the barrels being present at the sale, there is no implied warranty that the molasses is fit for the purpose for which it is purchased.—*Humphreys v. Comline*, 8 Blackf. 516.

[c] (*Super.* 1873)

Where one agrees to manufacture and furnish articles for a special purpose, the law implies a warranty that the article was reasonably fit for that purpose.—*Crane v. Lord*, Wils. 263

[d] (*Sup.* 1884)

In a sale of whisky barrels by a manufacturer, there is an implied warranty that they will hold whisky without leaking.—*Poland v. Miller*, 95 Ind. 387, 48 Am. Rep. 730.

[e] (*Sup.* 1885)

Under a contract for the sale of a windmill to "work well," there was an implied warranty that it would work well in the place previously pointed out by the purchaser to the seller for its location.—*McClamrock v. Flint*, 101 Ind. 278.

[f] (*Sup.* 1889)

A manufacturer of machinery who sells it to a person whom he knows buys it for a special purpose and with the intention of putting it to a particular use does, as a general rule, and in the absence of an express warranty, impliedly warrant that the machinery is fit for the purpose and reasonably suited to that use.—*Conant v. National State Bank*, 22 N. E. 250, 121 Ind. 323.

[g] (*App.* 1891)

In the sale of nursery trees for transplanting, the law implies a warranty on the part of the seller that they should be reasonably fit and adapted to the purpose.—*Weller v. Bectell*, 28 N. E. 333, 2 Ind. App. 228.

[h] (*App.* 1894)

Where personalty is bought for a particular purpose, known to the seller, and the buyer does not inspect the goods, but trusts to the judgment of the seller, there is an implied warranty that the goods will be reasonably fit for that purpose.—*Merchants' & Mechanics' Sav. Bank v. Frazee*, 36 N. E. 378, 9 Ind. App. 161, 53 Am. St. Rep. 341.

When producers of and dealers in horses for breeding purposes sell one of such horses to a person who they know desires a horse for such purposes, there is an implied warranty that the horse is reasonably fit for breeding purposes.—*Id.*

[i] (*App.* 1896)

One who sells an article with knowledge that it is to be used for a particular purpose impliedly warrants the same to be reasonably fit for that purpose.—*Zimmerman v. Druecker*, 15 Ind. App. 512, 44 N. E. 557.

[j] (*App.* 1896)

Where a party sold a boiler with knowledge that it was to be used in a certain saw-

mill, there was an implied warranty that the boiler was reasonably fit for the purpose intended.—*Fitzmaurice v. Puterbaugh*, 45 N. E. 524, 17 Ind. App. 318.

[k] (*Sup.* 1907)

Where a dealer in oil well supplies sold a Fittler cable to be used by the buyer in drilling wells, which purpose was known to the seller, and the buyer had no means of knowing or testing the qualities or strength of the cable until put into actual use, and Fittler cables were kept by the dealer as cables suitable for drilling wells, there was an implied warranty that the cable was reasonably fit for drilling wells.—*Oil-Well Supply Co. v. Watson*, 168 Ind. 603, 80 N. E. 157, 15 L. R. A. (N. S.) 868.

[l] (*App.* 1907)

Where plaintiff sold defendant starch for a certain purpose, it impliedly warranted the starch to be reasonably fit for the purpose, and in an action against defendant for the price of starch thereafter sold, defendant could set up a counterclaim for damages resulting from defects in the starch first sold.—*Glucose Sugar Refining Co. v. Climax Coffee & Baking Powder Co.*, 40 Ind. App. 182, 81 N. E. 589.

[m] (*App.* 1908)

Where a dealer keeps for sale articles for a particular purpose, and knows that the buyer intends to use them for that purpose, he is liable under an implied warranty of fitness for the contemplated use in the same manner as a manufacturer.—*Oil-Well Supply Co. v. Priddy*, 41 Ind. App. 200, 83 N. E. 623.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 772-776.

See, also, 35 Cyc. p. 399; notes, 22 L. R. A. 187, 2 L. R. A. (N. S.) 303, 5 L. R. A. (N. S.) 1103.

§ 275. Implied warranty of quantity.

[a] (*Sup.* 1860)

In a contract to sell all the wheat that may be raised on a farm, there is no implied warranty of quantity.—*Davis v. Murphy*, 14 Ind. 158.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 744, 748.

See, also, 35 Cyc. p. 393.

§ 276. Construction and operation.

Instructions, see post, § 446.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 780-796.

See, also, 35 Cyc. pp. 412-423.

§ 279. — Subject-matter and scope.

[a] (*Sup.* 1844)

A warranty that a fire engine sold and delivered would perform as well as any other in the Western country is not to be considered violated because the warranted engine is in-

ferior to others in that country much larger and more costly, if the inferiority be evident to a common observer.—*Town of Connersville v. Wadleigh*, 7 Blackf. 102, 41 Am. Dec. 214.

[b] (Sup. 1863)

A contract to deliver all the mule colts that may be got by a certain jack during the season, said colts to be delivered free from blemishes and in good condition, is an agreement to deliver all that were sound, and not that all got by the jack should be sound.—*Larimore v. Hornbaker*, 21 Ind. 430.

[c] (Sup. 1872)

A guaranty that a stock of goods will inventory at "wholesale prices" a certain sum should be construed to mean the wholesale prices at which the goods were purchased, and not their market value at the date of making the guaranty.—*Dodge v. Dunham*, 41 Ind. 186.

[d] (Sup. 1875)

To constitute a breach of warranty of the soundness of hogs sold, or to sustain an action for false representations, they must have been diseased at the time the warranty or the false representations were made.—*Bowman v. Clemmer*, 50 Ind. 10.

[e] (Sup. 1887)

Where a machine is warranted to "do good work, and give general satisfaction," the purchaser, in an action for the price, is not entitled to an instruction that, if it did not give satisfaction to him, the jury should find in his favor, whether or not the machine is defective, or did or did not do good work.—*May v. Hoover*, 112 Ind. 455, 14 N. E. 472.

[f] (App. 1891)

At common law an implied warranty extends only to defects existing at the time.—*Postel v. Oard*, 27 N. E. 584, 1 Ind. App. 252.

The general principle is that open, visible defects or qualities of goods sold and warranted are not reached by a warranty, though they may be inconsistent with its terms; a seller not being supposed to warrant against defects and qualities whose existence is clear.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 783-792.

See, also, 35 Cyc. pp. 412-423.

§ 281. Breach.

As ground for rescission of contract, see ante, § 120.

Instructions, see post, § 446.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 797-805.

See, also, 35 Cyc. pp. 434-440.

§ 284. — Warranty of quality, fitness, or condition.

[a] (App. 1897)

A warranty providing that, on notice of the insufficiency of the machine sold, the seller

shall send a competent man to remedy the defect, the purchaser rendering assistance, does not require the seller to teach the purchaser how to operate the machine, and, if the failure of the machine is due to the unskillfulness of the purchaser, the seller may recover the price.—*Burk v. Keystone Mfg. Co.*, 48 N. E. 382, 19 Ind. App. 556.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 803-805.

See, also, 28 Cyc. p. 47; 35 Cyc. pp. 418-420; note, 53 Am. Dec. 173.

§ 285. Notice to seller of defects.

Effect of stipulations on remedy for breach, see post, § 426.

Failure to give notice as waiver of breach, see post, § 288.

Question for jury, see post, § 445.

[a] (Sup. 1886)

The failure of a purchaser of agricultural machinery to give written notice of the failure to do its work properly, within the time specified in the contract of purchase, is not conclusive that the engine worked properly, nor will it prevent such defense, where it appears that the delay was occasioned by the desire and efforts of the seller to remedy the defects, and that written notice was given within a reasonable time.—*National Bank & Loan Co. v. Dunn*, 106 Ind. 110, 6 N. E. 131.

[b] (App. 1892)

Where the sale of a binder is made by agents on their own account, upon the understanding that if it does not work successfully, and the manufacturers have meanwhile become insolvent, they themselves will receive it back, and the warranty also of the manufacturers, upon which such sales are usually made, is adopted, declaring that before the binder can be returned notice must be given to the manufacturers, and an opportunity given to remedy the defect, it is not necessary to notify the manufacturers, in order to defend successfully against an action by the agents for the price, where such notice was given to the agents.—*Campbell v. Wray*, 5 Ind. App. 155, 31 N. E. 824.

Where it is provided in the sale of a machine that before it shall be returned for defects notice of, and an opportunity to remedy, the defects shall be given, such notice, in the absence of any effort to remedy the defects, is equivalent to notice of a desire to return the machine, and a specific offer, therefore, to return is not necessary.—*Id.*

[c] (App. 1893)

A contract provided that, if the machine sold failed to fill its warranty to do good work, written notice should be given the seller at its home office, and to its local agent who sold the machine. *Held*, that oral notice having been given to the seller's general agent, and he having acted thereon, putting the notice in writing, and sending a copy thereof to

the seller's home office, was waived.—*Springfield Engine & Thresher Co. v. Kennedy*, (Ind. App.) 34 N. E. 856, 7 Ind. App. 502.

[d] (App. 1896)

In an action for the price of a machine sold with warranty on contract requiring the vendee, if, after trial, it failed to do good work, to give immediate notice in writing to the vendor, who was then to have time to put it in order, and, if it failed, was to furnish a new machine or return the price paid, it appeared that plaintiff's agent for "selling, adjusting, setting up, and otherwise managing in the sale" was present at the first trial, and, on its failing to work, unsuccessfully tried to fix it, and then told plaintiff to try it again, and that, if it did not then work, to return it; that defendant gave it another trial, and, as it still failed to work, returned it. *Held*, that written notice was waived.—*J. F. Seiberling & Co. v. Newlon*, 16 Ind. App. 374, 43 N. E. 151.

[e] (App. 1896)

If a verbal notice of a breach of warranty is given, accepted, and acted upon, where a written notice has been stipulated for, the giving of the written notice is waived.—*Huber Manuf'g Co. v. Busey* (Ind. App.) 43 N. E. 967, 16 Ind. App. 410.

[f] (App. 1897)

Where a contract provides that, if the machine sold fails to respond to the warranty, it is to be returned, and that the continued use of the machine after a certain time shall be evidence of the fulfillment of the warranty, if the purchaser, without request by the seller, continues to use the machine after such time, he cannot rely upon the warranty to defeat an action for the price, and consequently he is not prejudiced by an instruction declaring that he should have given the written notice required by the contract of the insufficiency of the machine, notwithstanding that the agent's seller acquired knowledge of the defects within the time limited for trying the machine.—*Burk v. Keystone Mfg. Co.*, 48 N. E. 382, 19 Ind. App. 556.

Written notice of the failure of a machine, after trial thereof, to respond to the warranty under which it is sold, is not necessary where the seller's agent acquires knowledge of the defects within the time limited for trying the machine.—*Id.*

[g] (App. 1898)

Where a contract of sale and warranty of a machine provided that, in the event the machine was not as warranted, specified notice to the vendor should be sent within a certain time by registered letter, the vendor, by receiving and acting on an unregistered letter notice, waived the registration requirement.—*C. Aultman & Co. v. Richardson*, 52 N. E. 86, 21 Ind. App. 211.

Where a seller warranting machinery was notified of defects, and on his promise to remedy them the buyer executed notes for the

price, he cannot, on failing to remedy, complain that the notice of defects was not given, nor the machinery returned, in the time or manner stipulated for, nor insist that the use by the buyer thereafter was a ratification of the sale, though it was stipulated that it should be.—*Id.*

[h] (App. 1898)

Where one bought a machine on an agreement that a warranty thereof would be considered fully satisfied unless the buyer gave the seller and the agents from whom they purchased written notice within 10 days after trial and its failure to fulfill the terms of the warranty, and the buyer gave the agent selling it a verbal notice of defects, and he, acting for the seller, undertook to remedy them, no other notice is required, since notice to the agent was notice to the principal.—*Port Huron Engine & Thresher Co. v. Smith*, 52 N. E. 106, 21 Ind. App. 233.

[i] (App. 1906)

Where a contract for the sale of machinery required notice of defects by registered mail within six days from the day of its first use, the giving of notice by nonregistered mail within the time specified, if acted on by the seller, constituted a waiver of the notice required by the warranty.—*Siebe v. Heilman Mach. Works*, 77 N. E. 300, 38 Ind. App. 37.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 806-808, 810.

See, also, 35 Cyc. pp. 423-427.

§ 286. Opportunity to seller to remedy defects.

[a] (App. 1896)

Where it is provided in a contract for the sale of a machine that if the machine fail to do good work the purchaser is to give written notice, both to the selling agent and the machine company, and to allow a reasonable time for the company to get to the machine and to remedy the defects, these provisions must be complied with before the purchaser can declare a breach of the warranty.—*J. F. Seiberling & Co. v. Rodman*, 14 Ind. App. 400, 43 N. E. 38.

Where a contract for the sale of a machine with warranty provided that, if it did not work right, the seller was to be notified and given an opportunity to remedy the defect, but the purchaser gave notice of a defect and immediately returned the machine and refused to permit repairs to be made or to accept the machine, he could not rely on the warranty.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 809.

See, also, 35 Cyc. p. 428.

§ 287. Return of goods.

Condition precedent to action or defense for breach, see post, §§ 428, 429.

Stipulations as affecting remedy for breach, see post, § 426.

[a] (Sup. 1862)

In a suit on a promissory note for the price of a horse, containing the words, "But, should the beast prove unsound, a deduction to be made by two disinterested persons," it was held that proof of a warranty of soundness was admissible, and that this clause only provided a remedy for a breach of the warranty, and precluded either party from demanding a return of the horse.—*Cross v. Pearson*, 17 Ind. 612.

[b] (Sup. 1884)

Where a buyer of a machine under a warranty stipulating that, if it did not work well, he should return it at once to the agent of whom he received it, offered to return the machine to the agent, who informed the buyer that he need not do so, as the machine would not be received, the buyer showed a sufficient excuse for failure to return the machine.—*McCormick Harvesting Mach. Co. v. Embree*, 94 Ind. 85.

[c] (App. 1894)

Where the seller of goods refused to receive them when offered by the purchaser for breach of warranty, it is a sufficient excuse for a failure to make a specific tender.—*Ohio Thresher Engine Co. v. Hensel*, 36 N. E. 716, 9 Ind. App. 328.

[d] (App. 1897)

The purchaser of a machine under a warranty to do certain work, the contract providing that if the machine should not bear such warranty notice should be given the seller, and if it could not be made to fill the warranty it was to be returned by the purchaser and another substituted therefor or the money or notes returned, cannot abandon the contract and insist on the warranty. He should return the machine and receive another, or have his notes or money returned.—*Burk v. Keystone Mfg. Co.*, 48 N. E. 382, 19 Ind. App. 556.

[e] (Sup. 1902)

Where a machine is purchased, with warranty, by several parties, a sale of the interest of one of the purchasers does not affect the sellers' liability on their contract.—*Kenney v. Bevilheimer*, 64 N. E. 215, 158 Ind. 653.

[f] (Sup. 1905)

Where, on sale of a stallion, he was guaranteed to be a satisfactory breeder if he had proper care and exercise, the seller agreeing if he was not to take him back, and the horse when delivered had a defect which rendered him worthless for breeding purposes, the seller was bound to take him back, without regard to whether or not he had received proper care and exercise.—*Rosenthal v. Rambo*, 76 N. E. 404, 165 Ind. 584, 3 L. R. A. (N. S.) 678.

Where a horse was sold under an agreement that, if he did not fulfill a warranty, the seller would take him back if he was returned in as sound and healthy a condition as he was in when sold, and it appeared that when he

was returned gangrenous dermatitis, with which he was afflicted when sold, had rendered him unsightly in appearance, and thick wind, which he also had when sold, had developed into heaves, the buyer was nevertheless entitled to return the horse on finding that he did not comply with the warranty.—Id.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 811-816.

See, also, 35 Cyc. pp. 434-440; note, 3 L. R. A. (N. S.) 678.

§ 288. Waiver of breach.

[a] (Sup. 1883)

A warranty that a reaper will work well is broken, and the seller cannot recover the price, where the purchaser, after a day's trial, gave notice, as provided by the contract, to enable the seller to put it in order, and such notice was ignored, although he continued to use it for a week before he returned it.—*McCormick Harvesting Mach. Co. v. Hays*, 89 Ind. 582.

[b] (Sup. 1884)

Where there was an express warranty in the sale of whisky barrels that they were suitable for holding whisky, the vendees can recover for breach thereof, though, after some of the barrels had proved leaky, they used the others.—*Poland v. Miller*, 95 Ind. 387, 48 Am. Rep. 730.

[c] (Sup. 1886)

In an action for the price of a steam engine and separator, the purchaser who has used the implements for two months after discovering defects, and has given no notice thereof to the seller, cannot set up the defense of breach of warranty where the contract of sale provided that a written notice of defects should be given within the first 10 days of use, and a continued, use after that time should be conclusive evidence that the warranty was fulfilled.—*Brown v. Russell & Co.*, 105 Ind. 40, 4 N. E. 428.

[d] (App. 1893)

Under a contract of a sale of a machine, providing that continued use thereof should be evidence of fulfillment of the warranty that it should perform good work, retention and use of the machine, after notice to the seller of defects, at the instigation of the selling agent, and on his promise that the defects should be remedied, does not have this effect.—*Springfield Engine & Thresher Co. v. Kennedy*, 7 Ind. App. 502, 34 N. E. 856.

[e] (App. 1897)

Where a contract of sale provided that the continued use of the machine after the expiration of the time named in the warranty would be evidence of the fulfillment of the warranty, the purchaser, by retaining and using the machine beyond the expiration of such time, lost his right to set up the warranty.—*Burk v. Keystone Mfg. Co.*, 48 N. E. 382, 19 Ind. App. 556.

[f] (App. 1900)

The payment by a vendee of the purchase price of an ice machine in cash and by a renewal of the original purchase-price notes did not constitute a waiver of a breach of warranty of such machine, and he was entitled to urge such breach as a defense in a suit upon such renewal notes.—*York Mfg. Co. v. Bonnell*, 57 N. E. 590, 24 Ind. App. 607.

The vendor of an ice machine gave a written warranty that for every ton of coal it would produce a certain quantity of ice. Upon a test it failed to produce that result, and vendees refused to accept it. Vendor then verbally agreed that, if vendees would make a cash payment on the purchase money, and execute notes for the balance, he would make the machine comply with the warranty. *Held*, that an acceptance by vendees of the verbal offer was not a waiver of the written warranty, but constituted a reaffirmance thereof, and vendees were entitled to sue for a breach of the written warranty.—*Id.*

[g] (Sup. 1902)

The retention of a machine, purchased with warranty, after it was found to be defective, and after attempted repairs by the sellers, cannot preclude recovering for breach of the warranty, when in keeping it the purchasers acted on the request of the sellers' agent, whose promise that it should be made to work was confirmed by the sellers.—*Kenney v. Bevilheimer*, 64 N. E. 215, 158 Ind. 653.

Where a machine is purchased with warranty, correspondence before discovery of the defects cannot deprive the purchasers of the benefit of the warranty, if it was afterwards found that the machine was imperfect.—*Id.*

[h] (Sup. 1902)

Suit cannot be maintained on a warranty accompanying a sale of a stallion, and conditioned "to be null and void" on a date named, where no complaint of breach was made before such date.—*Wilson v. Ward*, 64 N. E. 458, 159 Ind. 21.

[i] (App. 1904)

A contract for the installation of a smoke consumer with warranty that it would consume 75 per cent. of the smoke otherwise produced by a furnace, and save 25 per cent. of the coal otherwise consumed, allowed the buyer 90 days for a trial, and provided that at the end of the trial the buyer should at once announce to the seller the result, and that, if the buyer should determine that the device met the warranty, and the installation was completed to the satisfaction of the buyer, then the buyer should pay a stipulated price. The device was installed, and tests were made, and within 90 days after the completion of the installation the representative of the buyer notified the seller that he would neither recommend acceptance nor the payment of the price, and also expressed his inability to determine whether the device met the requirements of the contract.

Thereafter tests were made, but the device was rejected after a compliance with the contract on the part of the buyer. *Held* that, notwithstanding the good faith of the seller, the buyer was not liable for the price.—*Reed Smokeless Furnace Co. v. State*, 72 N. E. 615, 34 Ind. App. 265.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 817-823.

See, also, 35 Cyc. pp. 429-433; notes, 68 L. R. A. 100, 1 L. R. A. (N. S.) 142.

VII. REMEDIES OF SELLER.

Of goods sold conditionally, see post, §§ 478-480.

Rescission, see ante, §§ 95-108.

(A) STOPPAGE IN TRANSITU.

§ 293. Persons as against whom right may be exercised.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 832-836.

See, also, 35 Cyc. p. 497.

§ 294. — In general.

[a] (Sup. 1870)

A resale by a consignee of goods in transit, who has neither possession of the goods nor a bill of lading, does not destroy the right of stoppage in transitu by his vendor.—*Pattison v. Culton*, 33 Ind. 240, 5 Am. Rep. 199.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 832-835.

See, also, 35 Cyc. p. 497.

§ 296. Duration and termination of transit.

[a] (App. 1895)

The transit does not necessarily end on the arrival of the goods at the point of their destination, but continues so long as they remain in the possession and control of the carrier as such.—*Rogers v. Schneider*, 41 N. E. 71, 13 Ind. App. 23.

A clear and unequivocal case of the termination of the transit should be made out by the evidence before the vendor should be deprived of the right of stoppage.—*Id.*

The carrier may convert himself into an agent for the vendee, or receive and store the goods as a warehouseman, and thus terminate the transit before the goods come into the actual possession of the vendee. This constitutes a constructive delivery to the vendee, and the vendor's right of stoppage in transit is lost.—*Id.*

As affecting the right of stoppage in transitu on account of the insolvency of the vendee, it is a question for the jury whether the transit has ended when the vendee, being unable to pay the freight, was, to save demurrage, allowed by the railroad to unload the cars, and

pile the goods in its yard until he could pay the freight.—Id.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 837-847.

See, also, 35 Cyc. pp. 499-504; note, 60 Am. Rep. 51.

§ 297. Waiver or loss of right.

[a] (App. 1895)

The fact that the vendor took the notes of the vendee, for the purchase money does not affect his right to stop in transitu.—*Rogers v. Schneider*, 13 Ind. App. 23, 41 N. E. 71.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 848-852.

See, also, 35 Cyc. p. 504; note, 50 L. R. A. 721.

(B) LIEN.

§ 305. Lien arising from possession of seller.

[a] (Sup. 1852)

A. sold B. nine cribs of corn at 20 cents per bushel, with a warranty that they contained 2,500 bushels; and it was agreed that, if they did not, A. would make up the deficiency. A sum was agreed to be given in payment, and time allowed for the payment; and the cribs of corn were left with A., as agent of B., to take care of for him. *Held*, that as between A. and B. the sale was complete, and A. had no lien on the corn.—*Sloan v. Kingore*, 3 Ind. 549.

[b] (Sup. 1858)

Where delivery and payment are to be concurrent acts, the purchaser cannot claim possession till he has paid the price; and in such case the seller has a lien for unpaid purchase money. Where delivery is to precede the payment of the money, possession may be claimed before payment, unless the purchaser be discovered to be insolvent; and, if possession be voluntarily delivered without the payment of the purchase money, the lien is waived, unless secured by mortgage.—*Sherry v. Picken*, 10 Ind. 375.

[c] (Sup. 1895)

On suit to foreclose a vendor's lien, it appeared that plaintiff frequently sold lumber to defendant's vendor; that, when a sale was made, the plaintiff would set the lumber purchased apart in his own yard, where it would remain till, by agreement with the purchaser, the plaintiff hauled it to cars for shipment, receiving nothing for hauling, but two dollars per car for loading; that the sales were for cash; that the possession held by plaintiff was recognized by such purchaser as security for the price; that defendant, without plaintiff's knowledge, went to the yard, saw the lumber thus sold set apart, and purchased it from such purchaser. *Held*, that he took it subject to plaintiff's lien for the price.—*Perrine v. Barnard*, 41 N. E. 820, 142 Ind. 448.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 861-864, 871.
See, also, 35 Cyc. p. 486.

§ 308. Priorities.

Between vendors' liens and chattel mortgages, see CHATTEL MORTGAGES, § 140.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 873.

See, also, 35 Cyc. p. 489.

§ 313. Waiver, loss, or discharge.

[a] (Sup. 1895)

A constructive delivery of property sold by setting the same apart for the purchaser, though sufficient to vest title in the purchaser, is not effective to divest the seller of his lien for the price or of the right to refuse to deliver the same without payment, if the sale is not one on credit.—*Perrine v. Barnard*, 41 N. E. 820, 142 Ind. 448.

[b] (Sup. 1896)

A vendor of personalty has no lien for the unpaid purchase money after parting with possession, but must look to the personal responsibility of the vendee.—*Slack v. Collins*, 145 Ind. 569, 42 N. E. 910.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 870, 872, 878-884.

See, also, 35 Cyc. pp. 489-491.

§ 315. Enforcement.

[a] (Sup. 1852)

A debtor agreed to give his creditor a lien on personal property sold by the latter to him, and set it apart for that purpose, and gave him power to sell the property upon the nonpayment of the debt. The purchase money not being paid, the creditor proceeded to sell the property at public sale, but the debtor purposely kept the property concealed and locked up from view. *Held*, that the sale was not rendered void by the property being kept from view, and also that the debtor could not complain of the inadequacy of the price caused by such concealment.—*Huff v. Earl*, 3 Ind. 300.

A debtor agreed to give his creditor a lien on personal property sold by the latter to him, and set it apart for the purpose of vesting in him possession, and gave him power to sell the property on the nonpayment of the debt. The purchase money not being paid, the creditor proceeded to sell the property at public sale, according to the agreement, but the debtor purposely kept the property concealed and locked from view. *Held*, that the sale was not rendered void by the property being thus kept out of view, but the lien could be enforced by replevin.—Id.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 885-889.

See, also, 35 Cyc. p. 492.

(C) RECOVERY OF GOODS DELIVERED OR PROCEEDS THEREOF.

Conditional sales, see post, § 479.

Enforcement of lien, see ante, § 315.

Return of goods by buyer as condition precedent to rescission of contract, see ante, § 124.

Return of goods by buyer on breach of warranty, see ante, § 287.

Rights of seller as to third persons, see ante, § 225.

§ 316. Right to reclaim goods in general.

[a] (Sup. 1883)

Where goods are purchased by means of fraudulent representations or concealment by the buyer, and they are delivered to him by the seller, the latter may reclaim them from him.—*Brower v. Goodyer*, 88 Ind. 572; (1891) *Levi v. Kraminer*, 2 Ind. App. 594, 28 N. E. 1028; (1895) *Waterbury v. Miller*, 13 Ind. App. 197, 41 N. E. 383.

[b] (App. 1891)

The vendor of personal property, obtained from him by the fraud of the purchaser, may bring replevin for it against the fraudulent purchaser, unless the rights of innocent persons have intervened.—*Tennessee Coal, Iron & R. Co. v. Sargent*, 28 N. E. 215, 2 Ind. App. 458.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 890-895.

See, also, 35 Cyc. p. 506; note, 1 L. R. A. (N. S.) 474.

§ 319. Conditions precedent to action.

[a] (Sup. 1887)

A. executed to B. & Co. a note for \$488.56. C. became the owner of this note. A. subsequently became the owner of a note executed by D. for \$547, and offered it for sale for \$500. C. proposed to buy it, and A. agreed to sell it. Upon the acceptance of C.'s offer, A. produced the note, and C. placed on the table before A. the \$488.56 note, and \$11.44 in money, and carried away the \$547 note. A. protested against accepting the note, but, after C. left, took up the note and money for safe-keeping. *Held*, that A. could maintain an action for the \$547 note without tendering in court the note and money placed on the table by C., and that the \$11.44 could not be treated as a payment of part of the price of the note.—*Vancleave v. Beach*, 110 Ind. 269, 11 N. E. 228.

[b] (App. 1899)

If goods are obtained by fraud by a buyer from a seller, the latter may rescind the sale, and replevy the same from the buyer, or one in possession as trustee for him, without demand before beginning action.—*West v. Graff*, 55 N. E. 506, 23 Ind. App. 410.

[c] (Sup. 1901)

A seller of chattels, where the sale was induced by fraud of the buyer, cannot maintain an action to reclaim such chattels without first paying or tendering the amount he has received

on account of the sale.—*Adam, Meldrum & Anderson Co. v. Stewart*, 61 N. E. 1002, 157 Ind. 678, 87 Am. St. Rep. 240.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 899-901.

See, also, 35 Cyc. p. 513.

§ 323. Pleading.

[a] (App. 1894)

In replevin by the seller of goods, after notes given in payment therefor, and secured by mortgage thereon, have become overdue, defendant, as a defense, under the general denial, may show payment in part, and damages from breach of warranty.—*C. Aultman & Co. v. Forgey*, 10 Ind. App. 397, 36 N. E. 939.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 904.

See, also, 35 Cyc. p. 516.

§ 325. Trial.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 907-910.

See, also, 35 Cyc. p. 518.

§ 328. — Instructions.

[a] (Sup. 1885)

In an action by a seller to recover goods, on the ground of fraud of the buyer and non-payment of the price, instructions considered, and *held* that the instruction refused was substantially covered by an instruction given.—*Curme, Dunn & Co. v. Rauh*, 100 Ind. 247.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 909.

See, also, 35 Cyc. p. 518.

§ 329. — Verdict and findings.

[a] (App. 1899)

In replevin to recover goods alleged to have been purchased under fraudulent representations, findings that defendant knew he was insolvent when purchasing the goods, and that he did not disclose his insolvency, and did not intend to pay, but intended to defraud the plaintiff, are sufficient to support a judgment for plaintiff, without proof of any actual representation calculated to lead plaintiff to believe him solvent.—*Goodman v. Sampliner*, 54 N. E. 823, 23 Ind. App. 72.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 910.

See, also, 35 Cyc. p. 518.

§ 330. Judgment and execution.

[a] (Sup. 1859)

In a suit to recover back articles delivered at an agreed price, as the consideration of a contract rescinded for the defendant's fraud, the defendant is bound by the price agreed upon, in the absence of fraud or warranty on the part of the plaintiff.—*Herbert v. Stanford*, 12 Ind. 503.

[b] (Sup. 1884)

In replevin, an answer alleging purchase of the property, payment by installments, and overpayment is good, but no recovery can be had for the overpayment.—*Baldwin v. Burrows*, 95 Ind. 81.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 911, 912.

See, also, 35 Cyc. p. 519.

(D) RESALE.

As basis of action for breach of contract, see post, § 371.

Enforcement of lien, see ante, § 315.

On abandonment of goods by buyer, see ante, § 98.

Resale by buyer to seller, see ante, § 218.

§ 332. Right to resell.

[a] (Sup. 1857)

Where a vendor agrees to deliver goods at a certain place between the 1st and 15th, and the vendee fails to give notice, as such a contract would imply he must, on which day he would be ready to receive them, or if the vendee in effect notifies the vendor that he cannot receive them till after the 15th, the vendor may sell and recover of the vendee any loss by such sale.—*Johnson v. Powell*, 9 Ind. 566.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 914–917.

See, also, 35 Cyc. pp. 519, 520.

§ 333. Notice.

[a] (App. 1896)

Where a purchaser refuses to comply with his contract, stipulating for the delivery to him of certain personalty, the seller may retain the property for his benefit and subject to his order and sue for the entire purchase price, or he may sell the property and recover from the purchaser the difference between the contract price and the price of sale; but, if he chooses to pursue the latter course, he must manifest his election to do so by a preliminary notice that he intends to sell and hold the purchaser for the loss.—*Ridgley v. Mooney*, 45 N. E. 348, 16 Ind. App. 362.

[b] (App. 1898)

A seller, who retakes goods delivered to buyer, and for which he refuses to pay, in order to recover the difference between the contract price and what he may secure from a resale, must give the buyer notice of the proposed sale of the recovered goods.—*Dill v. Mumford*, 49 N. E. 861, 19 Ind. App. 609.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 919.

See, also, 35 Cyc. p. 522.

§ 339. Recovery of difference in price or between price and market value.

[a] (Sup. 1857)

Where the seller has resold the goods on refusal of the buyer to receive them, the latter is liable for the loss sustained on the resale.—*Johnson v. Powell*, 9 Ind. 566.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 924, 926.

See, also, 35 Cyc. p. 520.

(E) ACTIONS FOR PRICE OR VALUE.

Action by principal against buyer from factor, see FACTORS, § 66.

After retaking goods sold conditionally, see post, § 479.

As waiver of rights under conditional sale, see post, § 477.

Claim for conversion by bailee as set-off in action by bailee for goods sold and delivered, see SET-OFF AND COUNTERCLAIM, § 36.

Grounds for new trial, see NEW TRIAL, §§ 90, 102.

On sale of intoxicating liquors, see INTOXICATING LIQUORS, § 329.

Unliquidated damages caused by nonperformance of contract as set-off in action for goods sold, see SET-OFF AND COUNTERCLAIM, § 35.

§ 340. Nature and form.

[a] (Sup. 1841)

In assumpsit for goods sold, etc., the general issue was pleaded. The facts were that the plaintiff, being the owner of 2,000 gunny bags, instructed a warehouseman, in whose possession they were, to deliver them to the defendant, if he called for them, but, if they were not so called for, to sell them. The defendant called, and received the bags, paying the warehouseman his charges, etc. At the time of this transaction there was a contract between the plaintiff and the defendant for a quantity of corn, to be delivered by the latter to the former in bags, which corn was not delivered. *Held*, that these facts did not sustain the suit.—*Cruikshank v. Henry*, 6 Blackf. 19.

[b] (Sup. 1885)

When a sale is for cash, and bonds which are void or are proved to be void, are given in payment, the creditor may afterwards sue upon the original cause of action.—*School Town of Monticello v. Grant*, 104 Ind. 168, 1 N. E. 302.

[c] (App. 1893)

Where a forged note is assigned, and is taken by plaintiff in part payment for property, plaintiff may disregard the assignment, and sue for the value of the property.—*Baldwin v. Threlkeld*, 8 Ind. App. 312, 34 N. E. 851, 35 N. E. 841.

[d] (App. 1897)

The seller is entitled to recover the purchase price, with interest, where no cash was

paid on the delivery of the machine sold, and the purchaser refused to execute notes for the deferred payments when required, as provided in the contract.—*Burk v. Keystone Mfg. Co.*, 48 N. E. 382, 19 Ind. App. 556.

[e] (App. 1898)

Where the sellers delivered a car of wheat to the usual railway carrier according to contract, caused it to be billed to the buyer's order, and sent the bill of lading to the buyer, who received it, thus fully completing a performance of the contract of sale, on a rejection of the wheat by the buyer the sellers had the right to treat the wheat as the property of the buyer and to maintain an action against him for the contract price or to retake possession and resell and bring their action to recover their resulting loss the difference between the contract price and the price received by them on the resale.—*Dill v. Mumford*, 49 N. E. 861, 19 Ind. App. 609.

[f] (App. 1906)

It is not error to refuse to instruct that a recovery of the amount due under a written contract for goods delivered cannot be had in the common-law action of *indebitatus assumpsit*.—*Peden v. Scott*, 73 N. E. 1099, 35 Ind. App. 370.

[g] (App. 1906)

Where goods are sold and delivered under a valid written contract fixing the price, quantity, time, and manner of delivery, the seller cannot recover the price in an action on an open account, but can only recover in an action based on the written contract.—*Over v. Byram Foundry Co.*, 77 N. E. 302, 37 Ind. App. 452, 117 Am. St. Rep. 327.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 927-942.

See, also, 35 Cyc. pp. 534, 535.

§ 341. Right of action.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 943-955.

See, also, 35 Cyc. pp. 528-533.

§§ 343, 344. — Price or value.

[a] (Sup. 1828)

To an action of debt on a writing obligatory for the payment of money, the defendant pleaded that the obligation had been given for a pair of mill stones, fraudulently represented to be good. *Held*, that if, in addition to the fraudulent representations, the defendant proved that the article was of no value, or that it had been returned, or tendered, within a reasonable time, he defeats the action; but if it appear that the article is of some value, and has not been returned or tendered, the plaintiff recovers the value.—*Wynn v. Hiday*, 2 Blackf. 123.

[b] (Sup. 1828)

Where goods were sold and delivered under a special contract, the seller could not prove a part performance and recover in *indebitatus as-*

sumpsit for the part performed.—*Hoagland v. Moore*, 2 Blackf. 167.

[c] (Sup. 1864)

Where the buyer of goods is entitled to avoid the sale for breach of the contract by the seller, but does not return or offer to return the same within a reasonable time, he is liable for their value.—*Bischof v. Lucas*, 6 Ind. 26.

[d] (Sup. 1877)

The refusal by the purchaser of goods at a specified price, payable in his notes, to give the notes agreed for, does not open the question of price, and let the seller in to prove and recover the value of the goods. He can only sue for the agreed price.—*Bicknell v. Buck*, 58 Ind. 354.

[e] (App. 1892)

Where there has been a violation of warranty in material furnished, but the material is retained and used, the amount of recovery in an action by the seller is not the actual value of the material furnished, but the difference between the value of the material contracted for, independent of the contract price, and the value of the property received, deducted from the contract price.—*Greene v. Witte*, 5 Ind. App. 343, 32 N. E. 214.

[f] (Sup. 1900)

Where the seller of a threshing machine agreed that, if it did not do good work, he would take it back, and it failed to work satisfactorily, the seller could not maintain an action for the price.—*Marion Mfg. Co. v. Harding*, 53 N. E. 194, 155 Ind. 648.

[g] (Sup. 1906)

Where goods sold are received and are of any value, in the absence of a return or tender, the seller may recover the amount of the value, even if the goods were not of the value represented.—*Price v. Huddleston*, 167 Ind. 536, 79 N. E. 496.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 947-955.

See, also, 35 Cyc. p. 526.

§ 345. Conditions precedent.

[a] (Sup. 1864)

A person who buys a horse which has been stolen, and afterwards sells him in good faith, and without any knowledge of the theft, is liable to the owner for its value, and no demand need be made before the commencement of an action.—*Robinson v. Skipworth*, 23 Ind. 311.

[b] (Sup. 1881)

A demand of payment is not an essential prerequisite to an action for the price of goods sold on defendant's order to be paid for on delivery.—*Rend v. Boord*, 75 Ind. 307.

[c] (App. 1894)

Judgment for the price of an article ordered made cannot be rendered on a special verdict showing notice to defendant that the

article was ready for her, and her repudiation of the contract, but no tender of delivery by plaintiff at the proper place.—*Shipp v. Atkinson*, 8 Ind. App. 505, 36 N. E. 375.

A repudiation of the contract of sale by the purchaser relieves the seller from further compliance with the contract on his part so far as to enable him to maintain an action for damages for the breach of the contract, but, in order to sustain an action for the contract price as on an executed contract, he must on his part comply entirely with the contract.—*Id.*

[d] (App. 1906)

Before the seller can recover the contract price, he must deliver the article sold, or must have done such things as vests title thereto in the buyer.—*Gaar, Scott & Co. v. Fleschman*, 38 Ind. App. 490, 77 N. E. 744, 78 N. E. 348.

[e] (App. 1908)

Under an agreement by defendants, in connection with a contract to sell goods for plaintiff on commission, that, if any goods ordered of plaintiff should remain unsold at a certain time, defendants would buy and pay for them at certain prices one year after that time, if requested, plaintiff could not recover the price of the unsold goods, in the absence of a showing that defendants had been requested to purchase them.—*Hollowell v. Smith Agricultural Chemical Co.*, 41 Ind. App. 361, 83 N. E. 772.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 956-961; 11 CENT. DIG. Contracts, § 1217.
See, also, 35 Cyc. pp. 531-533.

§ 346. Defenses.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 962-986.
See, also, 35 Cyc. pp. 537-548; note, 30 Am. Rep. 517.

§ 347. — In general.

In action against undisclosed principal, see PRINCIPAL AND AGENT, § 145.

[a] (Sup. 1839)

Where there has been fraud on the part of the vendor, in the sale of goods, an offer by the vendee to return them in a reasonable time constitutes a good defense against an action for their price.—*Howard v. Cadwalader*, 5 Blackf. 225.

[b] (Sup. 1890)

In an action on a note for the price of merchandise, where the answer alleges that defendant was induced to execute it by fraud, and that the consideration received by him was without value, an averment of an offer to rescind the contract is not necessary.—*Citizens' Bank v. Leonhart*, 126 Ind. 206, 25 N. E. 1099.

[c] (App. 1898)

The fact that the seller had charged an exorbitant price, and more than the goods could have been purchased for elsewhere, which the

buyer did not discover until after he had given a note for the price, was no defense to an action on the note, in the absence of fraud.—*Hodges v. Truax*, 49 N. E. 1079, 19 Ind. App. 651.

[d] (App. 1909)

Where a buyer had been induced to make a purchase by fraud he may retain the property, and when sued for the price plead fraud as a defense, and, if the damages sustained are equal to or greater than the price, defeat the action entirely, or he may rescind, in which case he must show either a return or offer to return the property, or that it is of no value.—*Wulschner-Stewart Music Co. v. Hubbard*, 89 N. E. 794.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 962-972; 11 CENT. DIG. Contracts, § 1196.
See, also, 35 Cyc. p. 537.

§ 348. — Set-off and counterclaim.

For breach of warranty, see post, § 428.

Right of purchaser to set off demand against his agent for money misappropriated by the latter and received by the seller, see PRINCIPAL AND AGENT, § 186.

[a] (Sup. 1850)

In an action on a promissory note for goods sold, the defendant may reduce the agreed price of the articles sold, by proving what the difference was at the time of delivery between the articles as they actually were and what they ought to have been according to the contract; but the damages which may have arisen from the defect of the articles must be recovered, if they are recoverable at all, by a separate suit.—*Kelly v. Case*, 2 Ind. 231.

[b] (Sup. 1851)

In an action to recover on a contract to furnish certain goods, where portions only of them were delivered, defendant may reduce the amount to be recovered by showing that he sustained special damages by reason of the non-performance by plaintiff.—*Epperly v. Bailey*, 3 Ind. 72.

[c] (Sup. 1864)

A purchaser of property may set up fraud or breach of warranty as a defense to an action against him for the purchase money. If the injury sustained is equal or greater than the amount of the purchase money unpaid, he may defeat the action entirely, and if less, it will go in reduction of plaintiff's claim.—*Love v. Oldham*, 22 Ind. 51.

Under the Code a defendant may set up fraud or breach of warranty by way of counterclaim, and not only defeat the action, but recover against the plaintiff any damages greater than the plaintiff's claim.—*Id.*

[d] (Sup. 1890)

In an action for the price of furniture for a hotel, when it appears that plaintiff con-

tracted to deliver it set up in the rooms, ready for use and occupancy, on a certain date, defendant may recover, on counterclaim, damages for the loss of the use of the rooms from the date agreed on to the day of delivery.—*Berkey & Gay Furniture Co. v. Hascall*, 123 Ind. 502, 24 N. E. 336, 8 L. R. A. 65.

[c] (Sup. 1890)

Plaintiff contracted to furnish, upon defendant's orders, 1,000 pounds of Hercules powder, to be paid for 60 days after each shipment. He received two shipments, the bills for which became due, respectively, September 31 and October 8, 1882. Having ordered another shipment, he received, on November 15th, 500 pounds of commercial instead of Hercules powder, which he returned May 22, 1883. *Held* that, in an action to recover for the first two shipments, defendant cannot recoup damages for plaintiff's failure to properly fill his last order, since by his own failure to pay the first two bills when they became due he first violated the contract.—*Skelhan v. Rummel*, 124 Ind. 347, 24 N. E. 1089.

[f] (App. 1891)

Where a brick manufacturer agrees to make and deliver a sufficient quantity of brick of a certain size and quality, for the erection of a certain building, the purchaser is not bound to rescind the contract, on discovering that the bricks do not conform to the specifications, but may accept them, and, when sued for the price, set up his damages in a cross-action.—*Bushman v. Taylor*, 2 Ind. App. 12, 28 N. E. 97, 50 Am. St. Rep. 228.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 973-986; 43 CENT. DIG. Set-Off, § 101.

See, also, 35 Cyc. pp. 543-548.

§ 349. Jurisdiction and venue.

Jurisdiction of equity, see EQUITY, § 43.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 987.

See, also, 35 Cyc. p. 548.

§ 350. Time to sue and limitations.

Accrual of right of action, see LIMITATION OF ACTIONS, § 46.

[a] (App. 1834)

Where a contract provided that no action for breach of warranty and no claim for recoupment of damages should be made after the expiration of a certain year, the limitation attempted to be established applied only to an action or cross-action, and not to a defense in bar of any suit for the purchase money.—*Ohio Thresher & Engine Co. v. Hensel*, 36 N. E. 716, 9 Ind. App. 328.

[b] (App. 1895)

Where a city's contract for the purchase of a road scraper expressly provides for payment in yearly installments, recovery cannot be

had for the full purchase price in an action brought when the first installment only is due.—*Hunt v. Town of Markle*, 12 Ind. App. 335, 40 N. E. 151.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 988-992; 11 CENT. DIG. Contracts, § 1510.

See, also, 35 Cyc. p. 528; note, 3 L. R. A. (N. S.) 908.

§ 351. Parties.

Bringing in new parties, see PARTIES, § 56.

Right of action against purchaser's agent, see PRINCIPAL AND AGENT, § 184.

Right of selling agent to bring suit in his own name, see PRINCIPAL AND AGENT, § 183.

[a] (Sup. 1878)

In an action on the common counts for goods sold and delivered and materials furnished, an application by defendant to make a third person a party alleged that the articles in controversy were contracted for and obtained by such person from plaintiffs on his own credit and account, and that he was bound in a written contract to furnish such material for the construction of a house for defendant, that defendant has paid him for the same, and that plaintiffs seek to make defendant liable for the material, etc. *Held*, that such allegations constituted a complete defense to the action, without making such third person a party.—*Lomax v. McKinney*, 61 Ind. 374.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 993, 994.

See, also, 35 Cyc. p. 548.

§ 352. Pleading.

Bill of particulars, see PLEADING, §§ 324, 327, 328.

Effect of demurrer as opening record, see PLEADING, § 217.

Filing written instrument with pleading, see PLEADING, § 308.

Materiality of issues, see PLEADING, § 371.

Motion to make more definite and certain, see PLEADING, § 367.

Motion to strike out pleadings, see PLEADING, § 352.

Waiver of objections, see PLEADING, § 412.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 995-1043.

See, also, 35 Cyc. pp. 549-562.

§ 353. — Declaration, complaint, or petition.

Anticipating defenses, see PLEADING, § 67.

Statement of cause of action in general, see PLEADING, § 48.

[a] (Sup. 1824)

It was agreed between A. and B. that the former should furnish the latter with a specified quantity of various enumerated articles, and that the latter should pay the former \$200

for them at a future time. A. sued for the money, averring the delivery of the kinds of articles agreed for to the value of \$200 and their receipt by B. in full satisfaction of the agreement; but the particular quantity of the articles furnished was not stated. *Held*, that the performance of the precedent condition was averred with sufficient certainty.—*Richards v. Carl*, 1 Blackf. 313.

[b] (Sup. 1835)

If a declaration for goods sold and delivered allege the goods to have been sold for a stipulated price, and then state a promise to pay the worth of the goods, alleging them to be worth the sum previously stated, it is bad on special demurrer.—*Gist v. Cicot*, 4 Blackf. 126.

[c] (Sup. 1843)

In assumpsit in a justice's court, the declaration stated, in substance, that defendant had received from the plaintiff certain bottles of cough drops, at a certain price, to be sold for him or returned, and that payment for such as had been sold, and a return of the residue, had been demanded and refused. *Held*, that the declaration was sufficient.—*Crosby v. Tichenor*, 6 Blackf. 418.

[d] (Sup. 1864)

The complaint in an action to recover the price of a machine, sold with a warranty under an agreement that the continued use of the machine by the vendee should be regarded as a waiver of the warranty, need not allege that the machine corresponded with the warranty, if it avers the continued use of it by the vendee.—*Bragg v. Bamberger*, 23 Ind. 198.

[e] (Sup. 1870)

In an action to recover the price of goods sold, if, at the time of the sale, the purchaser had been duly found to be of unsound mind by a proper proceeding for that purpose, this fact is matter of defense, and it does not devolve on plaintiff to allege the contrary in anticipation.—*Wilder v. Weakley's Estate*, 34 Ind. 181.

[f] (Sup. 1871)

A complaint, alleging that plaintiff sold and delivered to defendant certain wheat, for which he agreed to pay within 12c a bushel of the Cincinnati market, to be determined by the Cincinnati papers, at any time which plaintiff might select within a year from the delivery of the wheat, and that within the year plaintiff notified defendant that he would on that day set the price of the wheat as per the Cincinnati papers of that date, and that wheat was worth in Cincinnati, on that day, \$2.70 per bushel, and that plaintiff fixed the price on that day and demanded the payment therefor, which defendant refused, sufficiently states a cause of action.—*Jones v. Cook*, 35 Ind. 175.

[ff] (Sup. 1871)

That a complaint after stating a cause of action for goods sold and delivered at the request of and on account of the defendant pro-

ceeds to anticipate and avoid the defense to the action does not render it bad.—*Chicago, C. & L. R. Co. v. West*, 37 Ind. 211.

[g] (Sup. 1882)

In an action to recover the purchase price of goods, the complaint must allege that the debt is unpaid.—*Goodman v. Gordon*, 87 Ind. 126.

[h] (Sup. 1885)

In a contract for the sale of a windmill warranted to work well, a stipulation that if, after a certain time, it cannot be made to work well, the amount paid by the purchaser shall be refunded, does not postpone the cash payment, and the seller need not aver that the mill worked well during the period prescribed for testing it, in his complaint to recover such payment.—*McClamrock v. Flint*, 101 Ind. 278.

[i] (Sup. 1890)

In an action for services rendered or goods furnished, it is not sufficient to state by way of recital that the services and goods were of a designated value; but it must be directly averred, as a traversable fact, that the services were rendered, and that the goods were furnished.—*Brickey v. Irwin*, 122 Ind. 51, 23 N. E. 604.

[j] (App. 1892)

In an action to recover the price of barrels delivered and accepted under an executory contract of sale which stipulated that they should be "first class," plaintiff needed not to allege that they were "first class."—*Neal v. Shewalter*, 5 Ind. App. 147, 31 N. E. 848.

[k] (App. 1897)

A complaint for goods sold, alleging a sale and delivery to plaintiff's agent, without alleging that the sale was made to him for the defendant, or at his order or request, or on defendant's credit, is bad on demurrer.—*Fry v. Colborn*, 46 N. E. 351, 17 Ind. App. 96.

[l] (App. 1898)

A complaint alleging the delivery of a certain quantity of wheat, of a certain market value, by plaintiff to defendants, "and that in this way, and for said wheat, the said defendants became indebted to the plaintiff in said sum," etc., was insufficient.—*Drudge v. Leiter*, 49 N. E. 34, 18 Ind. App. 694, 63 Am. St. Rep. 359.

[m] (App. 1899)

A bill of particulars of the account sued on need not be filed where the sale was in bulk for a lump sum, without inventory, and where, before commencement of the action, the goods were resold to various persons.—*Tibbet v. Zurbuch*, 52 N. E. 815, 22 Ind. App. 354.

A complaint that defendant is indebted to plaintiff in a stated sum for a stock of merchandise sold for a certain sum which defendant agreed to pay, and which was paid with the exception of such stated sum, is a good complaint on quantum meruit for goods sold and delivered.—*Id.*

[n] (Sup. 1904)

Where plaintiff alleged that he agreed to furnish defendant 1,000 pounds of milk every day for a certain period, and did not allege performance, but averred that he did deliver "an average of 1,000 pounds," etc., except when prevented by defendant, the complaint was insufficient, under Burns' Ann. St. 1901, § 373, providing that in pleading the performance of a condition precedent in a contract it shall be sufficient to allege generally that the party performed all the conditions on his part.—*Mondamin Meadows Dairy Co. v. Brudi*, 72 N. E. 643, 163 Ind. 642.

[o] (App. 1908)

The complaint for the price of books ordered by defendant of plaintiff, on certain terms, showing that the title remains in plaintiff till after payment, that defendant refused to accept them, and making no tender, states no cause of action.—*Rouse v. Rose*, 41 Ind. App. 308, 83 N. E. 253.

In an action to recover for books sold, the complaint should allege the acceptance of the order for the books.—*Id.*

[p] (App. 1908)

A complaint in an action for lumber sold which alleges that plaintiff sold and delivered to defendant 11,269 feet of poplar lumber at \$19 per 1,000, and that he delivered oak and other lumber at a specified price, and that defendant paid \$119 on the lumber delivered shows a balance due on the poplar lumber, and is sufficient to withstand a demurrer notwithstanding the uncertainty of the averments as to the amount of the oak and other lumber delivered.—*Fletcher v. Southern*, 41 Ind. App. 550, 84 N. E. 526.

Where the facts alleged in a complaint show that title to the chattels had not passed to the buyer at the time of his breach of contract of sale, the complaint is fatally defective unless it shows the market value of the chattels when the default was made.—*Id.*

A complaint in an action for lumber sold, which alleges the delivery and acceptance of oak lumber, and which avers that poplar lumber delivered under the terms of the contract amounted to 11,269 feet, and that defendant neglected and refused to measure and accept the lumber, when considered as a whole, shows one transaction involving the sale and purchase of both the oak and poplar lumber, and shows that the contract was executed so far as it related to the oak lumber, and states a cause of action as against a demurrer.—*Id.*

[q] (App. 1910)

A complaint by the seller of goods for the contract price is fatally defective, where it fails to allege a delivery.—*Penn-American Plate Glass Co. v. Harshaw, Fuller & Goodwin Co.*, 90 N. E. 1047.

A complaint alleged that plaintiff and defendant entered into a contract by correspond-

ence during October, November, and December, 1905, by which plaintiff sold and delivered to defendant certain arsenic at a specified price per pound; that by the terms of the agreement defendant was indebted to plaintiff therefor in the sum of \$381.25, which was wholly due and unpaid. Copies of the correspondence between the parties were made a part of the paragraph by exhibit, and showed a proposal by plaintiff to furnish defendant 25 kegs of arsenic at \$3.25 per hundred, net 30, 1 per cent. 10, and that defendant accepted the proposal. *Held*, that such count sufficiently alleged the terms of the contract and its performance, and was not objectionable for failure to charge that the letters were inclosed in an envelope directed, stamped, and mailed to, and received by, the parties for whom they were intended.—*Id.*

[r] (App. 1910)

A complaint for the price of coal alleging a sale and delivery of coal, and that a certain sum as the purchase price is due and unpaid, is sufficient to withstand a demurrer for want of facts.—*Niagara Oil Co. v. McBee*, 91 N. E. 250.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 995-1004.

See, also, 35 Cyc. pp. 549, 550.

§ 354. — Plea or answer, and subsequent pleadings.

Admissions, see PLEADING, § 127.

Cross-complaint, see PLEADING, § 148.

Matter in abatement, see PLEADING, § 111.

Partial defenses, see PLEADING, § 80.

Plea or answer to part of cause of action, see PLEADING, § 88.

Set-off or counterclaim, see PLEADING, § 146.

[a] (Sup. 1820)

In an action of debt on a specialty for the payment of a certain sum, a special plea that the steam engine for which the writing was given "proved to be altogether defective and unfit" for the purposes or uses for which it was intended, and was altogether unsound and defective at the time of purchase, was bad on general demurrer, although the Statute of 1818, regulating proceedings at law and in equity, authorized defendant to go into and impeach the consideration or any part thereof of a specialty on which suit may be instituted.—*Fellows v. Stevens*, 1 Blackf. 508.

[b] (Sup. 1834)

In assumpsit for goods sold and delivered, a plea that defendant made payment in goods and money is not good as a plea of accord and satisfaction, because not stating that plaintiff accepted the goods in satisfaction, nor as a plea of payment, nor as a plea of set-off under the statute, which requires such pleas to be a good plea of payment.—*Sinard v. Patterson*, 3 Blackf. 353.

[c] (Sup. 1834)

To an action on a promissory note the defendant pleaded in bar, as to part of the amount, that the consideration of that part was goods sold and delivered, which were damaged and of little or no value, but averred no fraud nor warranty. *Held*, that the plea was insufficient.—*Phillips v. Bradbury*, 3 Blackf. 388.

[d] (Sup. 1836)

In assumpsit for goods sold and delivered, a general plea of fraud is good, even on special demurrer.—*Elliott v. Coggsball*, 4 Blackf. 238, 29 Am. Dec. 365.

[e] (Sup. 1842)

In assumpsit against the president and trustees of the town of Connersville, the first count relied upon a promissory note alleged to have been given for the price of a fire engine. The others were for the price of a fire engine sold and delivered. *Held*, that a plea that the engine was wholly useless and of no value whatever, wherefore the consideration had failed, was bad.—*Town of Connersville v. Wadleigh*, 6 Blackf. 297.

[f] (Sup. 1846)

In assumpsit on a promissory note, the plea was, that the note was given for a certain newspaper and printing establishment, which, the plaintiff, at the time the note was given, sold to the defendant for \$5 in hand and for \$2,000, for which last-named sum the said note and others were given, and that the plaintiff had not at the date of the note, nor had he then, any title to said property, wherefore the consideration of the note has wholly failed. *Held*, that the plea was bad.—*Conard v. Dowling*, 8 Blackf. 38.

[g] (Sup. 1852)

In debt upon a promissory note, the defendants pleaded that the plaintiff had previously purchased a printing office and fixtures of W. & B. at a specified price, and had given them a mortgage for the purchase money; that on the same day the plaintiff sold the printing office, etc., to the defendants for \$70, and took their note therefor (the note now sued on); and that the defendants were to have the privilege of purchasing the claim of W. & B. upon such terms as they could, and if they succeeded in purchasing so as to release the plaintiff from any liability to W. & B. the defendants were to have the ownership of the property upon paying the plaintiff the amount specified in the note, but, if they did not purchase, they were to pay said sum of \$70 for the use of the property a year, during which time the plaintiff agreed to assure the possession of it. The plea then averred that the defendants did purchase the claim of W. & B. and procured the plaintiff's release from all claims of W. & B. for the purchase money, whereby they became invested with the entire property in the printing office, etc., and so the consideration of said note had failed. *Held*, that the averment showed no

failure of consideration, and the plea was bad.—*Howell v. Lemon*, 3 Ind. 492.

[h] (Sup. 1856)

Where it was agreed when a note was given for the price of goods that all errors in listing might be corrected and deducted from the amount of the note, a plea in an action on the note that there were errors in the listing which would reduce the amount of the note constituted a counterclaim.—*Poag v. La Due*, 7 Ind. 675.

[i] (Sup. 1856)

Plaintiff sued defendant on a promissory note. The first paragraph of the answer alleged that the consideration was two deeds of a patent right for an improvement in force pumps, which the plaintiff warranted to be an improvement, but which was wholly worthless. The second set forth the alleged improvement and the plaintiff's warranty, and averred that it was not new and useful, and that the pump would perform as well without it as with it. The third alleged that the plaintiff falsely and fraudulently represented that the pretended invention was an improvement, and new and useful, when it was neither, but wholly worthless. The fourth averred that the specifications did not describe the pump in use so that it might be known in what the improvement consisted. The fifth alleged that plaintiff made several warranties, setting them forth, but the pump failed in every particular warranted, and was wholly useless. Plaintiff demurred to the first four paragraphs. Issue was joined on the fifth. Verdict for the plaintiff. *Held*, that the second, third, and fourth paragraphs each contained facts sufficient to bar the action.—*McClure v. Jeffrey*, 8 Ind. 79.

[j] (Sup. 1858)

Under the Code a general plea of fraud as a defense to a suit on notes given for the purchase of stock is bad. The facts must be set out.—*Keller v. Johnson*, 11 Ind. 337, 71 Am. Dec. 355.

[j] (Sup. 1859)

To rebut the inference of an implied warranty, or to show an admission of compliance, plaintiffs in an action on a note for the price set up that there was a written contract for the building, and that, after the boiler and engine were set up, defendants accepted the same, destroyed the contract, and gave the note. *Held* on demurrer that the contract, and the acts of acceptance relied on, should have been set out that the court might judge of the legal effect thereof.—*Page v. Ford*, 12 Ind. 46.

[k] (Sup. 1859)

To a plea of the statute of limitations in an action on an account for goods sold and delivered plaintiff replied that the account was between merchants, and that part was evidenced by writing. Defendant took issue generally. *Held*, that both points were open at the trial.—*Prenatt v. Runyon*, 12 Ind. 174.

[kk] (Sup. 1859)

In an action for the price of goods purchased, an answer that part of the goods were injured and of no value is bad without an allegation of fraud or warranty or that part of the goods were never received or are wanting, is bad, unless it be also alleged that this is through the fault of the plaintiff.—*Smith v. Baxter*, 13 Ind. 151.

[ll] (Sup. 1864)

An answer to an action upon a note is sufficient which alleges that the note was given in payment for the last installment on a stock of goods purchased of the plaintiff, which was represented to him at the date of purchase to be worth \$3,500, and that it would invoice that amount or more; that the defendants were ignorant of the amount and value of the stock, and requested an invoice before purchasing, but the plaintiff said he had no time to make it, but assured them that he knew the goods would amount to more than \$3,500; that the defendants purchased on this representation, but that it was false, and known to be so by the plaintiff when he made it; and that the goods in fact invoiced and amounted to but \$1,500.—*Davis v. Jackson*, 22 Ind. 233.

[ll] (Sup. 1868)

In an action on a note, an answer that it was given in payment of certain trees warranted to be in good condition, but that the same were worthless, and that the plaintiff had failed to replace them, as agreed when the note was given, sufficiently states a failure of consideration.—*Morehead v. Murray*, 31 Ind. 418.

[m] (Sup. 1871)

In a suit upon a promissory note, the defense being a failure to comply with the terms of a contract for the manufacture of certain fanning mills, in part payment of which the note was given, the replication of the plaintiff alleged that the mills were manufactured under the direction of the authorized agent of the defendant, who received and sold a number of them, and that afterwards the defendant, having seen and examined the mills, executed the note in payment. *Held*, that the facts alleged in the replication, taken altogether, showed an acceptance by the defendant of the mills in full discharge of the plaintiff's contract, and that any defects in the mills were waived.—*Hunter v. Leavitt*, 36 Ind. 141.

[mm] (Sup. 1871)

In an action by the assignee of promissory notes given for the purchase of a mill and machinery, an answer alleging that the payee of the note falsely and knowingly represented the machinery to be in good condition for the running of the mill, which was relied on by defendants, when in fact it was worthless, but which could not be discovered by ordinary diligence, and that defendants were required to expend large sums in repairs on account of such defects, sets up a good defense.—*Frenzel v. Miller*, 37 Ind. 1, 10 Am. Rep. 62.

[n] (Sup. 1872)

In a suit upon a promissory note given for a patent right, when the maker of the note depends on the ground of fraud in the sale of the patent, and he does not allege in his answer that he has made no profits out of its use or sale, or an offer to reconvey the right within a reasonable time after discovering the fraud, the answer is bad.—*Rose v. Hurley*, 39 Ind. 77.

[nn] (Sup. 1874)

To an action on a note an answer that the note was given for a stock of goods bought of the plaintiff, and that numerous articles mentioned in the invoice were not in the possession of the plaintiff at the time the invoice was made, and have never been delivered to the defendant, presents no defense in whole or in part.—*Bacon v. Markley*, 46 Ind. 116.

[o] (Sup. 1874)

To a suit upon a note for \$355, and answer alleging that it was given in part payment for a saw and sawmill, represented to be sound and perfect, and claiming a failure of consideration on account of a latent defect in pulley tighteners, of the value of \$15, causing them to break, and, by breaking, to destroy and injure other parts of the machinery, to the value of \$385, but not showing that the pulley tighteners were a part of the mill purchased, and that they broke and caused the injury complained of without the fault of the defendant was *held* bad.—*Lane v. Whitehouse*, 46 Ind. 389.

[oo] (Sup. 1874)

To an action by A. against B. on a promissory note, the defendant answered that the note was given for a mortgage on a steam sawmill, executed by one H., who then had a suit pending against B., and that A., to induce B. to execute the note, represented to him that the mortgage was valid, and could be used by him as a set-off in said pending suit, upon which representations, believing them to be true, B. purchased the mortgage and gave therefor the note, but that the mortgage was not a valid mortgage, and B. could not use it as a set-off in said action of H. *Held*, that the answer was bad, if for no other reason, because it failed to state why the mortgage was invalid, or why B. could not use it as a set-off.—*Patterson v. Lord*, 47 Ind. 203.

[p] (Sup. 1875)

In a suit on a promissory note, an answer alleged that the note was given as part consideration for the purchase by defendant from plaintiff of a saw and planing mill, and that at the time of said sale the plaintiff falsely and fraudulently represented to the defendant that "said machinery" was in complete order in every particular, and in good condition, but, on the contrary, the same was in bad order and condition, and in bad repair, and worn out and worthless. *Held* bad, because it does not show that the machinery belonged to the mill, nor that defendant relied on the representations.—*Jones v. Frost*, 51 Ind. 69.

[pp] (Sup. 1877)

In an action by an assignee against the maker on a promissory note payable in bank, the defendant answered, alleging fraud and collusion by the payee and assignee in procuring the execution of the note, and averring that the consideration therefor was a "pretended assignment" by the payee to the maker of a certain patent on an article of no utility whatever. *Held*, on demurrer, that the answer was insufficient. It should have contained either an offer by defendant to return the consideration and all profits received therefrom, or an averment that the consideration was of no value and had yielded no profits. Averring that the article patented was of "no utility" is not equivalent to an averment that it had "no value."—*Burns v. Barnes*, 58 Ind. 436.

[q] (Sup. 1878)

In an action on a promissory note by payee against maker, given for the price of a sewing machine, an answer averring that the payee's agent had falsely represented that the machine was "a good machine and would work all right," was insufficient as an answer of fraud, without averring that he knew his representations were false and fraudulent.—*Shook v. Singer Mfg. Co.*, 61 Ind. 520.

[qq] (Sup. 1878)

An answer by one sued on a note for the purchase price of a horse, that the horse was of no value, is not a good defense in the absence of any further averment of fraud, warranty, or any fault on the part of the seller.—*Myers v. Conway*, 62 Ind. 474.

[r] (Sup. 1880)

In the absence of a showing of materiality, a false representation by the vendor of the right to sell a machine that it could be bought at a certain place at a certain price does not amount to fraud; and an answer to an action on a note for the purchase price that the machine could not be purchased at the place named for the price represented, without any allegation of injury flowing from the falsity of the statement, as that the machines could not have been purchased for even a less price and at a more convenient place, is demurrable.—*Neidefer v. Chastain*, 71 Ind. 363, 36 Am. Rep. 198.

In an action on a note given for the purchase price of the right to sell a certain machine, an allegation in the answer that the machine failed to perform as the vendor represented, and that it was utterly worthless for the purpose for which the same was purchased, is not equivalent to an averment that the machine was worthless for all purposes.—*Id.*

[rr] (Sup. 1885)

In an action for the price of a harvesting machine, an answer setting up as imperfections the heavy draught and the great weight on the horses was sufficient, without showing what defect in construction caused these results.—*McCormick Harvesting Mach. Co. v. Gray*, 100 Ind. 285.

[s] (Sup. 1885)

In a suit on a contract for a windmill, which contract read: "If it does not work well for 60 days after erection, the vendee is to notify the vendor and give him 90 days after such notice in which to remedy the defect." And also: "After 90 days, if the mill suits J. M. C., he agrees to settle on the conditions named in the written order"—the answer which says the mill did not work well is not an allegation of any defect in the mill, and is not a good answer.—*Flint v. Cook*, 102 Ind. 391, 1 N. E. 633.

In defense of an action for the price of a windmill put up on defendant's premises, under a contract according to which plaintiff was bound to furnish and erect the same so that defendant could use it for the purpose intended, and, upon notice within the time limited that it failed to perform as designed, cause it to work satisfactorily or take it away, it is not enough for the defendant to aver that the agent of plaintiff "wholly failed to cause the same to work sixty days or any other period, or to work at all." There must be an averment of failure of the mill to work on account of a defect in itself.—*Id.*

[ss] (Sup. 1889)

A pleading, in a suit on notes given for the purchase price of certain machinery, which alleges that the sellers of the machinery, being experts, falsely, and with intent to deceive, represented that the machinery, when properly adjusted, would have the capacity of doing certain work, without alleging that the sellers knew, or had reason to believe, that the representation was untrue, is not sufficient to show fraud.—*Conant v. National State Bank*, 121 Ind. 323, 22 N. E. 250.

[t] (App. 1891)

In an action on a note given for the purchase price of a horse, answer alleging that the horse was worthless for the buyer's use was not equivalent to an allegation that the horse was worthless.—*Postel v. Oard*, 27 N. E. 584, 1 Ind. App. 252.

[tt] (App. 1894)

Where, in an action for the purchase price of machinery, the defense was breach of warranty creating a failure of consideration, it was not necessary that the answer should point out the particular defects in the machine.—*Ohio Thresher & Engine Co. v. Hensel*, 36 N. E. 716, 9 Ind. App. 328.

In an action on notes for the price of a machine, defendant answered that plaintiff promised to take back the machine and cancel the notes, should the machine fail to fulfill its warranty; that it did so fail, and was quite worthless; that defendant offered to return it, and demanded cancellation of his notes, but the seller refused to receive it. *Held* a good answer on the theory of rescission.—*Id.*

[u] (App. 1894)

In an action for the price of a machine sold, a breach set up in the answer alleging in

general terms only that the machine would not do good work, and was wholly unfit for the work it was designed to do, is insufficient by reason of its indefiniteness and generality.—*Walter A. Wood Mowing & Reaping Mach. Co. v. Irons*, 10 Ind. App. 454, 36 N. E. 862, 37 N. E. 1046.

[uu] (App. 1897)

In an action to recover the price of a motor, an answer alleging that the machine was sold to defendant for the special purpose of operating a feed cutter, but that, after it was erected, and after a fair and thorough trial, it wholly failed to fulfill such purpose; that plaintiff's agent was unable to make it perform the expected work, and was informed that it was not accepted; and that said motor was of no value whatever, etc.—without specifying any defect therein, or averring in what manner it failed to work, is insufficient.—*Aermotor Co. v. Earl*, 47 N. E. 685, 18 Ind. App. 181.

[v] (Sup. 1899)

In an action on a purchase-money note and a chattel mortgage, defendant alleged that he was induced to buy through fraud; that, soon after discovering the fraud, he returned the property, informing plaintiff that it was not as represented; that plaintiff directed him to leave the property, which he did; but that plaintiff refused to surrender the note and mortgage. *Held*, that a reply was merely an argumentative denial, which alleged that, while defendant had the property, he misused it, damaging it in a certain sum; that he returned the property, and left it on plaintiff's premises without her knowledge or consent; and that plaintiff did not accept it.—*Magnuson v. Billings*, 52 N. E. 803, 152 Ind. 177.

[vv] (App. 1900)

A special answer, in an action for goods sold and delivered, alleging that it was agreed that defendant might reject inferior goods and hold them subject to plaintiff's order; that inferior goods were delivered; that plaintiff was promptly informed by defendant that he had rejected them, and was asked to instruct what disposition he desired to be made of them; and that plaintiff refused to receive them back, or to substitute acceptable goods—is good as against a demurrer for want of facts.—*Tecumseh Facing Mills v. Sweet*, 58 N. E. 93, 25 Ind. App. 284.

Where a vendee, in an action against him for the price of the goods sold, answered that he bought them under an agreement by which he had a right to return goods as not being equal to sample, and that on receiving the goods in question he notified the vendor that he would not accept them and asked what disposition he should make of them, and that the vendor refused to receive back such worthless goods so rejected or to substitute acceptable goods therefor, the facts pleaded did not bring the case within the rule that, when goods are accepted or kept by the vendee in his posses-

sion, there is a presumption that they were of the kind bought and satisfied the contract.—*Id.*

[w] (App. 1901)

An answer to an action on a purchase-money note given for a certain machine which alleges that the machine was totally unfit for the purposes for which it was to be used, and would not do the work, and that the consideration of the note had failed for that reason, is insufficient to raise the defense of failure of consideration.—*Woodruff v. Hensley*, 60 N. E. 312, 26 Ind. App. 592.

[ww] (Sup. 1902)

A plea of whole or partial failure of consideration must state facts showing such failure, though a general plea of no consideration may allege such facts in general terms.—*D. M. Osborne & Co. v. Hanlin*, 63 N. E. 572, 158 Ind. 325.

A plea in an action on notes given for farm machinery alleged in its introductory part that plaintiff ought not to maintain the action because defendant, before their execution, had purchased the machinery of plaintiff, under an agreement by which he was not to pay therefor unless the machinery worked right. It was further alleged that defendant gave the machinery a trial, and that it would not work properly; but it was not alleged that it was properly tested, or that its failure to operate was due to defects. The plea further stated that thereafter the notes were executed under an agreement that defendant would not have to pay for the notes till the machinery did good work, and a similar agreement was alleged as occurring some three years later. *Held*, that the answer could only be construed to raise the defense that the notes were not to be paid till the machinery was made to work properly, and not as showing a breach of warranty, and was insufficient as a plea in bar, and demurrable, as an answer in bar must answer all that it assumes to answer, in the introductory part, in order to withstand a demurrer.—*Id.*

[x] (Sup. 1903)

Where, in an action on a note for the price of a windmill, the answer alleged a warranty with respect to its operation and a breach thereof, and that defendant had requested plaintiff to remove the machine on the ground that it was entirely worthless, and offered to permit plaintiff to remove the same, and requested that he do so, the answer sufficiently alleged a total failure of consideration for the note to withstand a demurrer.—*Smith v. Borden*, 66 N. E. 681, 160 Ind. 223.

[xx] (Sup. 1905)

The counterclaim to a complaint for the balance of the price of 324 bushels of wheat sold and delivered, alleging a contract for the sale by plaintiff of 600 bushels at a certain price, on which a certain amount had been paid, and that only a certain amount of the wheat had been delivered, and that, by reason of plaintiff's failure to deliver the remainder, defend-

ants had been damaged in a certain amount, and demanding judgment, is insufficient; it not alleging facts sufficient to constitute a cause of action against plaintiff.—*Stoner v. Swift*, 74 N. E. 248, 164 Ind. 652.

[y] (Sup. 1906)

In an action to recover for goods sold, the complaint alleged that defendant directed plaintiff to ship him the goods described, that plaintiff accepted the order and shipped the goods, and that the price remains unpaid. An exhibit filed contained a guaranty as to the quality of the goods. *Held*, that an answer alleging that the goods shipped under the contract were at the time of shipment, and have been at all times, wholly worthless, and that defendant refuses to accept them, is sufficient.—*Price v. Huddleston*, 167 Ind. 536, 79 N. E. 496.

In an action to recover for goods sold under a contract set out defendant alleged that through the fraud of plaintiffs' agent who secured the order the contract was substituted for an order for the goods which defendant thought he was signing. *Held*, that the answer states a good defense.—*Id.*

[yy] (App. 1907)

A paragraph of an answer, in an action for the price of a channeling machine sold under a written contract, which did not deny the execution of the contract by defendants and its fulfillment by plaintiff, but set up an entirely different contract, and in no way referred to the contract sued on, but averred that under the contract set up in the paragraph plaintiff placed in defendants' quarry a worthless machine, which defendants refused to receive, but which did not aver that the worthless machine was the same machine for which plaintiff sued, and did not aver that the contract set up therein was the only contract for a channeling machine, was demurrable.—*Sullivan Machinery Co. v. Breeden*, 40 Ind. App. 631, 82 N. E. 107.

[z] (App. 1908)

In an action for the price of an article sold, an answer alleging that on a specified date defendant returned the article to plaintiff in rescission of the contract, and that it was accepted and retained by plaintiff, is a sufficient pleading of rescission.—*National Cash Register Co. v. Price*, 41 Ind. App. 274, 83 N. E. 776.

[zz] (App. 1909)

A plea that defendant was induced to purchase the piano sued for by false representations as to its quality and market value, that he learned of the falsity of the representations a few days after delivery of the piano, when he notified plaintiff that it was subject to its order, was fatally defective as a plea of rescission for failure to allege an offer to return or that the piano was of no value.—*Wulschner-Stewart Music Co. v. Hubbard*, 89 N. E. 794.

The plea was insufficient as a plea of fraud for failure to show that defendant was injured.—*Id.*

In an action for the price of a piano, a cross-complaint, alleging that defendant was induced to purchase the piano by false and fraudulent representations, by reason of which he was alleged to have been damaged in the sum of \$600, was fatally defective for failure to show the value of the instrument purchased.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1005-1024.

See, also, 35 Cyc. pp. 553-558.

§ 355. — Issues, proof, and variance.

[a] (Sup. 1824)

Proof that the plaintiff had consigned goods to the defendant for sale, and that part of them had been sold by the defendant, does not support a count for goods sold and delivered.—*Colman v. Price*, 1 Blackf. 303.

[b] (Sup. 1844)

In an action for the price of goods sold with a warranty, fraud in the sale is a good defense under the general issue, though there may have been no violation of the warranty.—*Town of Connersville v. Wadleigh*, 7 Blackf. 102, 41 Am. Dec. 214.

[c] (Sup. 1844)

In assumpsit for goods sold and delivered, the plea was payment, alleging that plaintiff was indebted to defendant in a certain sum of money had and received. The replication was in denial of the plea. *Held*, that a note given by plaintiff to a third person, and indorsed to defendant before the suit was commenced, might be read in evidence by defendant under the plea.—*Usher v. Stewart*, 7 Blackf. 310.

[d] (Sup. 1865)

In a complaint for personal property sold and delivered, an averment that the plaintiff sold a greater interest than he did in fact dispose of does not, under the issue raised by a general denial, prevent his recovering the value of the interest the defendant purchased from him.—*Vanaukin v. Smith*, 25 Ind. 249.

[e] (Sup. 1871)

Evidence that the seller converted a portion of the property sold to his own use, thus reducing the quantity realized by the buyer, cannot be received under an answer alleging that he falsely represented the quantity and quality.—*Brooker v. Hetzelgesser*, 35 Ind. 537.

[f] (App. 1891)

Where, in an action for lumber sold, the only question was as to whether the alleged agent of the purchaser was in fact his agent, evidence as to the quantity or value of the lumber was properly excluded.—*Lauter v. Simpson*, 2 Ind. App. 293, 28 N. E. 324.

Nor will the fact that the agent testified as to the value of the lumber change the rule, when his testimony was introduced without objection.—*Id.*

[g] (Sup. 1894)

In an action on a purchase-price note, fraud in the sale cannot be shown under plea of breach of warranty.—*Shirk v. Mitchell*, 36 N. E. 850, 137 Ind. 185.

[h] (App. 1895)

Where one liable under an implied contract for the value of property taken agrees with the owner that nothing shall be paid for the property, such agreement is not admissible under a general denial in an action for the value of the property.—*Crum v. Yundt*, 40 N. E. 79, 12 Ind. App. 308.

[i] (App. 1900)

Where plaintiff sued for the price of wheat alleged to have been sold and delivered to defendants, and the undisputed evidence showed that the wheat was delivered to defendants only for storage, it was error to render judgment for plaintiff.—*Barrows v. Wampler*, 56 N. E. 935, 24 Ind. App. 472.

[j] (App. 1909)

A complaint that plaintiff sold defendant gravel taken by defendant, and that defendant agreed to pay him therefor what it was reasonably worth, charges an express and not a special contract, and hence plaintiff may recover on proof of an implied contract.—*Indianapolis Coal Traction Co. v. Dalton*, 43 Ind. App. 330, 87 N. E. 552.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1025-1043.

See, also, 35 Cyc. pp. 559-562.

§ 356. Evidence.

Admissions, as evidence, see EVIDENCE, § 215.

As to delivery and acceptance of goods, see ante, § 181.

As to existence and validity of contracts, see ante, § 52.

Limitation of cross-examination to subjects of direct examination, see WITNESSES, § 269.

Scope of cross-examination, see WITNESSES, § 268.

To aid construction of contract, see ante, § 87.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1044-1059.

See, also, 35 Cyc. pp. 564-573.

§ 358. — Admissibility.

Admissions as evidence, see EVIDENCE, § 208.

Evidence admissible by reason of admission of similar evidence, see EVIDENCE, § 155.

Expert testimony, see EVIDENCE, §§ 516, 542.

Parol evidence to construe contract, see EVIDENCE, § 450.

Proof and effect of admissions, see EVIDENCE, § 263.

[a] (Sup. 1861)

Where one seeks to recover the contract price of corn, he cannot prove the price of the corn at the time of the commencement of the suit, being one year after the date of the sale.—*Vickery v. Evans*, 16 Ind. 331.

[b] (Sup. 1884)

In an action against defendant for necessities furnished to his family, where it was in issue whether or not defendant when the suit was brought was about to leave the state, taking with him property subject to execution, it was proper to question plaintiff as a witness as to how much property defendant had.—*Orr v. Miller*, 98 Ind. 436.

[c] (Sup. 1885)

In an action for the price of potatoes, it was not error to exclude the proceedings and report of the committee of a grocers' association, as the parties could not be affected by what third persons did in an association organized for the purpose of settling mercantile disputes.—*Sohn v. Jervis*, 1 N. E. 73, 101 Ind. 578.

[d] (App. 1894)

Evidence that other price lists, received by the buyer from various people, were accurate statements of the market value of lumber, was inadmissible.—*Deither v. Ferguson Lumber Co.*, 9 Ind. App. 173, 35 N. E. 843, 36 N. E. 765.

It was proper to show whether the lumber was scarce or plentiful, as affecting its market value.—*Id.*

[e] (App. 1900)

In an action for goods furnished after defendant had sold his store, alleged to have been sold to defendant, it was not error to exclude evidence of the publication of a notice of the sale of the store in a newspaper in the town where the store was located, without an offer to show that the publication was material, or that plaintiff had seen or had had opportunity to see such notice; since such publication in itself was no notice.—*Haas v. C. B. Cones & Son Mfg. Co.*, 58 N. E. 499, 25 Ind. App. 469.

[f] (App. 1904)

In an action for the price of railroad ties defendant's witness testified that he bought ties from other people, and inspected them before he bought, as he did with plaintiff. He was then asked, "That was the custom, was it not?" *Held*, that his answer thereto was properly stricken out, his custom in the matter not being material.—*T. J. Moss Tie Co. v. Huff*, 70 N. E. 86, 32 Ind. App. 466.

The defendant asked its witness, a practical tie man, to state whether it would have been possible, from the time he (the witness) took charge of the work until the expiration of the contract, to get off the ties. The question was urged as proper because plaintiff asked a commission, because he claimed he would have got the ties off, whereas defendant claimed that plaintiff had delayed until it found it necessary to send the witness to take charge of the work. *Held*, that an objection to the question was properly sustained.—*Id.*

[g] (Sup. 1904)

Where a street paving contractor purchased paving bricks according to samples, the buyer's paving contract with the city, and the bond accompanying it, were inadmissible in an action for the price of the brick.—*O'Brien v. Higley*, 70 N. E. 242, 162 Ind. 316.

Where a written contract for the sale of bricks contained a stipulation that the buyer should give a good and sufficient bond, or other security, for the payment of all sums due on account of the sale, and the buyer consented to such condition, evidence that the seller, before entering into the contract, had agreed to accept the buyer's contract with the city for the paving of a street, and his bond executed therefor, as sufficient security, was immaterial.—*Id.*

In an action for the price of bricks sold, the bills of lading for the cars on which the bricks were delivered were admissible in evidence.—*Id.*

[h] (App. 1908)

Where, in an action for lumber alleged to have been sold by plaintiff to defendant, the answer alleged that the lumber furnished was not of the kind, quality, description, or dimensions agreed on in the contract, and that by reason thereof defendant refused to measure and accept the same, the exclusion of testimony of an expert as to the grade, quality, value, and dimensions of the lumber based on his observation thereof, made about a year after it had been bulked down, was erroneous.—*Fletcher v. Southern*, 41 Ind. App. 550, 84 N. E. 526.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1049-1055.

See, also, 35 Cyc. pp. 566-571.

§ 359. — Weight and sufficiency.

[a] (Sup. 1878)

Where a counterclaim alleges the furnishing of an inferior article to that contracted for and payment for the article furnished, it cannot be inferred, in the absence of averment, that the payment was more than the fair value of the article furnished.—*Hadley v. Prather*, 64 Ind. 137.

[b] (App. 1898)

In an action on two notes given for the purchase price of a gas engine, part payment of which has been made, the fact that the purchaser, who refuses to pay the balance, on the ground that it was not up to warranty, or worth more than had already been paid, mortgaged it, with other articles, does not tend to show that he valued it at the full purchase price, there being no representation in the mortgage as to the value of any of the articles.—*Thomas Kane & Co. v. Sefrit*, 51 N. E. 496, 21 Ind. App. 74.

[c] (Sup. 1906)

Evidence, in an action to recover for goods sold, held insufficient to sustain a defense that

the contract sued on was obtained by fraud.—*Price v. Huddleston*, 167 Ind. 536, 79 N. E. 496.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1056-1059.

See, also, 35 Cyc. pp. 571-573.

§ 361. Trial.

Grounds for new trial, see NEW TRIAL, §§ 90, 102.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1063-1077.

See, also, 35 Cyc. pp. 574-576.

§ 364. — Instructions.

Instructions excluding or ignoring issues, defenses or evidence, see TRIAL, § 253.

[a] (Sup. 1884)

In an action on an account for logs sold and delivered, where there was evidence that a portion of the lumber made from the logs was not merchantable, but there was no evidence as to the actual value of such portions of the lumber or of the logs from which it was manufactured, it was not erroneous to instruct that, under such a contract, all the logs that were taken by defendants and the lumber used by them would be regarded to have been merchantable lumber, and defendants would be liable to pay for all such so appropriated by them at the contract price.—*Hege v. Newsom*, 96 Ind. 426.

[b] (App. 1895)

An instruction that, if the vendee accepted any portion of the goods by paying the freight and taking them out of the freight office and into his possession by directing what should be done with them, he thereby waived any defect as to the number and quantity and was liable for that portion of the goods so accepted by him, was modified by adding the further condition that, if a vendee exercised acts of ownership over such goods, he will be liable for them. *Held* no error, for whether the acts of the vendee were acts of ownership was for the jury.—*J. A. Coats & Sons v. Huffine*, 13 Ind. App. 182, 41 N. E. 465.

[c] (App. 1906)

Where, in an action for the price of certain windmill machinery, plaintiff's agent testified that he agreed that, if the mill was not equal to the best, plaintiff would take it down and take it away at his own expense, and defendant testified that the agent was to put the mill up on 60 days' trial, and if at the expiration of that time defendant was not satisfied with it plaintiff was to remove it at his own expense, and there was no other evidence on the issue as to whose duty it was to return the mill in case it was unsatisfactory, it was proper for the court to refuse to charge that it was the duty of the buyer to return the mill within a reasonable time if it was not satisfactory.—*Allyn v. Burns*, 76 N. E. 636, 37 Ind. App. 223.

Where, in an action for the price of a wind-mill and pump, the charge clearly informed the jury as to the legal effect of defendant's use of the machinery after the time provided by the contract for trial, as well as the effect of an acceptance of the mill, and left the fact to the jury, it could not have been misled by instructions which did not submit to their consideration the inference which might be drawn from defendant's exercise of dominion over the mill and pump inconsistent with ownership in the plaintiff, and consistent only with title in defendant, after the expiration of the period prescribed for trial.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1065-1076.

See, also, 35 Cyc. p. 576.

§ 365. — Verdict and findings.

Conformity of findings and conclusions of court to pleadings, issues and proofs, see TRIAL, § 300.

Failure of court to find on particular questions, see TRIAL, § 397.

Sufficiency of special findings in general, see TRIAL, § 355.

[a] (Sup. 1890)

It was agreed that the buyer of chattels should give to the seller, upon delivery of the goods, notes of solvent persons in payment therefor. A certain note was so given, but was not such as the contract called for; and the vendor, through his agent, offered to return the note to the vendee and demanded of him other good notes. In a suit by the vendor against the vendee, the plaintiff brought the note into court, and offered to return it to defendant. *Held*, that a finding for the plaintiff in a certain sum, and that defendant be entitled to withdraw the note from the files of the court and hold it as his own, was correct.—*Kinney v. Blythe*, 31 Ind. 140.

[b] (Sup. 1888)

In an action for goods sold and delivered, where defendant set up breach of warranty as to quality, and that he was compelled to furnish other goods to his customers in their stead, the jury rendered a general verdict for plaintiffs for \$183, and, in answer to special interrogatories, valued the goods, had they been as warranted, at \$275, and the damage to defendant, by having to replace goods sold at \$92. *Held*, that plaintiffs were not entitled, upon the answers, to a judgment for \$275; the special findings not being inconsistent with the general verdict.—*Blacker v. Slown*, 114 Ind. 322, 16 N. E. 621.

[c] (App. 1892)

Plaintiff contracted to sell defendants a clover huller, with a clause of warranty, the rights under which were to be waived if the defendants made no settlement on delivery of the machine. The jury found specially that the machine was delivered to defendants without

any settlement by them; that there was an express waiver of the stipulations of the warranty clause by the agent delivering it; that the machine was returned; and that plaintiff's agent had no authority to allow defendants to take possession of the machine without full compliance with the contract. The general verdict was for defendants. *Held*, that there was no antagonism between the general verdict and the answers to interrogatories, since, from the facts of the case, plaintiff's agent may have been a general agent to sell such machines, and since it was nowhere found that defendants had any notice of any limitation of the agent's authority.—*Gaar Scott & Co. v. Rose*, 3 Ind. App. 269, 29 N. E. 616.

[d] (App. 1893)

In an action for goods sold, special findings that the goods were not as bargained for; that defendant paid by check a certain sum; that defendant was asserting part of the goods to be inferior in quality, and disputing his liability for the rest of the contract price; that the check sent was not accepted by plaintiff in full payment,—are not inconsistent with a general verdict for plaintiff.—*Pottlitzer v. Wesson*, 8 Ind. App. 472, 35 N. E. 1030.

[e] (App. 1899)

In an action for goods sold, a general verdict was returned for defendant, with answers to interrogatories, finding that defendant did not order the goods shipped, and that plaintiff, in pursuance of the order, shipped the goods, and delivered the same to defendant, and that defendant unloaded the same from the car, and sold some of them, and that there was no evidence as to the value. It did not appear that any price was agreed upon, or that any account was rendered to defendant, or that the goods had ever been accepted. *Held*, that a motion for judgment for plaintiff notwithstanding the verdict was properly denied.—*Gates Lumber Co. v. Todd*, 33 N. E. 385, 22 Ind. App. 148.

[f] (App. 1901)

In an action on account for goods sold to the firm of A. & B., defenses were set up by A. that the debt was paid, and also that plaintiff had released A. from liability, and accepted B. in his stead. There was a general verdict against B. and in favor of A. There was also a special finding that the indebtedness of the firm was fully paid before the action was instituted. *Held*, that, while such findings might be inconsistent with other findings and with the general verdict against B., who did not appeal, it would not have been consistent with such finding to render judgment against A., and not being irreconcilable with the general verdict in his favor, the judgment would not be reversed.—*Jones v. Austin*, 59 N. E. 1082, 26 Ind. App. 399.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 1077.

See, also, 35 Cyc. p. 578.

§ 366. Judgment and execution.

Conformity to verdict and findings, see JUDGMENT, § 256.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 1078.

See, also, 35 Cyc. p. 579.

(F) ACTIONS FOR DAMAGES.**§ 369. Nature and form.**

[a] (App. 1908)

The suit is on an executed contract for money due thereon, and not for damages for breach thereof; the complaint setting out an order by defendant to plaintiff for books on specified terms, alleging plaintiff's delivery of the books to defendant, and performance by plaintiff of all the stipulations of the alleged contract, and defendant's refusal to accept the books, and pay therefor, and demanding judgment for the price.—Rouse v. Rose, 41 Ind. App. 308, 83 N. E. 253.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1083, 1084.

See, also, 35 Cyc. p. 583.

§ 370. Right of action.

[a] (Sup. 1864)

When a part owner of a steamboat sells his interest in it to another part owner, subject to the indebtedness of the boat, in consideration of a sum of money and an agreement by the vendee to indemnify him for all payments and expenses on account of said indebtedness, the vendor can maintain a personal action against the vendee for a failure to fulfill said agreement of indemnification.—McMahan v. Stewart, 23 Ind. 590.

[b] (Sup. 1878)

Where anything remains to be done in order to transfer the title to personal property, though the seller cannot sue for the price, he may maintain an action for a breach of the contract, provided such thing remains undone through the fault of the buyer.—Indianapolis, P. & C. Ry. Co. v. McGuire, 62 Ind. 140.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 1085.

See, also, 35 Cyc. p. 583.

§ 371. Conditions precedent.

[a] (Sup. 1860)

Where, on failure of the buyer to accept the goods, the seller resells them at public auction, the fact that the auction sale was a sham does not preclude the seller from a recovery for breach of the contract.—Barbee v. Laws, 15 Ind. 109.

[b] (Super. 1873)

On a contract of purchase, neither party can maintain a suit for nonperformance without having first performed or offered to perform his

part of the agreement.—Campbell v. Miller, Wils. 412.

[c] (Sup. 1882)

Where a contract for the sale of ice provided that it should be delivered "as required," and the buyer failed to give orders for the delivery of part of it, the seller, in a suit for breach of the contract, was only required to allege that he had at all times been ready and willing to perform, and was not required to allege that he had tendered the ice.—Schreiber v. Butler, 84 Ind. 576.

[d] (Sup. 1886)

An action for damages for failure to execute a note for the purchase of goods according to agreement cannot be maintained where the plaintiff retains another note for the full price, which is not shown to be worthless.—Carnahan v. Hughes, 108 Ind. 225, 9 N. E. 79.

[e] (App. 1900)

Where a purchaser contracted to take a certain amount of ice each month, at a stipulated price, and bound the seller not to sell to any other person, the seller cannot recover damages for the buyer's refusal to take the specified amount, when he neither tendered it, nor attempted to dispose of it at the market price.—Gardner v. Caylor, 36 N. E. 134, 24 Ind. App. 521.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1086-1088.

See, also, 35 Cyc. p. 584.

§ 372. Defenses.

[a] (App. 1895)

In an action for the breach of a contract to purchase corn, the fact that plaintiff was not the sole owner of the corn is no defense, where it appears that he was willing and able to deliver the same.—Rhea v. Crunk, 12 Ind. App. 23, 39 N. E. 879.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 1089.

See, also, 35 Cyc. p. 585.

§ 374. Time to sue and limitations.

[a] (Sup. 1886)

Where a purchaser of goods refuses on their delivery to execute a note in payment, in violation of the contract of sale, the seller can sue immediately as for breach of contract.—Carnahan v. Hughes, 108 Ind. 225, 9 N. E. 79.

[b] (App. 1901)

Where property is sold on credit, and the purchaser fails to give security as agreed, the seller may sue before the expiration of the credit period, on the breach of the agreement, for damages equal to the value of the security had it been given.—Orr v. Leathers, 61 N. E. 941, 27 Ind. App. 572.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 1091.

See, also, 35 Cyc. p. 586.

§ 376. Flooding.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1092-1094.

See, also, 35 Cyc. pp. 586-588.

§ 377. — Declaration, complaint, or petition.

[a] (Sup. 1857)

Where a party agrees to deliver property on a day and at a place named in the contract of sale, he cannot maintain an action on the contract without alleging and proving his readiness at the time and place to deliver the property to the vendee.—*Johnson v. Powell*, 9 Ind. 566.

[b] (Sup. 1866)

In an action on a contract for the sale of goods, although not reduced to writing, which has been rendered valid by a part payment or by delivery, the complaint will be sustained on demurrer, notwithstanding it does not aver that the contract was reduced to writing.—*Harper v. Miller*, 27 Ind. 277.

[c] (Sup. 1872)

In an action by the seller for damages for a breach of contract for the purchase of a certain number of hogs, at a specified price, of a minimum weight, at a fixed time and place, where the complaint alleged that the plaintiff had the hogs at the place and time fixed, ready for delivery, and the defendant failed and refused to receive and pay for them, after verdict and judgment for the plaintiff, it was not necessary to further aver that the hogs were weighed and set apart for the defendant.—*Dawson v. Byard*, 41 Ind. 165.

[d] (Sup. 1873)

One paragraph of the complaint averred that the plaintiff contracted and agreed with the defendant to sell him certain shares of stock, etc., and the defendant in consideration therefor undertook and expressly agreed with the plaintiff to pay him, etc., and that the plaintiff offered to execute and perform said contract, and to transfer said stock, and had been ready and willing at all times to perform said contract, but the defendant failed and refused, etc. Another paragraph varied the averment thus: "And the plaintiff then and there delivered to defendant the certificate of stock held and owned by him for said two shares of stock, which defendant accepted, and the plaintiff then and there offered to transfer the said shares of stock to defendant, and defendant refused to pay," etc. *Held*, that each paragraph alleged a complete agreement to sell by the plaintiff and to pay by the defendant; that the two minds met; and that the contract was not nude, for the agreement of the one was the consideration for the agreement of the other.—*Bruce v. Smith*, 44 Ind. 1.

[e] (Sup. 1876)

Where sale is made of a certain amount of unidentified personal property, to be of a specified kind and quality, an averment of the tender

of such amount, kind, and quality to defendant by plaintiff, in an action for breach of such contract of sale, is sufficient.—*Newby v. Rogers*, 54 Ind. 193.

[f] (Sup. 1876)

By the terms of a written contract one party thereto bound himself to deliver to the other a specified amount of a certain kind of chattels, at a place therein designated, "at the option of the" latter, "at any time" during a specified period. *Held*, in a suit by the former against the latter for a breach of such contract, that it was sufficient for the former to aver in his complaint that during all of such period he had had the amount and kind of chattels agreed upon in his possession ready for delivery, but that, though the latter had notice thereof, he never notified the former to deliver the same, whereupon, after the expiration of such period, he sold the same to a third person, to his damage.—*Posey v. Scales*, 55 Ind. 282.

[g] (Sup. 1881)

The averment of an offer to perform is a material and necessary averment in an action by the seller for breach of contract to purchase goods.—*Fell v. Muller*, 78 Ind. 507.

[h] (Sup. 1882)

Defendant agreed to purchase of plaintiff a certain quantity of ice during the season of 1880. In an action on the contract, plaintiff alleged that he was ready to comply therewith, but defendant had ordered only one-third of the specified quantity, and refused to order the balance, and that the season of 1880 had expired. *Held*, that plaintiff need not allege demand of performance of defendant.—*Schreiber v. Butler*, 84 Ind. 576.

Where a contract provided for the sale of 30 cars of ice by plaintiff to defendant, a complaint for breach by defendant alleging that he failed to order 20 car loads, whereby plaintiff had been left with 260 tons of ice which he had been unable to sell and was thus damaged in a certain sum, was sufficient as to its allegations of the quantity of ice lost and the damages suffered by plaintiff, and allegations as to precisely when the breach occurred, as to the price of ice at that time, were unnecessary, in the absence of any motion to make more definite and certain.—*Id.*

In an action for failure of defendant to accept ice pursuant to a contract of sale, allegations in the complaint that defendant had failed and refused to take the ice during the period fixed by the contract for its delivery were sufficient to show that the cause of action had accrued at the time the action was brought.—*Id.*

[i] (Sup. 1884)

A complaint in an action for breach of contract stipulating for the purchase of a monument for a specified sum on delivery thereof, which alleges that the seller on receiving the monument to be manufactured by him notified the buyer and informed her that he was ready

to put it up, but which does not allege that he tendered the property to the buyer at the place appointed for delivery, or that it was impossible for him to make the tender or that he was prevented by the buyer from making the tender, states a cause of action for the difference between contract price of the monument and its market price.—*Dwiggins v. Clark*, 94 Ind. 49, 48 Am. Rep. 140.

[J] (App. 1896)

The complaint for breach of a contract to purchase bark the title to which has never passed to the purchaser must allege the market price at the time and place of delivery.—*Ridgley v. Mooney*, 45 N. E. 348, 16 Ind. App. 362.

[K] (App. 1899)

A complaint by a seller for damages for a breach by the buyer is sufficient, if the breach is alleged generally.—*Vice v. Brown*, 53 N. E. 776, 22 Ind. App. 345.

[I] (App. 1909)

A complaint for breach of a contract to purchase staves, averring that the manufacturers have fully performed, and have been at all times ready, willing, and able to perform, and were at all times, and remained up to the bringing of the action, ready, able, and willing to deliver the staves, and that they were prevented from so doing by the buyer, in that he failed and neglected to accept the same, sufficiently avers performance of the contract by the manufacturers, under *Burns' Ann. St.* 1908, § 376, providing that, in pleading performance of a condition precedent in a contract, it shall be sufficient to allege generally that a party has performed.—*Jennings v. Shertz*, 88 N. E. 729.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 1092.

See, also, 35 Cyc. p. 588.

§ 378. — Plea or answer, and subsequent pleadings.

[a] (Sup. 1880)

In an action against a widow for breach of contract to accept a monument for the grave of her husband, an answer showing that plaintiff's agent professed to deal with the widow as her friend, she not knowing him to be an agent, and falsely represented the amount which would be received by her from her husband's estate, and greatly exaggerated the value of the monument, and thereby procured the contract, was sufficient on demurrer.—*Hummel v. Tyner*, 70 Ind. 84.

[b] (Sup. 1882)

In a suit for damages for defendant's breach of contract to purchase a stated quantity of ice, a counterclaim for damages because of the negligent packing of a portion of the ice covered by the contract is bad, in the absence of any averment of payment therefor by defendant.—*Schreiber v. Butler*, 84 Ind. 576.

[c] (Sup. 1889)

In an action for a refusal to accept corn delivered under a contract of purchase, an answer, admitting the contract and refusal, but alleging the failure of the seller to deliver corn of the quality agreed on, and demanding, by way of counterclaim, the amount of profits which the purchaser would have realized on a resale that he had made, is bad on demurrer, where it fails to allege that the purchase and sale were made by the parties in contemplation of a then existing contract of resale to certain named parties in a designated market and at a specified price, and that at the time and place of delivery under the contract of purchase no other corn of the desired quality could be obtained with which to fulfill the contract of resale.—*Rahm v. Deig*, 121 Ind. 283, 23 N. E. 141.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 1093.

See, also, 35 Cyc. p. 588.

§ 379. — Issues, proof, and variance.

[a] (Sup. 1885)

Under a complaint that plaintiffs agreed to deliver, and defendant to receive, at a stipulated price, 100 stock hogs, within 20 days at either of two scales, and that plaintiffs had the hogs ready for delivery at the time and place agreed on, the evidence showed that plaintiffs had purchased the hogs from different persons and had them ready to deliver, but had not actually driven them to the scales. *Held*, that there was no substantial variance.—*Carter v. Carter*, 101 Ind. 450.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 1094.

See, also, 35 Cyc. p. 588.

§ 384. Damages.

Conditional sales, see post, § 479.

[a] (Sup. 1875)

An action against a railroad company, based on a contract under which plaintiff has placed on the line of defendant's road a quantity of firewood, which, by the contract, defendant was to measure, receive, and pay for at a certain price per cord, of which placing of the wood defendant has been notified by plaintiff, but as to a portion thereof has not measured, received, or paid therefor as agreed on, which portion, having been insured by plaintiff as his own after it should have been so accepted, has been destroyed by fire without plaintiff's fault, is not an action for the price of the wood, but is an action for not accepting the wood, according to the contract; and the measure of damages is the difference between the contract price and the market price at the time and place at which the wood ought to have been accepted.—*Pittsburgh, C. & St. L. Ry. Co. v. Heck*, 50 Ind. 303, 19 Am. Rep. 713.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

[b] (Sup. 1875)

Where one agreed to purchase property, and refused to take it, the loss of the bargain constitutes the proper measure of damages, and not the price.—*Dolman v. Studebaker*, 52 Ind. 286.

[c] (Sup. 1881)

In an action for breach of contract to purchase goods, plaintiff could not recover as damages the profits which he would have made by the sale, where he does not offer to deliver the goods.—*Fell v. Muller*, 78 Ind. 507.

[d] The seller's measure of damages for the rescission of an executory contract of sale is the difference between the market value of the property at the time and place of delivery and the price fixed by the contract.—(Sup. 1884) *Dwiggins v. Clark*, 94 Ind. 49, 48 Am. St. Rep. 140; (1896) *McComas v. Haas*, 8 N. E. 579, 107 Ind. 512; (1896) *Ridgley v. Mooney*, 45 N. E. 348, 16 Ind. App. 362; (1897) *Browning v. Simons*, 46 N. E. 86, 17 Ind. App. 45; (1898) *Dill v. Mumford*, 49 N. E. 861, 19 Ind. App. 609.

[e] (Sup. 1884)

Where a buyer of a monument to be manufactured by the seller refused to accept the same, and no title passed to the buyer, the measure of damages in an action for breach of contract was the contract price less the market value of the property at the place and time where and when it should have been accepted, or, if there was no market price at that place, the measure of damages was the difference between the contract price and the value of the property at the place of delivery determined by the market value at some other reasonable convenient place and the reasonable cost of transportation to that place.—*Dwiggins v. Clark*, 94 Ind. 49, 48 Am. Rep. 140.

[f] (Sup. 1886)

Where goods are sold upon credit, the purchaser agreeing, as part of the contract, to execute notes payable at a future day for the purchase price, the seller is entitled, upon the refusal of the purchaser to execute the notes, to maintain an action therefor, and the measure of damages is the full price of the goods.—*Carnahan v. Hughes*, 108 Ind. 225, 9 N. E. 79.

[g] (App. 1892)

Defendants agreed to buy and plaintiffs to sell 4,000 barrels, to be delivered at defendants' mill by January 1st. It was further agreed that defendants should buy of plaintiffs all the barrels they should use for one year from the date of the contract. *Held* that, where plaintiffs had a quantity of barrels ready for delivery, though after January 1st, but before tender at the place agreed on were notified by defendants not to deliver them, plaintiffs' measure of damages is the difference between the contract price and the market value.—*Neal v. Shewalter*, 5 Ind. App. 147, 31 N. E. 848.

Defendants agreed to buy and plaintiffs to sell 4,000 barrels, to be delivered at defendants' mill by January 1st. It was further agreed that defendants should buy of plaintiffs all the barrels they should use for one year from the date of the contract. *Held* that, since title to the barrels did not pass until delivery, where a quantity of the barrels was destroyed by fire while in plaintiffs' possession, after defendants' refusal to receive them, plaintiffs can only recover for those so destroyed the difference between the contract price and the market value at the time defendants made default.—*Id.*

[h] (App. 1896)

In an action for the breach of a contract to purchase all the tomatoes which plaintiff should grow and deliver to defendant, plaintiff can recover only the difference between the contract price and the cost of picking and delivering, where it is shown there is no market for the tomatoes.—*Indiana Canning Co. v. Priest*, 45 N. E. 618, 16 Ind. App. 445.

[i] (App. 1909)

Defendant contracted to purchase 650 tons of bar iron, assorted hardware specifications, within a specified period, at specified prices; defendant to furnish specifications. Plaintiff operated a rolling mill for the manufacture of such iron; defendant having knowledge by previous dealings that, though the contract did not require plaintiff to manufacture the goods, such was its intention, and that it expected to obtain its profits therefrom. *Held*, that the measure of plaintiff's damages was not the difference between the market value and the contract price, but the difference between what it would cost plaintiff to make and deliver the iron specified and the contract price, if such price was greater than the cost.—*W. J. Holliday & Co. v. Highland Iron & Steel Co.*, 43 Ind. App. 342, 87 N. E. 249.

FOR CASES FROM OTHER STATES.

SEE 43 CENT. DIG. Sales, §§ 1098-1107.

See, also, 35 Cyc. pp. 591-600.

§ 385. Trial.

FOR CASES FROM OTHER STATES.

SEE 43 CENT. DIG. Sales, § 1108.

See, also, 35 Cyc. pp. 600, 601.

§ 388. — Instructions.

[a] (Sup. 1834)

In an action for breach of contract in refusing to accept the article bought, an instruction that if the buyer prevented the delivery of the article and the seller had kept it not as his own property, but for the buyer, ready at all times to deliver it pursuant to contract, the measure of the seller's recovery was the contract price, was erroneous, as authorizing a recovery on a cause of action not stated in the complaint which was for the recovery of the difference between the contract price and the market value.—*Dwiggins v. Clark*, 94 Ind. 49, 48 Am. Rep. 140.

[b] (App. 1909)

Where the evidence was sufficiently clear to enable the jury to estimate the difference between the cost of manufacturing and delivering the iron and the contract price, the court did not err in authorizing the jury to apply that measure of damages on the theory that the method of estimating them was uncertain.—*W. J. Holliday & Co. v. Highland Iron & Steel Co.*, 43 Ind. App. 342, 87 N. E. 249.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 1108.

See, also, 35 Cyc. p. 601.

VIII. REMEDIES OF BUYER.

Action of debt, see DEBT, ACTION OF, § 1.
Of goods sold conditionally, see post, § 481.
Rescission, see ante, §§ 112-130.

(A) RECOVERY OF PRICE.

Earnest money as element of damage for breach, see post, § 418.

§ 390. Nature and form of remedy.

[a] (Sup. 1864)

Rescission of contract is not the only remedy of a purchaser of goods. If fraud has been practiced, or there has been a breach of warranty, he may stand to the bargain and recover damages for the fraud, or he may rescind the contract, return the thing bought, and receive back what he paid or sold.—*Love v. Oldham*, 22 Ind. 51.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 1109.

See, also, 35 Cyc. p. 606.

§ 391. Right of action.

[a] (Sup. 1847)

On the 24th of September, 1845, A. and B. made a written agreement by which the latter sold to the former 100 hogs, to be delivered between the 1st and 25th of the next December. A. was to pay \$3 per hundred-weight for the hogs. He paid \$100 down, and was to pay the further sum of \$540 on or before the 27th of November, 1845. He failed to pay such further sum by the last-named day, but on the 2d of December following he tendered the amount to B., who refused to receive it, alleging that, as A. had failed to pay the money according to the agreement, he (B.) had sold the hogs to C. B. contracted with C. for the hogs on the 29th of November, 1845, but did not deliver them to him till the 10th of December following. On the day before they were thus delivered A. again offered to pay B. the balance due according to his contract, if B. would deliver the hogs to him, which B. refused to do. *Held*, that A. might recover from B., in an action for money had and received, the \$100 advanced as aforesaid.—*Patterson v. Coats*, 8 Blackf. 500.

[b] (App. 1891)

In the absence of a breach of warranty or fraud, the mere fact that goods sold are worth less than the contract price will not authorize a recovery by the purchaser of the excess of the price so paid over the actual value of the goods.—*Weller v. Bectell*, 2 Ind. App. 228, 28 N. E. 333.

[c] (App. 1900)

A complaint alleged that plaintiff agreed to convey mortgaged land, and pay \$250 for the immediate delivery of livery stock, the title to which should not pass unless the mortgage was reduced to a specified sum within a certain time; that plaintiff conveyed the land and paid the \$250, but failed to reduce the mortgage within the time agreed; that defendant thereupon took possession of the livery stock, as owner, and sold a part or all of the same; that the contract of sale was wholly rescinded by mutual consent; that defendant has retained the land and money paid by plaintiff; and that there is due him, after making all allowances, a certain sum. *Held*, that plaintiff, though in default, was entitled to recover back the amount paid, on a rescission of the contract by mutual agreement.—*Fruits v. Pearson*, 57 N. E. 158, 25 Ind. App. 235.

[d] (Sup. 1904)

A complaint which alleges that plaintiff returned a horse which he had purchased from defendant and demanded a return of his money on the ground that the horse was not as represented, and that defendant accepted and retained the horse and promised to repay the money by a stated time, shows a complete rescission of the contract of sale, and states a cause of action for the recovery of the price paid.—*Kendall v. Hardebeck*, 71 N. E. 957, 163 Ind. 373.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1110-1127.

See, also, 35 Cyc. pp. 602-606.

§ 392. Conditions precedent.

[a] (App. 1893)

Where the complaint asked that defendant be compelled to restore money paid by plaintiff for stock in a gas company, alleging that plaintiff was induced to purchase the stock through false representations of defendant, an officer in such company, proof that defendant made false representations concerning the company's ownership of a certain gas well does not entitle plaintiff to recover the purchase price, in the absence of any evidence that the stock was worthless, unless he restores the stock issued him.—*Baldwin v. Marsh*, 6 Ind. App. 533, 33 N. E. 973.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1128-1131

See, also, 35 Cyc. p. 607.

§ 396. Pleading.

In justice's court, see JUSTICES OF THE PEACE, § 91.

[a] (Sup. 1877)

In an action to recover money paid for a patent right, the complaint alleged that defendant and an agent for its sale represented that it was of a certain value; that if plaintiff would join defendant in purchasing it, each paying half, as assignment and sale of the same would be made to them; that plaintiff, being informed that defendant had paid his half, paid his also, and an assignment of such patent right was made to them; that it was of no value; and that defendant had not paid or intended to pay his half, but combined with such agent to, and did, induce plaintiff to purchase a worthless article, and received a portion of the money for so deceiving plaintiff. *Held*, that the complaint was not demurrable.—*Hess v. Young*, 59 Ind. 379.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1134, 1135.

See, also, 35 Cyc. p. 609.

(B) RECOVERY OF GOODS.

§ 399. Nature and form of remedy.

[a] (App. 1895)

As a general rule, replevin will not lie where there is an executory and unexecuted contract of sale, although there may have been a tender of performance in strict compliance with the contract; the parties, in such cases, being left to their action for the breach of the agreement.—*Platter v. Acker*, 41 N. E. 832, 13 Ind. App. 417.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 1140.

See, also, 35 Cyc. p. 612.

§ 400. Right of action.

[a] (Sup. 1868)

In replevin of a box of furs shipped by express to the plaintiff, to be paid for before delivery, it was *held* not to be a sufficient reply in avoidance that, besides the furs answered upon, the box contained certain furs bought of third parties, but unmarked and commingled; these not being the plaintiff's property until delivery.—*Minchrod v. Windoes*, 29 Ind. 288.

[b] (Sup. 1831)

The vendee named in a bill of sale of personal property is not deprived of the right to recover the possession from the vendor, who afterwards wrongfully obtains possession of the property, by the fact that the bill of sale may have been without actual consideration; but he may recover if the conveyance was made as a complete and perfect gift.—*Schenck v. Sit-hoff*, 75 Ind. 485.

[c] (App. 1894)

In replevin for a traction engine sold to plaintiff, and afterwards seized by defendant for default in the payment of a purchase-money mortgage, evidence of a breach of warranty in the sale, without evidence of damage therefrom,

does not justify a verdict for plaintiff.—*C. Aultman & Co. v. Richardson*, 10 Ind. App. 413, 38 N. E. 532.

In replevin for an engine, where the defense was lawful possession under a purchase-money mortgage executed by plaintiff, evidence is admissible in rebuttal to show that at the time possession was taken the damage to plaintiff by reason of a false warranty on the sale left nothing due on the mortgage.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 1141.

See, also, 35 Cyc. p. 612.

§ 401. Conditions precedent.

[a] (Sup. 1849)

A. contracted with B. for a lot of cattle, paid part of the purchase money, and took part of the cattle; it being agreed that upon payment of the balance he should have the rest of the cattle. *Held*, that until payment of the balance the right of possession was in B., and that A. could not maintain replevin for the rest of the cattle without payment or tender of such balance.—*Bradley v. Michael*, 1 Ind. 551, Smith, 346.

[b] (Sup. 1881)

A vendee of personal property is not deprived of the right to recover the possession thereof from the vendor, who wrongfully obtained it after the execution and delivery of a bill of sale, by the fact that he may not have paid or tendered the consideration mentioned in the bill of sale, but may recover by showing that it was based on a different consideration, which was paid before the execution of the bill of sale.—*Schenck v. Sit-hoff*, 75 Ind. 485.

[c] (Sup. 1890)

At a public sale of property, pursuant to a notice which contained a provision that a credit of eight months would be given, the purchaser executing a note, with approved surety, bearing interest, plaintiff purchased a part of the property, and agreed to execute a note for the price, but did not do so, and more than two weeks afterwards he tendered the amount in money. This the seller refused, and told him he considered the contract at an end. *Held*, that the tender of money, instead of a note, was not sufficient, and there was no change of ownership of the goods, and the buyer could not maintain replevin for them.—*Morgan v. East*, 126 Ind. 42, 25 N. E. 867, 9 L. R. A. 558.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 1142.

See, also, 35 Cyc. p. 613.

§ 402. Defenses.

[a] (App. 1892)

A person who sells a horse in his possession, in which others have, unknown to the purchaser, joint interests with him, is estopped from setting this up as a defense to an action by the purchaser for possession of the horse.—

Kaiger v. Brandenburg, 4 Ind. App. 497, 31 N. E. 211.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 1143.

See, also, 35 Cyc. p. 613.

§ 403. Proceedings.

[a] (App. 1898)

In replevin by a buyer for machinery seized by the seller for default in payment of the price, evidence of a breach of warranty in the sale, without a showing of damages therefrom, does not justify a verdict for plaintiff.—C. Aultman & Co. v. Richardson, 52 N. E. 86, 21 Ind. App. 211.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1144, 1145.

See, also, 35 Cyc. pp. 613, 614.

(C) ACTIONS FOR BREACH OF CONTRACT.

§ 405. Right of action.

[a] (Sup. 1862)

The defendant contracted to sell and deliver to the plaintiff a certain number of hogs, well-fatted and merchantable, and "to be our best hogs, weighing 200 lbs. and upwards." To make up the number the defendant added to hogs of his own other hogs bought by him for this purpose; they were, however, weighed before the plaintiff's agent, and not objected to by him. The plaintiff agreed to take them if the defendant would take in part payment certain certificates of deposit. The defendant refused so to do, and thereupon the plaintiff refused to take the hogs, as not filling the contract, and brought suit thereon. *Held*, that the defendant had failed to comply with the contract, and that no waiver by the plaintiff of his rights thereunder was shown, and that judgment for defendant should be reversed.—Daggy v. Cox, 19 Ind. 142.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1147-1155.

See, also, 35 Cyc. pp. 615-618.

§ 406. Conditions precedent.

Pleading, see post, § 411.

[a] (Sup. 1824)

Where there is a precedent condition, its performance or that which is equivalent must be shown.—Richards v. Carl, 1 Blackf. 313.

[b] (Sup. 1838)

A suit for the nondelivery of goods will not lie where the conditions on which the delivery was to have been made have not been complied with.—Peters v. Gooch, 4 Blackf. 515.

[c] No demand is necessary before suit on a contract to deliver goods at a certain time.—(Sup. 1848) Mountjoy v. Adair, 1 Ind. 254, Smith, 96; (1849) Foust v. Hannah, 1 Ind. 273, Smith, 155.

[d] (Sup. 1865)

Where the acceptance of goods, upon an executory contract, is procured by the fraud of the seller, an offer to return is not necessary to entitle the buyer to maintain his suit on the contract for damages by delivery of inferior goods.—McAroy v. Wright, 25 Ind. 22.

[e] (Super. 1873)

On a contract of purchase, neither party can maintain a suit for nonperformance, without having first performed or offered to perform his part of the agreement.—Campbell v. Miller, Wils. 412.

[f] (App. 1908)

A party to a contract, who has been informed by the adverse party that he will not supply the goods contracted for, need not, to maintain an action for breach of contract, demand the goods.—Packers' Fertilizer Ass'n v. Harris, 42 Ind. App. 240, 85 N. E. 375.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1156-1158.

See, also, 35 Cyc. p. 619.

§ 410. Pleading.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1161-1169.

See, also, 35 Cyc. pp. 623-626.

§ 411. — Declaration, complaint, or petition.

[a] (Sup. 1832)

In an action on a contract to deliver chattels to plaintiff to be paid for on delivery, the declaration must aver a payment or tender of the purchase money, or a readiness to receive and pay for the articles; the payment of the purchase money being regarded as a condition precedent to the delivery of the property.—Chun v. Howard, 3 Blackf. 163.

[b] (Sup. 1837)

The declaration in assumpsit stated that the plaintiff had bought of the defendant all the fat hogs which the defendant then had, supposed to be about 530, at \$3.12½ per cwt., to be delivered, but that the hogs had not been delivered. *Held*, that the declaration was bad, on general demurrer, for not averring some particular number of hogs, with their weight, which the defendant had when the contract was made.—McConnell v. Baker, 4 Blackf. 325.

[c] (Sup. 1846)

In a suit on a contract for the delivery of goods on or before certain periods, at a certain place, or as much sooner as the defendant might wish, the declaration should aver that the plaintiff had been always ready and willing, upon the delivery of the goods as aforesaid, to pay to the defendant the price according to his promise.—Smith v. Smith, 8 Blackf. 208.

[d] (Sup. 1853)

In a contract of sale, where the time of delivery of the goods is stated, but no place, they should be delivered at the place where the

vendor has them at the time of sale, or at his place of business; and to sustain an action by the vendee for nonperformance a request to deliver is not requisite, but his declaration should aver that he was, at the time and place of delivery, ready to receive and pay for them.—*Bailey v. Ricketts*, 4 Ind. 488.

[j] (Sup. 1853)

In an action on an agreement to deliver to plaintiffs a specified quantity of merchantable shelled corn at a certain place within a designated period, and for a specified price, a pleading that at the time of making the agreement the plaintiffs agreed that in consideration that defendant would deliver such quantity of corn they would pay to defendant the agreed price, and furnish him a thresher to thresh the corn for one cent a bushel, and that they had failed and refused all requests to furnish such thresher, whereby defendant was unable to perform the contract, is sufficient.—*Bembridge v. Stoddard*, 4 Ind. 587.

[l] (Sup. 1865)

In a suit by the purchaser upon a contract for the sale of tobacco, a part of which only was manufactured at the time of sale, the complaint alleged that the tobacco already manufactured was put up in tight boxes, and that the residue was similarly packed as it was made; that it was all received and paid for without examination; that the seller fraudulently packed the tobacco in boxes made of green lumber, and put into the boxes inferior and damaged tobacco, by means of which it became spoiled and unsalable; that the plaintiff had no knowledge of the quality of the tobacco, and that with a view to defraud him, defendant exhibited specimens which he fraudulently represented to be the quality of the tobacco he was manufacturing. *Held*, that as to so much of the tobacco as was manufactured at the time of the contract the complaint showed no cause of action.—*McAroy v. Wright*, 25 Ind. 22.

[g] (Sup. 1866)

In a suit to recover damages for the non-delivery of goods, the damages sustained by the purchaser by reason of his inability in consequence of such nondelivery to fulfill a contract of sale made by him for the same goods if reasonable at all must be pleaded specially.—*Harper v. Miller*, 27 Ind. 277.

[h] (Sup. 1868)

A vendor of lumber on a contract to deliver "on or before August 1st" has the whole 1st day of August to deliver in, and, in an action for nondelivery, the complaint must aver a readiness to receive on that day, not merely "up to the 1st of August."—*Adams v. Dale*, 29 Ind. 273.

[i] (Sup. 1868)

The complaint, in an action on a contract for the sale of goods to be delivered at a certain time and place, should show an obligation on the part of the plaintiff to receive and pay

for the goods, and aver that he was ready to pay the price according to his promise, upon the delivery of the goods as contracted.—*Beard v. Sloan*, 30 Ind. 279.

[j] (Sup. 1874)

In an action to recover damages for breach of a contract to deliver certain kinds or brands of tobacco at stipulated prices, the quantity and kind or brand demanded should be specified.—*Lindman v. Wolf*, 47 Ind. 501.

[k] (Sup. 1883)

In an action for damages for failure to deliver corn under a contract, a complaint which alleges that plaintiff went to defendant's house to pay the purchase price, but could not make the payment or tender the same because of defendant's absence; that plaintiff tendered the amount to defendant's family and they refused it; that on defendant's return he tendered it to him and it was refused; that defendant refused to keep the contract, and that plaintiff was at all times ready and willing to pay for the corn, and offered to perform the contract; and that defendant failed to perform any part of his contract—is not demurrable, because it does not allege a specific demand for the property agreed to be sold, or that the tender was kept good.—*Thomas v. Mathis*, 92 Ind. 560.

[l] (Sup. 1902)

A written contract for the sale of canned apples, subject to the approval by the purchaser of sample when packed, being assignable, under *Burns' Rev. St. 1901, § 7515* (*Rev. St. 1881, § 5501*; *Hornor's Rev. St. 1901, § 5501*), which provides that written contracts for the delivery of a specific article, etc., shall be negotiable by indorsement, imports a consideration; and, in an action for a breach of the contract, it was not necessary to allege one.—*Magic Packing Co. v. Stone-Ordean-Wells Co.*, 64 N. E. 11, 158 Ind. 538.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1161-1164.

See, also, 35 Cyc. pp. 623, 624

§ 412. — Plea or answer, and subsequent pleadings.

[a] (Sup. 1834)

In an action for nondelivery of hogs for a certain sum by a specified time, a plea in bar that the hogs were set apart and that the plaintiff failed to attend is insufficient, as it should have stated the number of hogs so set apart, and also that they were left at the place of plaintiff, or that they had always been and still were ready to be delivered.—*Dorman v. Elder*, 3 Blackf. 490.

[b] (Sup. 1859)

The defendant sold wheat to be delivered on board a boat lying at his warehouse on a day certain, and before that day the time for delivery was indefinitely extended by agreement. Four days afterwards he notified the plaintiff that he was ready to deliver whenever the plain-

tiff would send a boat, and requested immediate payment, which was thereupon made. The plaintiff sent no boat, and three days afterwards the wheat was burned. In a suit for non-delivery, the defendant set up the above facts, as showing that the property had passed before the fire, and the answer was held bad on demurrer. He then amended by adding averments that the plaintiff had failed to send a boat within a reasonable time, and that, at the time of payment in full, the wheat had been measured and set apart, and so remained until the fire, and was not removed by reason of the want of diligence of the plaintiff. *Held*, that the answer, as amended, was good.—*Scott v. King*, 12 Ind. 203.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 1165.

See, also, 35 Cyc. p. 625

§ 413. — Issues, proof, and variance.

[a] (App. 1899)

A buyer cannot recover for defects in the article purchased, on the strength of a subsequent agreement, where his complaint does not show that his action was based on such agreement.—*F. C. Austin Mfg. Co. v. Clendenning*, 52 N. E. 708, 21 Ind. App. 459.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1160-1169.

See, also, 35 Cyc. pp. 625, 626.

§ 414. Evidence.

As to delivery and acceptance of goods, see ante, § 181.

As to existence and validity of contract, see ante, § 52.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1170-1173.

See, also, 35 Cyc. pp. 627-631.

§ 416. — Admissibility.

Evidence admissible by reason of admission of similar evidence, see EVIDENCE, § 155.

[a] (App. 1902)

In an action for breach of a contract for failure to deliver lumber, where the seller knew that the buyer purchased the lumber to resell, and where the lumber had no market value, it was not error to receive evidence of the value of the lumber from the time of the failure to deliver it to the commencement of the action.—*Pape v. Ferguson*, 62 N. E. 712, 28 Ind. App. 298.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1171, 1172.

See, also, 35 Cyc. pp. 628, 629.

§ 417. — Weight and sufficiency.

[a] (App. 1893)

In an action for damages for selling plaintiff worthless stock, evidence examined, and *held* insufficient to show that the stock was

worthless.—*Baldwin v. Marsh*, 33 N. E. 973, 6 Ind. App. 533.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 1173.

See, also, 35 Cyc. p. 631.

§ 418. Damages.

[a] (Sup. 1839)

The measure of damages for breach of a contract to deliver goods is the difference between the price agreed on and the market value of the goods at the time of the breach.—*Ward v. Burr*, 5 Blackf. 116.

The rule of damages in an action on a contract of sale, when the vendor neglects or refuses to deliver the personal property sold, and when nothing was paid by the purchaser, is the difference between the contract price and the market value of the property on the day when it should have been delivered.—*Id.*

[b] (Sup. 1857)

Where a contract for the sale of a chattel is broken by the seller failing to deliver it to the buyer, who has paid the price in advance, he may elect to rescind the agreement and recover the money, with interest; but, if he elect to affirm the contract and sue for damages, he cannot recover interest.—*Harvey v. Myer*, 9 Ind. 391.

[c] (Sup. 1858)

A purchaser who has paid in advance, and recovers damages for nondelivery, cannot recover interest on his advances; he affirming the contract.—*Dobenspeck v. Armel*, 11 Ind. 31.

[d] (Sup. 1864)

Under the Code, a purchaser of property may set up by way of counterclaim breach of warranty in an action for the purchase price on the sale of such property.—*Love v. Oldham*, 22 Ind. 51.

Under the Code a defendant may set up breach of warranty by way of counterclaim, and not only defeat the action, but recover against the plaintiff any damage greater than the plaintiff's claim.—*Id.*

[e] (Sup. 1864)

In an action for the breach of a contract, to deliver corn paid for in advance, the measure of damages is the highest price of the corn at any time between the contract time of delivery and the rendition of the verdict in the suit.—*Kent v. Ginter*, 23 Ind. 1.

For the seller's failure to deliver the goods according to the terms of the bargain the measure of damages is the difference between the contract price and the market value of the article at the time when, and place where, it should have been delivered.—*Id.*

[f] (Sup. 1865)

In an action for breach of contract of sale of tobacco by sample, which was inferior and damaged because fraudulently packed in boxes made of green lumber, plaintiff's damages should

be ascertained by deducting the market value of the tobacco delivered, at the time of delivery, from the market value of that contracted for.—*McAroy v. Wright*, 25 Ind. 22.

Where tobacco sold by sample was inferior and damaged, and fraudulently packed in boxes made of green lumber, whereby it became unsalable, the measure of plaintiff's damages was the actual loss sustained, to which the jury were entitled to add punitive damages for deceit.—*Id.*

[g] (Sup. 1865)

The measure of damages for the breach of a contract for the sale and delivery of personal property is the difference between the contract price and the market value at the time fixed for delivery.—*Zehner v. Dale*, 25 Ind. 433.

[h] (Sup. 1866)

In a suit to recover damages for the non-delivery of goods, the damages sustained by the purchaser by reason of his inability in consequence of such nondelivery to fulfill a contract of sale made by him for the same goods are too remote.—*Harper v. Miller*, 27 Ind. 277.

[i] (Sup. 1867)

Where a manufacturer contracted with plaintiff that if an engine should not be of sufficient power to run four pairs of burr millstones he would remove it and pay plaintiff \$1,000, plaintiff was entitled on failure of the engine to do the work and the manufacturer's refusal to remove the engine to recover \$1,000 and cost of removal only, and was not remitted to damages he might show under a breach of warranty.—*Street v. Chapman*, 29 Ind. 142.

[j] (Sup. 1871)

The measure of damages for failure to manufacture and deliver an article according to contract is the difference between the price to be paid for the article on delivery and its market value, though the market price may be enhanced by the fact that the article is patented, and the right to sell held exclusively by the party who contracted to have the article manufactured.—*Frink v. Tatman*, 36 Ind. 259, 10 Am. Rep. 19.

[k] (Sup. 1871)

The measure of damages for breach of contract to sell and deliver is the difference between the contract price and the market price at the time and place of delivery.—*Beard v. Sloan*, 38 Ind. 128.

[l] (Sup. 1875)

In proving damages sustained by a failure to deliver goods sold, by showing the increase of their value above the contract price, the inquiry should relate to their value at the place as well as at the time fixed for delivery.—*McCollum v. Huntington*, 51 Ind. 229.

[m] (Sup. 1883)

In an action for failure of title to one of two counties for which a patent right had been assigned, the measure of damages is such a proportion of the whole price paid as the value of

the county the title to which failed bore to the value of both.—*Moorehead v. Davis*, 92 Ind. 303.

[n] (Sup. 1884)

Earnest money paid on an oral contract of sale to one who fails to perform his part of such contract without fault of the other party can be recovered back as damages.—*Gossard v. Woods*, 98 Ind. 195.

[o] (Sup. 1889)

In an action for damages for a failure of defendants to comply with their contract to furnish lumber for plaintiff's use in constructing a building, plaintiff may show that he could not procure lumber such as defendants had contracted to furnish in the market where it was to be delivered, and may recover the enhanced cost of procuring lumber elsewhere.—*Vickery v. McCormick*, 117 Ind. 594, 20 N. E. 495.

Where goods are sold for a special purpose, and the seller has notice that a failure to furnish the goods according to contract will occasion special damages by the suspension of an important work, the purchaser is entitled to recover any direct loss which he may sustain on account of the unreasonable failure of the seller to perform his contract.—*Id.*

[p] (Sup. 1889)

Where a person sells a merchantable article to another, who is engaged in selling such articles in another market, and a sale is made without reference to the fulfillment of any particular contract of resale by the purchaser, but with the general knowledge that the purchaser is purchasing with a view of reselling in the future in the course of trade, the measure of damages in case of failure to deliver is the difference between the contract price and the value in the market at the time and place of delivery, unless it appears that such article cannot be had in the market.—*Rahm v. Deig*, 23 N. E. 141, 121 Ind. 283.

[q] (Sup. 1890)

Where a person contracts to deliver furniture for a hotel set up in the rooms ready for use and occupancy on a certain day, the measure of the purchaser's damage for delay is the rent of the rooms when furnished from the date agreed on for delivery.—*Berkey & Gay Furniture Co. v. Hascall*, 123 Ind. 502, 24 N. E. 336, 8 L. R. A. 65.

[r] (App. 1891)

Where a brick manufacturer agrees to make and deliver a sufficient quantity of brick of a certain size and quality for the erection of a certain building, and the bricks do not conform to the specifications, the measure of damages is the difference between the articles sold and those delivered at the time and place of delivery.—*Bushman v. Taylor*, 28 N. E. 97, 2 Ind. App. 12, 50 Am. St. Rep. 228.

[s] (Sup. 1896)

On the failure of the state to deliver its bonds to a purchaser in accordance with its con-

tract, the measure of damages is the difference in the market value of the bonds at the date of the contract and the time fixed for their delivery, or the date of the breach of the contract.—*Coffin v. State*, 144 Ind. 578, 43 N. E. 654, 55 Am. St. Rep. 188.

[t] (App. 1899)

Where one who had contracted to furnish material of a certain quality to be used in the construction of a house, furnished an inferior quality, which became known to the owner after the house was finished, the owner had the right to keep the house in its inferior condition, and recover from the contractor the difference between its actual value and its value had the proper material been furnished, since the parties must be deemed to have contracted with reference to the value of the house with the proper materials furnished.—*Elwood Planing-Mill Co. v. Harting*, 52 N. E. 621, 21 Ind. App. 408.

[u] (App. 1902)

In an action for breach of a contract for failure to deliver lumber, when the seller knew that the buyer bought the lumber to resell, the measure of damages is the actual value of the lumber at the time and place of the required delivery for the purpose of resale.—*Pape v. Ferguson*, 62 N. E. 712, 28 Ind. App. 298.

[v] (Sup. 1905)

Where, under a contract for the purchase of wheels, plaintiff agreed to purchase from defendant such quantity of 10,000 sets as it might want, the minimum quantity not to be less than 5,000 sets, on failure to deliver on an order given defendant above the minimum quantity plaintiff became entitled to recover the difference between the contract and the market price on the wheels covered by such order.—*Connersvills Wagon Co. v. McFarlan Carriage Co.*, 76 N. E. 294, 166 Ind. 123, 3 L. R. A. (N. S.) 709.

[w] (App. 1905)

A recovery for the difference in the amount of the contract price of goods, and the price plaintiff was compelled to pay for such goods because of defendant's breach, is not excessive.—*Semon, Bache & Co. v. Coppes, Zook & Mutschler Co.*, 74 N. E. 41, 35 Ind. App. 351, 111 Am. St. Rep. 171.

FOR CASES FROM OTHER STATES.

SEE 43 CENT. DIG. Sales, §§ 1174-1201.

See, also, 35 Cyc. pp. 632-647; note, 42 Am. Rep. 461.

§ 419. Trial.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1202-1204.

See, also, 35 Cyc. pp. 649-651.

§ 422. — Verdict and findings.

Sufficiency of special findings in general, see TRIAL, § 355.

[a] (Sup. 1872)

Where a contract provided for the sale of a boat and cargo lying at a certain place in a river, and the delivery for the seller of the boat and cargo at another specified place on the first rise of the river, in order to hold the seller liable for damages occasioned by his failure to deliver, it was not necessary that the jury find that the seller made an independent contract to deliver the boat and cargo, as the agreement to deliver the boat and cargo at the specified place was a part of the contract of sale.—*Temple v. Aders*, 38 Ind. 506.

[b] (App. 1896)

Where the jury found that defendant failed to furnish plaintiff with a harvester as agreed, and that it was worth \$135, it was sufficient to justify a judgment for plaintiff for that amount.—*Plano Manuf'g Co. v. Kesler*, 13 Ind. App. 110, 43 N. E. 925.

[c] (App. 1898)

A special verdict, in an action for damages for failure of defendant to deliver certain goods by the date specified in the contract therefor, found that such goods were to be delivered on specifications to be furnished by plaintiff; that, after the expiration of the period specified, during which defendant had filled all orders for which plaintiff had furnished specifications, the time for the delivery of the remainder was extended by an agreement on which both parties afterwards acted; and that defendant thereafter delivered all such goods for which plaintiff furnished specifications. Such verdict also expressly declared that no damage was sustained by plaintiff from defendant's failure to deliver all the goods contracted for as originally specified, and failed to show that defendant was not ready to deliver all the remainder under the contract in question as extended. *Held*, that a conclusion that plaintiff was entitled to damages in a certain sum, on the facts found, was inconsistent with such findings, and that defendant was entitled to judgment on such special verdict.—*Rau v. Ball Bros. Glass Mfg. Co.*, 51 N. E. 945, 21 Ind. App. 147.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 1204.

See, also, 35 Cyc. p. 651.

§ 423. Judgment and execution.

Merger and bar of causes of action and defenses, see JUDGMENT, § 585.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 1205.

See, also, 35 Cyc. p. 651.

(D) ACTIONS AND COUNTERCLAIMS FOR BREACH OF WARRANTY.

Jurisdiction of justices of the peace as dependent on amount in controversy, see JUSTICES OF THE PEACE, § 44.

Right to trial by jury, see JURY, § 12.

§ 426. Provisions of contract as to remedy.

[a] (Sup. 1885)

Whatever might have been the effect of a stipulation between a vendor and a purchaser of a machine for notice to the vendor on one day's trial by the purchaser, the fact that there was a defect in the original construction of the machine in question, and that the vendor, on notice thereof, attempted to remedy it, and failed to do so, gave the purchaser a right of action on the warranty.—*McCormick Harvesting Mach. Co. v. Gray*, 100 Ind. 285.

[b] (App. 1899)

A buyer gave his note for the price of a rock crusher, and agreed to return it, if it failed to do certain work as represented; and the seller agreed, on such failure, to receive it, and to cancel the contract of sale. *Held*, that the transfer of the note by the seller to an innocent purchaser, and payment thereof by the buyer, did not enable him to recover damages for the failure of the crusher to do the work, where he had not previously offered to return it, and the seller had not refused to receive it.—*F. C. Austin Mfg. Co. v. Clendenning*, 52 N. E. 708, 21 Ind. App. 459.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 1200.

§ 427. Right of action.

[a] (Sup. 1837)

The breach of an express warranty as to the soundness of a horse is, of itself, a valid ground of action, whether the suit be founded on tort or contract.—*House v. Fort*, 4 Blackf. 203.

[b] (Sup. 1857)

If accompanying a contract there be an express warranty, a party may have remedy for a breach thereof by suit upon the warranty.—*Gatling v. Newell*, 9 Ind. 572.

[c] (Sup. 1862)

Where a contract provided for the delivery of washed wool, the failure to deliver such wool worked no breach of warranty of a thing sold, but a simple breach of contract for the delivery of a given kind of article.—*McConnell v. Jones*, 19 Ind. 328.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1210-1213.

See, also, 35 Cyc. p. 441.

§ 428. Right to defend, recoup, set off, or counterclaim in action for price.

Defense by sureties on notes for price, see PRINCIPAL AND SURETY, § 143.

[a] (Sup. 1858)

A breach of warranty may be set up against either of the notes given for the price.—*Rose v. Wallace*, 11 Ind. 112.

[b] (Sup. 1859)

In an action on a note defendant answered by way of counterclaim that the note was executed to secure the payment of the balance of the price of a steam engine and boiler manufactured by the payee for defendant to be used in a sawmill, of which the payee had knowledge, and made the engine expressly for that purpose; that the boiler and engine were worthless; and that, in consequence thereof, it burst, and destroyed defendant's mill. *Held* to constitute a valid counterclaim, because the damages attempted to be set up were the proximate cause of plaintiff's breach of warranty.—*Page v. Ford*, 12 Ind. 46.

[c] (Sup. 1874)

If property be sold to several persons under representation and warranty that it is of a certain quality and value, and a part only of the purchasers give a note for the price of the property, the latter, when sued upon the note, may set up, by way of answer, that the property for which the note was given was not of the quality or value represented and warranted.—*Gordon v. Swift*, 46 Ind. 208.

[d] (App. 1893)

In an action on notes given for the purchase money of a machine, a breach of warranty may be treated as matter of defense, or as a matter of counterclaim, at the option of the warrantee.—*Springfield Engine & Thresher Co. v. Kennedy*, 34 N. E. 856, 7 Ind. App. 502.

[e] (App. 1894)

A stipulation in a contract of sale that no action for breach of warranty, nor claim for recoupment of damages, should be made after the year of the sale, cannot deprive the buyer of his defense on the warranty in an action on the purchase-price notes.—*Ohio Thresher & Engine Co. v. Hensel*, 36 N. E. 716, 9 Ind. App. 328.

[f] (App. 1895)

Where the thing sold was worthless, it was not necessary to return it to sustain a defense of breach of warranty in an action for the purchase price.—*M. D. Barry Saw & Supply Co. v. Campbell*, 13 Ind. App. 455, 41 N. E. 955.

[g] (App. 1896)

When there is a warranty, express or implied, in the sale of goods, the vendee need not return, or offer to return, the goods in order to establish his right to recoup the damages he sustains by a breach of such warranty.—*Zimmerman v. Druecker*, 15 Ind. App. 512, 44 N. E. 557.

[h] (App. 1900)

A vendee of an ice machine which his vendor had warranted is entitled to urge a breach of such warranty as a defense to a suit by the vendor against him on the purchase-price notes, although he has sold the machine to another.—*York Mfg. Co. v. Bonnell*, 57 N. E. 590, 24 Ind. App. 667.

[1] (App. 1907)

Where the implied warranty of a seller furnishing an article to a purchaser which the seller knows is to be used for a certain purpose is breached, the purchaser need not return the property and rescind the contract, but he may set up his damages in a counterclaim when sued for the price.—Glucose Sugar Refining Co. v. Climax Coffee & Baking Powder Co., 40 Ind. App. 182, 81 N. E. 589.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1214–1223.

See, also, 35 Cyc. pp. 441–443; note, 21 L. R. A. 406.

§ 429. Conditions precedent.

To defense in action for price, see ante, § 428.

[a] (Sup. 1877)

The omission of the buyer of a chattel to complain of its unsoundness, and offer to return it, is not a defense to an action for damages for breach of an express warranty of soundness.—Ferguson v. Hosier, 58 Ind. 438.

[b] (Sup. 1882)

A complaint, in an action for breach of a warranty, need not allege that the breach of warranty was brought to defendant's knowledge before the institution of the suit.—Means v. Means, 88 Ind. 196.

A purchaser is not required to inform the seller that there has been a breach of warranty as a condition precedent to the institution of a suit for such breach.—Id.

[c] (Sup. 1884)

The measure of damages for breach of warranty as to the quality of a chattel sold is the difference between the actual value of the article at the time of the sale and the value it would have had if it had been as warranted, and the buyer need not return nor offer to return the article in order to sustain an action for the breach of the warranty, or to set it up as a defense or as a counterclaim in an action for the recovery of the price.—Hege v. Newsom, 96 Ind. 426.

[d] (Sup. 1889)

An action for breach of warranty as to an article sold may be maintained without a tender or return of the property.—Harrisburgh Car Mfg. Co. v. Sloan, 120 Ind. 156, 21 N. E. 1088.

[e] (App. 1894)

The purchaser of a horse for breeding purposes notified the sellers that he was worthless, and the parties then agreed that the purchaser should use him during another season to give him a better trial. Before such season expired, the horse died. *Held*, that the purchaser need not make another tender of the horse during such season, to entitle him to damages for breach of warranty.—Merchants' & Mechanics' Sav. Bank v. Frazee, 9 Ind. App. 161, 36 N. E. 378, 53 Am. St. Rep. 341.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1224–1229.

See, also, 35 Cyc. p. 445; note, 3 L. R. A. 465.

§ 433. Pleading.

Alternative relief on bill in equity, see EQUITY, § 138.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1234–1237.

See, also, 35 Cyc. pp. 446–452.

§ 434. — Allegations of breach as cause of action.

[a] (Sup. 1837)

In a suit for tort based on the breach of an express warranty, as to the soundness of a horse, the proper form of the declaration is that defendant falsely and fraudulently warranted, etc., but the words "falsely and fraudulently" as thus used are only matters of form.—House v. Fort, 4 Blackf. 293.

[b] (Sup. 1858)

An allegation, in a complaint for fraud in the sale of a mare, that she was ten years old, and of much less value than if she had been eight years old, as she was fraudulently represented to be, without an averment that she was worth less than the price paid, is sufficient.—Gray v. Rich, 10 Ind. 430.

[c] (Sup. 1859)

A breach of an affirmative warranty must be set out with more particularity in an action therefor than in an action for the breach of one of a negative character.—Leeper v. Shawman, 12 Ind. 463.

In a complaint setting up a breach of a warranty of soundness, the breach stated must be coextensive with the contract of warranty.—Id.

A breach of a warranty of soundness is well set out by negating the words of the warranty. The particulars of the breach need not be alleged.—Id.

[d] (Sup. 1872)

A paragraph of a complaint alleging that the defendant sold to the plaintiff certain cattle warranting them to be sound, healthy, and merchantable, and that one of them proved to be diseased, and unfit for beef, and not marketable, to the plaintiff's damage, etc., sufficiently states a cause of action on the warranty.—Hardwick v. Wilson, 40 Ind. 321.

[e] (Sup. 1877)

A complaint for damages for a breach of a warranty of the soundness of a chattel sold and delivered, alleging the sale of the chattel at an agreed value, and a warranty of its soundness, and averring unsoundness at the time of the sale, "to the damage of the plaintiff" in a certain sum, sufficiently alleges that such unsoundness diminished the value of the chattel.—Ferguson v. Hosier, 58 Ind. 438.

[f] Where a warranty was general, it was proper to state the breach generally, and it might be alleged in the negative of the words of the contract.—(Sup. 1882) *Johnston Harvester Co. v. Bartley*, 81 Ind. 406; (1893) *Brower v. Nellis*, 33 N. E. 672, 6 Ind. App. 323.

[g] (Sup. 1882)

A complaint for a breach of a warranty of a machine to be "fit for cutting wheat and grass, and that it will do first-class work," alleging that "it was not fit for and would not do first-class work," is bad on demurrer, as the particulars of the breach and of the testing of the machine should be stated.—*Johnston Harvester Co. v. Bartley*, 81 Ind. 406.

In an action for breach of warranty on the sale of a machine, the warranty having been qualified or restricted, an allegation that the machine is "worthless" to plaintiff is not sufficient, but it must be shown that the thing bought is either without value, or of a less value than it would have been had the warranty been fulfilled.—*Id.*

Where the vendor of a machine warranted it to be "fit for cutting wheat and grass, and that it will do first-class work," a complaint for breach of the warranty, alleging that the machine "was not fit for, and would not do, first-class work," and that it was worthless to the plaintiff, does not sufficiently show a breach of the warranty, but the specific facts constituting such breach should have been alleged.—*Id.*

[h] (Sup. 1882)

A complaint, in an action for breach of a warranty of a horse, alleging that the horse had lung fever, was incurably diseased, and that it died shortly thereafter without plaintiff's fault, in connection with the averment that it was of little or no value, was equivalent to an averment that the horse was of no value.—*Means v. Means*, 88 Ind. 196.

In a complaint for breach of a warranty of a horse, an averment that the horse would have been worth a certain sum if it had been "sound and all right" was equivalent to an averment of the value if the horse had been "sound."—*Id.*

In an action for breach of warranty in the sale of a mare, the allegations that she was of "little or no value," but would have been worth the price if "sound and all right," are sufficiently definite to determine the value of the mare and the damage sustained.—*Id.*

[i] (Sup. 1884)

In an action for breach of warranty the complaint need not allege that the defects were not open and visible.—*Poland v. Miller*, 95 Ind. 387, 48 Am. Rep. 730.

[j] (App. 1892)

A complaint for alleged breach of warranty of a jack is insufficient which alleges that defendant's representations were false, that he knew the animal was not a sure foal getter and

was worthless, but does not allege that he was not a sure foal getter and was worthless.—*Lincoln v. Ragdale*, 7 Ind. App. 354, 31 N. E. 581.

A complaint for alleged breach of warranty which alleges false representations of defendant is insufficient when it does not allege that defendant intended that plaintiff should rely on these false representations.—*Id.*

A statement of the seller alleged as a warranty should be pleaded as an undertaking made by him as part of the contract of sale, with intent that it should be relied on, and that it induced, or was in consideration of, the purchase.—*Id.*

[k] (App. 1893)

An allegation of the breach of a warranty that certain cultivators were of good and substantial material is sufficient, where it states that they were not of good material.—*Brower v. Nellis*, 6 Ind. App. 323, 33 N. E. 672.

[l] (Sup. 1894)

A breach of warranty pleaded as a cause of action or defense must, to be good on demurrer, aver the character and extent of the warranty, and the nature and particulars of the breach.—*Shirk v. Mitchell*, 36 N. E. 850, 137 Ind. 185.

[m] (App. 1896)

A complaint alleged that defendant, being informed by plaintiffs of the purpose for which they wanted a boiler, told them that he had just what they wanted,—a second-hand boiler, better than a new one,—and that they bought it, relying on his statements. *Held* a sufficient allegation of an implied warranty that the boiler was fit for the purpose for which it was bought.—*Fitzmaurice v. Puterbaugh*, 17 Ind. App. 318, 45 N. E. 524.

[n] (App. 1906)

Where a complaint was based on a seller's warranty of certain horses that they were free from disease, and suitable for plaintiff's purpose, the warranty being general, an allegation of breach that the horses were not healthy and sound, but were diseased, because of which one died within a few days after the purchase, and the other became and remained lame and was of no value, was not demurrable for failure to allege the character and extent of the warranty and the nature and particulars of the breach.—*Warman-Black-Chamberlain Co. v. Indianapolis Mortar & Fuel Co.*, 75 N. E. 672, 36 Ind. App. 259.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1234-1238;

11 CENT. DIG. Contracts, § 1686.

See, also, 35 Cyc. p. 450.

§ 435. — Allegations of breach as ground of defense, recoupment, set-off, or counterclaim.

In justices' courts, see JUSTICES OF THE PEACE, § 92.

[a] (Sup. 1844)

In an action on a sealed note, brought by an assignee against the maker, a plea that the note was given for improvement in machines for renovating feathers, and that the payee of the note warranted that the machine would improve old feathers, which it did not, is bad as a plea in bar, where it fails to aver that the property for which the note was given is of no value, or has been returned or tendered to the vendor.—*Mullikin v. Latchem*, 7 Blackf. 136.

[b] (Sup. 1856)

Plaintiff sued defendant on a note, and the first paragraph of the answer alleged that the consideration was two deeds of a patent right for an improvement in force pumps, which the plaintiff warranted to be an improvement, but which was wholly worthless. *Held* defective for not alleging in what the improvement consisted.—*McClure v. Jeffrey*, 8 Ind. 79.

[c] (Sup. 1873)

An answer setting up a warranty and a breach of it must show the character and extent of the warranty, and the nature and particulars of the breach, and, if in bar of the entire action, it must show that the damages amounted to as much as the cause of action.—*Booher v. Goldsborough*, 44 Ind. 490.

[d] (Sup. 1873)

To an action on a note, defendant answered that it was given for a threshing machine of plaintiff's manufacture, and that the plaintiff warranted it to be a good machine, and capable of doing good work, when, in fact, it would not operate at all, and was utterly worthless, as plaintiff well knew. *Held*, that the answer was good. The machine being worthless, an offer to redeliver it to the seller was unnecessary.—*Dill v. O'Ferrell*, 45 Ind. 268.

[e] (Sup. 1874)

To a complaint on a note the defendant answered: (1) That the note was given for a combined reaping and mowing machine; that the plaintiff warranted that the machine would perform all the requisites of ordinary mowing; that the defendant relying, etc., purchased the machine; and that at the time of the sale and warranty it was utterly worthless, and of no value to the defendant. (2) That the defendant was unacquainted with the machine; that the plaintiff represented that the same would perform all the requisites of ordinary reaping and mowing; that the defendant was thereby induced, etc.; but that the machine would not perform as represented. *Held*, that both answers were bad. Each should have averred that the defendant tested the machine in a proper manner, and in a reasonable time, and also that it was of no value, or that it was returned by the defendant to the plaintiff. It was not sufficient to aver that it was of no value to the defendant.—*Lafayette Agricultural Works v. Phillips*, 47 Ind. 259.

[f] (Sup. 1877)

In an action for the price of a sawmill sold by plaintiff to defendant, the answer alleged a breach of an implied warranty in that the mill would not saw and work in as good and efficient a manner as ordinary sawmills do; that by reason of certain alleged defects it was wholly unfit for the purpose of sawing lumber; and that, after having been "set up with care and in accordance with the directions given by plaintiff," it would not saw as ordinary mills do. *Held*, that the answer did not sufficiently aver that its capacity had ever been properly tested.—*Robinson Mach. Works v. Chandler*, 56 Ind. 575.

[g] (Sup. 1882)

In an action on a note, an answer admitting the execution of the note, and setting up a breach of warranty in the sale of a threshing machine, is demurrable where it omits to allege that the note was executed in consideration of the purchase or contemplated purchase of the machine.—*Downey v. Lee*, 86 Ind. 260.

[h] (Sup. 1884)

Where a buyer of a machine under a warranty stipulating that, if on one day's trial the machine should not work well, the buyer should give immediate notice to the seller, or his agent, and allow time to send a person to put it in order, alleged that the seller, by its agent trying the machine, promised, on the machine failing to work, to return in two or three days and repair the machine, and that the buyer notified the agent to do so, and informed him that, unless the machine was repaired at once, he would be compelled to purchase another, there was a showing that the buyer allowed the agent time within which to put the machine in order.—*McCormick Harvesting Mach. Co. v. Embree*, 94 Ind. 85.

In an action on a contract for sale of a warranted machine, wherein notice to plaintiff or agent of any failure to work well was required, an answer alleging that the machine broke down the first day in presence of plaintiff's agent, who agreed to come and repair it, shows sufficient notice.—*Id.*

[i] (Sup. 1884)

Where the defense to an action for the price of an article sold is breach of warranty and rescission, the answer must show a tender of the article, or that it was worthless.—*Fleetwood v. Dorsey Mach. Co.*, 95 Ind. 491.

[j] (Sup. 1884)

Where the article warranted is of no value, it is not necessary to state expressly in answering a complaint to recover the price that the damages arising from a breach of the warranty equal the price of the article.—*Hoover v. Sidener*, 98 Ind. 290.

[k] (Sup. 1885)

An answer in an action for the price of a windmill, merely alleging that it did not work well as warranted, without particularly alleging

wherein it was defective, is insufficient.—*McClamrock v. Flint*, 101 Ind. 278.

[l] (*Sup.* 1888)

In an action for the price of machinery, an answer that at the time of sale there was a chattel mortgage on the property, which had been foreclosed, and the property sold; that plaintiffs warranted the title; and that one of defendants had sold his interest in the machinery to his codefendant—states a good defense, it not appearing that he had disposed of his rights in the cause of action against plaintiffs for the breach of warranty.—*Lewellen v. Crane*, 113 Ind. 289, 15 N. E. 515.

[m] (*Sup.* 1890)

In an action for the price of goods sold, pleas alleging breach of warranty, and fraud in the procurement of the contract, and praying that the damages thereby sustained by defendants may be deducted from any amount found due plaintiff, are sufficient, without offering to rescind the contract and return property.—*Hillenbrand v. Stockman*, 123 Ind. 598, 24 N. E. 370.

[n] (*Sup.* 1890)

In an action on a promissory note given for part of the price of a binder machine, the answer alleged that plaintiff warranted the machine to do good work, and to cut and bind wheat in good order; and further alleged "that said machine would not do good work, and would not cut and bind wheat in good order," and that "it would not and could not be made to do good work," and that it was "absolutely worthless." *Held*, that these allegations, without any averments of the particulars of the breach of warranty relied on, were insufficient.—*Aultman, Miller & Co. v. Seichting*, 126 Ind. 137, 25 N. E. 894.

[o] (*App.* 1891)

Where, in a suit on a note given for the price of a horse, the answer was in three counts, two of which pleaded a warranty, while the other set up fraudulent representations, the count setting up fraudulent representations being insufficiently pleaded, it was not error for the court to treat all the paragraphs as setting up a warranty, and instructing that defendants would not be entitled to set off any amount against plaintiff's claim unless the warranty were proved.—*Postel v. Oard*, 1 Ind. App. 252, 27 N. E. 584.

[p] (*App.* 1893)

Under the provisions of a contract of sale that, if the machine did not fill the warranty that it should do good work, notice should be given the seller, and a reasonable time allowed to remedy it, and, if the seller did not make it do good work, the purchaser need not pay for it, the answer in an action for the purchase price need not allege that a sufficient test of the machine was made, as the duty of making such test after notice was on the seller.—*Springfield*

Engine & Thresher Co. v. Kennedy, 34 N. E. 856, 7 Ind. App. 502.

An answer in an action for the price of a separator, sold with a warranty that it should perform good work, which alleges that it crushed the wheat, and did not properly separate it, but carried off large quantities with the straw, sufficiently states its defects.—*Id.*

[q] (*App.* 1893)

In an action for the price of a reaping machine, an answer alleging that the machine was warranted to be made of good material, and that with proper management it would do good work, but that it was not in certain particulars well made, and would not with proper management do good work, is not insufficient on demurrer.—*Walter A. Wood Mowing & Reaping Mach. Co. v. Field*, 8 Ind. App. 107, 35 N. E. 516.

[r] (*Sup.* 1894)

In an action on notes given in payment for "a traction Atlas secondhand engine on wheels, ten-horse power," defendants pleaded that the engine was warranted in writing "with proper usage and management to do as good work as any of its size made for the same purpose, and to be of good material, and durable with proper care," and alleged that the engine was deficient in that "it could not be made to furnish horse power with which to draw the separator from one setting to another; that in fact it was deficient in every particular and phase of mechanism to the extent that defendants could not use the same for threshing purposes, the purposes for which they purchased" it. *Held*, that the answer was demurrable, since the warranty did not state, nor the answer allege, the purpose for which the engine was bought, and there were no allegations to show that the defects alleged were within the terms of the warranty.—*Shirk v. Mitchell*, 137 Ind. 185, 36 N. E. 850.

[s] (*App.* 1894)

Defendant alleged breach of the written warranty, and further that, having tested the machine, he refused it, and only accepted it and gave the notes after A., a director and manager of plaintiff company, had assumed to correct its defects, and asked him to give the notes, promising that plaintiff would make the machine fulfill the warranty, and do as good work as any first-class machine of like capacity; that defendant notified plaintiff by telegram that the machine would not work as warranted, and plaintiff repeatedly and vainly tried to put it right; that defendant had complied with all the conditions of the warranty. *Held* not demurrable, as not showing that defendant had notified plaintiff in writing of the defects, as was required by the written warranty.—*Ohio Thresher & Engine Co. v. Hensel*, 9 Ind. App. 328, 36 N. E. 716.

The answer alleged that the machine did not thresh clean, but carried much unthreshed

grain through the cylinder, which passed onto the stack, and was wasted and lost to defendant and his customers, and broke and destroyed large quantities of the kernels; that, under proper and skillful management, it could scarcely thresh enough grain to pay running expenses; could not do half the work that ordinary separators of the size did in the same county; that so it had been, and was, wholly worthless. *Held* specific enough as to defects.—Id.

A counterclaim for breach of warranty which alleges that the machine was radically defective, and could not be made to do proper work, is not demurrable as failing to aver that it was properly tested before rejection.—Id.

[ss] (App. 1894)

In a cross-complaint for breach of warranty upon sale of a reaping machine, allegations that the machine would not do good work; that it would not bind the wheat, and would choke; that it would not cut the grain in a satisfactory manner, and would not elevate it; and that it had a heavy draft,—are sufficiently specific.—Walter A. Wood Mowing & Reaping Mach. Co. v. Irons, 10 Ind. App. 454, 36 N. E. 862, 37 N. E. 1046.

Printed directions in accordance with which a machine sold was to be set up and tried were not a part of the written guaranty in that sense which would require them to be filed as a part of the foundation of the pleading setting up breach of warranty as a defense to an action on a note given for the price.—Id.

[t] (App. 1895)

In an action for the price of a machine, the answer alleged that plaintiff warranted that it was well made, and of good material; that it would work well, and as well as any machine in the market; that if it did not give satisfaction, and work better than the old machine, which defendant delivered to plaintiff as part of the price, defendant need not pay for it, and plaintiff would return to him his old machine, or its value in cash; that the new machine was not well made, or of good material, and did not work as well as other machines in the market; that it did not do better work than such old machine; that it was given a fair trial; and that defendant returned it in good repair to plaintiff, and demanded the return of his machine. *Held*, that such answer was sufficient.—J. F. Seiberling & Co. v. Tatlock, 13 Ind. App. 345, 41 N. E. 841.

[tt] (App. 1895)

A paragraph of answer in an action on a note, alleging that it was a purchase note for a buggy warranted in writing, and that the buggy is not worth the amount of the note, is demurrable, where it neither alleges its value if it had been as warranted, nor any depreciation therein caused by the breach of warranty, and the written warranty or a copy is not filed with the pleading.—Kern v. Saul, 14 Ind. App. 72, 42 N. E. 496.

[u] (App. 1896)

In an action on a contract for the sale of a machine, an answer pleading a breach of the warranty must allege specifically wherein the machine failed to comply with the warranty.—J. F. Seiberling & Co. v. Rodman, 14 Ind. App. 460, 43 N. E. 38.

[uu] (App. 1896)

In an action to recover the price of cement, a counterclaim alleging that the cement was the kind usually sold by plaintiff to construct sidewalks; that it was purchased by defendant for that purpose; that plaintiff knew the use to which it was intended to be put; and that the cement, though used in a proper and skillful manner, proved worthless, etc.,—sufficiently states a breach of an implied warranty, without any express averment that defendant was ignorant of such worthlessness at the time he purchased.—Zimmerman v. Druecker, 15 Ind. App. 512, 44 N. E. 557.

[v] (App. 1898)

In an action on notes for the price of a certain machine sold with warranty, a counterclaim averring such warranty, the failure of the machine to do the work for which it was intended, the efforts on the part of defendant to make it work, and the expenditure of certain sums of money in repairs, labor, etc., in such behalf, was sufficient on demurrer, as it contained all the essential averments of a complaint, and stated a cause of action in favor of defendant and against plaintiffs, growing out of the subject-matter alleged in the complaint, though it did not aver that such machine was worthless.—Tinsley v. Fruits, 51 N. E. 111, 20 Ind. App. 534.

[vv] (App. 1901)

An answer alleging that a machine sold and warranted was not well built, or of good material, and was totally unfit to do the work for which it was intended, is insufficient to raise the defense of breach of warranty in an action on a purchase-money note, in failing to allege the particulars of the breach.—Woodruff v. Hensley, 60 N. E. 312, 26 Ind. App. 592.

Such defect is not cured by an allegation that the plaintiff waived a provision in the warranty requiring defendant to return the machine on its failure to comply with such warranty.—Id.

[w] (Sup. 1902)

A plea in an action on notes given for farm machinery alleged in its introductory part that plaintiff ought not to maintain the action because defendant, before their execution, had purchased the machinery of plaintiff, under an agreement by which he was not to pay therefor unless the machinery worked right. It was further alleged that defendant gave the machinery a trial, and that it would not work properly; but it was not alleged that it was properly tested, or that its failure to operate was due to defects. The plea further stated that thereafter the notes were executed under

an agreement that defendant would not have to pay for the notes till the machinery did good work, and a similar agreement was alleged as occurring some three years later. *Held*, that the answer could only be construed to raise the defense that the notes were not to be paid till the machinery was made to work properly, and not as showing a breach of warranty, and was insufficient as a plea in bar, and demurrable, as an answer in bar must answer all that it assumes to answer, in the introductory part, in order to withstand a demurrer.—*D. M. Osborne & Co. v. Hanlin*, 63 N. E. 572, 158 Ind. 325.

[ww] (Sup. 1902)

An answer, in an action on a note given for machinery, averring a breach of warranty, is not defective because it shows that defendants continued to use the machine after the time allowed for trial, where such use is alleged to have been authorized by the sellers.—*Kenney v. Bevilheimer*, 64 N. E. 215, 158 Ind. 653.

In an action on a note for machinery, in which a breach of warranty is relied on, an averment that on account of its defects the machine was not worth more than the \$400 which had been paid on account of its purchase, is sufficient as to the amount of damages sustained by reason of the defects and breach of warranty, though not precise.—*Id.*

Under Burns' Rev. St. 1901, § 373, providing that in pleading the performance of a condition precedent in a contract it shall be sufficient to allege generally that the party performed all the conditions on his part in an action on a purchase-money note, an answer setting up breach of warranty is not defective for omission of a general allegation of performance by defendants of the conditions on their part, where it specifically avers performance of every material condition of the agreement, or sets out a sufficient excuse for their failure to comply with such conditions.—*Id.*

[x] (App. 1902)

In an action to recover the value of a heater sold to defendant, the latter pleaded a counterclaim to the effect that he consulted plaintiff's agents for the purpose of securing a hot-water heater for his house, giving to the agents a description of the house, together with the size of the rooms, etc.; that the agent gave him the amount of pipe and size of the radiators required, and stated that a particular heater was the best one for the purpose; that, relying upon such statements, he purchased the heater, which proved to be defective, and failed to work properly. *Held*, that the counterclaim alleged an express warranty that the heater was fit for the purpose of properly heating the house.—*H. B. Smith Co. v. Williams*, 63 N. E. 318, 29 Ind. App. 336.

In an action to recover the value of a heater sold to defendant, the latter pleaded a counterclaim to the effect that he consulted

plaintiff's agents for the purpose of securing a hot water heater for his house, giving to the agents a description of the house, together with the size of the rooms; that the agent gave him the amount of pipe and size of the radiators required, and stated that a particular heater was the best one for the purpose; and that, relying on such statements, he purchased the heater which proved to be defective, and failed to work properly. The counterclaim alleged that the heater was defective and wrongly constructed, and would not work, in that the smoke would not pass off through the flue constructed for it, but would come into the cellar and house. *Held*, that the allegation did not imply that the heater was defective or improperly constructed, for the fault might have been in the flue constructed by defendant, and hence insufficient to show the seller's breach of the warranty.—*Id.*

[xx] (Sup. 1903)

Where, in an action on a note given for the price of a windmill, defendant's answer alleged that plaintiffs represented that the machine was capable of furnishing power to grind 20 or 30 bushels of grain per hour in a moderate wind, and with a very light wind would pump an abundance of water, and that defendant, relying on such representations, purchased the machine, but that it would pump only a very small stream under the force of a very strong wind, and required a very high and strong wind to enable it to grind from 1 to 2 bushels of grain per hour, and that plaintiffs had made vain attempts to make the same comply with such representations, and that the machine was wholly worthless, it sufficiently averred an express warranty of the property and breach thereof.—*Smith v. Borden*, 66 N. E. 681, 160 Ind. 223.

[y] (Sup. 1907)

In an action for the purchase price of a cable, the defense was a breach of warranty of fitness, and the answer alleged that the cable was sold with the knowledge that it was to be used in drilling wells; that it was rotten, and would not sustain the weight of the drill, and that it broke off before it had drilled 50 feet; and that as soon as defendants discovered the worthlessness of the cable they notified plaintiffs and returned the cable. *Held*, that the allegations, on demurrer, were sufficient averments as to the character of the test, and to show the unfitness of the property for the purpose contemplated, and to warrant proof of the particular time at which or during which the test was made.—*Oil-Well Supply Co. v. Watson*, 168 Ind. 603, 80 N. E. 157, 15 L. R. A. (N. S.) 868.

Where, in an action for the price of a cable, the defense was a breach of warranty of fitness, an allegation that "relying on the presumed knowledge of the plaintiff of the required qualities of said cable from their exposing it for sale and selling the same, they purchased it as herein stated," was a sufficient aver-

ment on demurrer that the buyers relied on the warranty.—Id.

Where, in an action for the price of a cable, the defense was a breach of warranty of fitness, and the averments of the answer were sufficient to admit proof of the particular time when the test of the cable was made, and it appeared from the complaint and answer that the test was made within the first five months after the sale, the answer was sufficient on demurrer; it being a question for the jury whether such a time for testing and return, in case the cable was unsatisfactory, was reasonable.—Id.

[yy] (App. 1907)

A cross-complaint, in an action for the price of a channelling machine, alleging defects therein, and that the machine was warranted to cut 700 feet per day, but that it at no time cut that amount, and that defendants had been compelled to pay the same as if the machine cut 700 feet per day, which failed to show, except by inference, that the machine was delivered to defendants, and did not aver that defendants paid anything therefor or agreed to do so, and failed to show that in using the machine the work it did was not worth more than the expense of operating it, was demurrable as failing to show that defendants sustained any damages.—Sullivan Machinery Co. v. Breedon, 40 Ind. App. 631, 82 N. E. 107.

[z] (App. 1908)

In an action for the purchase price of pipe, the defense was a breach of warranty of fitness, and the answer alleged that plaintiff was a manufacturer and dealer in pipe used in drilling oil wells, and sold defendant pipe to be used in driving wells, at the price of good quality pipe, knowing the intended use of the pipe and that a good quality pipe was necessary for such purpose; that plaintiff warranted the pipe to be of sound material, free from defects, and suitable for defendant's purposes, but that it was defective and insufficient for the use intended, and broke and bent when driven. *Held*, that the allegations, on demurrer, sufficiently averred an implied warranty of the fitness of the pipe for the purpose intended, and the breach thereof, and was not defective as not alleging facts showing that the pipe was properly tested, or because it showed an executed and not an executory agreement, by which the fitness of the pipe for the purpose was left to the determination of the vendor.—Oil Well Supply Co. v. Priddy, 41 Ind. App. 200, 83 N. E. 623.

[zz] (App. 1909)

In an action for the price of a piano, a plea, alleging false representations made as warranties, that defendant relied thereon, and that it was agreed if the piano was not as represented there would be no sale, and that it should remain with the defendant as plaintiff's property, subject to plaintiff's disposal, showed a conditional sale with unperformed condi-

tion and was not demurrable.—Wulschner-Stewart Music Co. v. Hubbard, 89 N. E. 794.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1239-1245.

See, also, 35 Cyc. p. 450.

§ 437. — Issues, proof, and variance.

Evidence admissible under pleading in general, see PLEADING, § 380.

[a] (Sup. 1837)

In an action for the breach of an express warranty, a scienter need not be laid, nor, if laid, proved.—House v. Fort, 4 Blackf. 293.

[b] (Sup. 1837)

A suit against the vendor of goods, founded on fraud in the sale, is not sustained by proof of a warranty and breach without fraud.—Stanley v. Norris, 4 Blackf. 353.

[c] (Sup. 1841)

In a suit by an assignee against the maker of a promissory note not governed by the law merchant, the defendant may prove, under the general issue, a breach of warranty as to the quality of goods sold to him by the payee, for the price of which the note was given, in order to lessen the amount to be recovered.—Comparet v. Johnson, 6 Blackf. 50.

[d] (Sup. 1878)

Where, in an action to recover the contract price of an article, the answer set up a breach of warranty, but made no mention that such warranty was in writing, a presumption was thereby created that the warranty was a mere parol warranty, and that the defendant could not prove a written warranty under his answer; and the plaintiff's printed price list and correspondence between the parties, amounting to a warranty, were held inadmissible.—Morgan v. Incorporated Co. of Gaar, Scott & Co., 64 Ind. 213.

[e] (Sup. 1882)

The fact that a complaint for the price of goods sold refers to a warranty as "the warranty herein indorsed," while the warranty is on the same face of the paper, below, and distinctly separated from, the agreement by rules and lines, does not render such warranty inadmissible in evidence.—Musselman v. Wise, 84 Ind. 248.

[f] (Sup. 1882)

In an action for breach of a warranty of a horse, *held*, that the pleadings warranted the recovery of substantial damages.—Means v. Means, 88 Ind. 196.

[g] (App. 1895)

Where the complaint alleges a sale, the warranty, breach, and consequent damage, a defense that plaintiff had released his claim against defendant is not available under a general denial.—Milhollin v. Sharp, 13 Ind. App. 697, 41 N. E. 552.

This Digest is compiled on the Key-Number System. For explanation, see page iii.

[b] (App. 1801)

An answer alleging the breach of a written warranty, and setting out a copy thereof, does not raise the question of an oral or implied warranty, since such warranty was merged in the written warranty.—*Woodruff v. Hensley*, 60 N. E. 312, 26 Ind. App. 592.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1248-1257.

See, also, 35 Cyc. pp. 453-456.

§ 438. Evidence.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1258-1283.

See, also, 35 Cyc. pp. 457-464.

§ 440. — Admissibility.

Opinion evidence, see EVIDENCE, § 474.

[a] (Sup. 1870)

On the exchange of one chattel for another, where the owner of the one warrants its soundness as part of the contract, and the other, alleging breach of such warranty, tenders back what he received, demands the return of what he parted with, and on refusal replevies the same, on the trial of such case, on the assumption by both parties that such action can be maintained for such breach, evidence may be admitted tending to prove the warrantor's knowledge of the alleged defect at the time he made such warranty.—*Graham v. Nowlin*, 54 Ind. 389.

[b] (Sup. 1878)

In an action for breach of warranty of title of property sold, where the evidence showed that the seller contracted to deliver possession of the property, evidence that it had been sold to a third party for taxes, rendering such delivery impossible, was admissible.—*Long v. Anderson*, 62 Ind. 537.

[c] (Sup. 1886)

A practical machinist who made repairs on an engine about two years after its purchase may testify as to some peculiarities and apparent defects in its construction in addition to the bad repair it was in at the time, where the issue is as to its fulfillment of the warranty given on its sale.—*National Bank & Loan Co. v. Dunn*, 6 N. E. 131, 106 Ind. 110.

In a suit upon a promissory note given for the purchase of an engine and belt to run a threshing machine, where the failure of the engine to fulfill the terms of the warranty is relied upon as a defense, evidence of how much wheat the owner of an engine and machine of the same make and pattern could thresh in a day with his engine and thresher is not improper.—*Id.*

[d] (App. 1891)

Upon an issue as to the breach of warranty of soundness of a horse, evidence of a physical defect, to be admissible, must refer to his condition at the time of the sale, and not at

a subsequent period.—*Postel v. Oard*, 1 Ind. App. 252, 27 N. E. 584.

[e] (App. 1891)

In an action on a note given for boot in a horse trade defendant counterclaimed for breach of warranty of the horse traded him. *Held* that, where the agreement for the trade was oral, evidence of representations made by plaintiff regarding his horse several days before the trade was consummated is admissible.—*Starke v. Dicks*, 2 Ind. App. 125, 28 N. E. 214.

In an action on a note given for boot in a horse trade defendant counterclaimed for breach of warranty of the horse traded him. *Held*, that evidence is admissible as to the breeding qualities of plaintiff's horse two years before the sale, plaintiff having warranted him as a sure breeder.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1261-1276.

See, also, 35 Cyc. pp. 458-463.

§ 441. — Weight and sufficiency.

[a] (Sup. 1866)

In determining the value of property as an element of the measure of damages for breach of warranty of personal property, the price paid for the property is prima facie evidence of the value of such an article as would have fulfilled the warranty.—*Overbay's Adm'r v. Lighty*, 27 Ind. 27.

In determining the value of property as an element in the measure of damages for a breach of warranty of personal property, the price realized when the property is put on a fair market and sold to the best advantage within a reasonable time is prima facie evidence of its value.—*Id.*

[b] (App. 1908)

In an action for the price of pipe, in which defendant set up a counterclaim for loss resulting from the pipe being defective, evidence held sufficient to warrant a verdict for defendant on his counterclaim on the theory of an implied warranty of fitness for the use intended.—*Oil-Well Supply Co. v. Priddy*, 41 Ind. App. 200, 83 N. E. 623.

Where a case proceeds upon the theory of an implied warranty, it cannot be contended that evidence sufficient to sustain that theory was insufficient to authorize a verdict because no express warranty is shown.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1277-1283.

See, also, 35 Cyc. p. 464.

§ 442. Damages.

Instructions, see post, § 446.

Where action is for breach of contract instead of on warranty, see ante, § 418.

[a] (Sup. 1869)

An engine builder for a fair price built an engine and boiler to go into a sawmill for

a special purpose. Solely by reason of the unsoundness of the boiler it exploded, and the makers were *held* liable on an implied warranty not only for damages for the imperfection of the boiler, but for damage done by the explosion to the surrounding machinery.—Page v. Ford, 12 Ind. 46.

[b] The measure of damages for a breach of warranty in the sale of a chattel is the difference between the actual value of the chattel and the value, if the warranty had not been broken.—(Sup. 1866) Overbay's Adm'r v. Lighty, 27 Ind. 27; (1877) Ferguson v. Hosier, 58 Ind. 438; (App. 1894) Crist v. Jacoby, 10 Ind. App. 688, 38 N. E. 543.

[c] (Sup. 1867)

The rule of damages upon a breach of a warranty of personal property is the difference between the actual value and the value that the article would have possessed if it had conformed to the warranty; the price paid being mere evidence of the latter value.—Street v. Chapman, 29 Ind. 142.

[d] (Sup. 1873)

Damages for breach of warranty is the difference between the value of the property at the time of the sale and what it would have been had the property been as warranted.—Booher v. Goldsborough, 44 Ind. 490.

Where damages are claimed for a breach of warranty in machinery sold by a person not the manufacturer, and where no fraud is charged, it is error to instruct the jury that they may allow, as damages, the value of the use of the machinery for a reasonable time to make the repairs necessary to cause the machinery to comply with the warranty.—Id.

[e] (Sup. 1878)

In an action to recover damages for a breach of warranty of the soundness of certain live stock, the measure of damages was *held* to be the difference between the value of the stock at the time it was purchased and the value as it would have been at the same time if they had been as they were warranted to be; and it was *held* that this measure could not be increased by the care and feed wasted upon some of the stock which was sick.—Cline v. Myers, 64 Ind. 304.

[f] (Sup. 1884)

The measure of damages for breach of warranty as to the quality of a chattel sold is the difference between the actual value of the article at the time of the sale and the value it would have had if it had been as warranted, and the buyer need not return nor offer to return the article in order to sustain an action for the breach of the warranty, or to set it up as a defense or as a counterclaim in an action for the recovery of the price.—Ilege v. Newsom, 96 Ind. 426.

[g] (Sup. 1890)

When a boiler is sold with an express warranty and, on account of its explosion, a mill

owned by plaintiff has been compelled to remain idle for some time, the rental value of the mill for that time is to be considered in estimating the damages.—Sinker v. Kidder, 123 Ind. 528, 24 N. E. 341.

[h] (App. 1891)

A butcher in good faith and for value bought a cow, and after she had been slaughtered the true owner demanded payment for her. The buyer notified the sellers, who told him to contest the claim of the third party, and they would reimburse him for any expenses. The owner sued and obtained judgment against the buyer and sellers jointly. *Held*, that the buyer was not a joint tort-feasor, and might maintain an action for the money expended in defending his title.—Bash v. Young, 2 Ind. App. 207, 28 N. E. 344.

[i] (App. 1905)

Where plaintiff shipped to defendant, on 60 days' trial, a refrigerator guaranteed to keep meat for three weeks, when properly iced, plaintiff was liable for loss of meat during the 60 days, caused by the failure of the refrigerator to fulfill the terms of the guaranty.—Cincinnati Butchers' Supply Co. v. Steinmetz, 73 N. E. 950, 35 Ind. App. 228.

FOR CASES FROM OTHER STATES.

SEE 43 CENT. DIG. Sales, §§ 1284-1301.

See, also, 35 Cyc. pp. 465-479; notes, 3 L. R. A. (N. S.) 1047, 4 L. R. A. (N. S.) 858, 5 L. R. A. (N. S.) 1151; note, 40 Am. Dec. 303.

§ 443. Trial.

Right to open and close, see TRIAL, § 25.

Right to trial by jury, see JURY, § 12.

FOR CASES FROM OTHER STATES.

SEE 43 CENT. DIG. Sales, §§ 1302-1318.

See, also, 35 Cyc. pp. 481-485.

§ 445. — Questions for jury.

[a] (Sup. 1847)

Whether an affirmation of soundness was intended to be a warranty is a question for the jury.—Humphreys v. Comline, 8 Blackf. 516.

[b] (Sup. 1867)

When the language used upon a sale of personal property is not a warranty in terms, it is a question for the jury whether the words used were intended on the one hand and relied upon on the other as a warranty; and this is to be determined from the language used and all the attendant circumstances.—Jones v. Quick, 23 Ind. 125.

[c] (App. 1891)

Where, in an action for the price of a chattel, the defense was breach of warranty, none of the words being a warranty in terms, it was proper to submit to the jury the question whether they were intended as such.—Postel v. Oard, 27 N. E. 584, 1 Ind. App. 252.

[4] (App. 190)

Where defendant testified that within the time required by a warranty of machinery he wrote a letter to the seller calling its attention to certain defects, placed the letter in an envelope addressed to the seller at its place of business, put a stamp on it, and delivered the letter thus addressed to the United States post office, and the seller denied that it received the letter, such proof presented an issue of fact for the jury.—*Kiebe v. Heilman Mach. Works*, 77 N. E. 390, 38 Ind. App. 37.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1303-1308.

See, also, 35 Cyc. pp. 481-483.

§ 446. — Instructions.

Applicability of instructions to pleadings and evidence, see TRIAL, § 251.

[a] (Sup. 1858)

Where a defendant had represented the waterwheel and shaft of a mill sold by him to be sound and new, it was held error to instruct the jury that, if they had been put in less than two years, they were new, and the representation was correct, and subsequent rotting would not render the defendant liable; since it was for the jury to judge both of their soundness and newness.—*Reynolds v. Cox*, 11 Ind. 282.

[b] (Sup. 1871)

In an action by the assignee of notes given for the purchase of a mill and machinery, the court allowed evidence of the want of knowledge by the seller and plaintiff of the falsehood of the representations made, one of the paragraphs of the answer having charged that plaintiff united with such seller in the fraudulent representations. Held that, if the evidence had been admissible under the answers alleging fraud, the court should have instructed the jury that such testimony could not be considered in determining whether there had been a warranty and a breach thereof.—*Frenzel v. Miller*, 37 Ind. 1, 10 Am. Rep. 62.

[c] (Sup. 1874)

In an action for fraud and breach of warranty in the sale of personal property, a charge that, if the plaintiff made an examination of the property for himself, he cannot recover, unless the defendant warranted the property to be of a certain kind or character and it did not comply with the terms of the warranty, is erroneous.—*Meek v. Keene*, 47 Ind. 77.

[d] (Sup. 1876)

Where, on the exchange of chattels, the owner of one warrants its soundness, and the other, alleging a breach, tenders back what he received and replevies his property on the trial of such cause, it was not error for the court to instruct the jury that plaintiff's evidence was intended to show such sale to have been void, because, at the time of making it, defendant, knowing the property to be unsound falsely and fraudulently warranted it to be sound; and

because defendant, not knowing it to be true, represented to be true that which was false, on which warranty and representation plaintiff had a right to, and did rely. Such instruction not assuming facts to have been proved.—*Graham v. Nowlin*, 54 Ind. 389.

[e] (Sup. 1876)

In an action for the price of a horse, where the defense is a counterclaim for breach of warranty of soundness, it was error to charge that the measure of damages to be allowed defendant was the difference between the contract price and the actual value of the horse at the time of sale, to which might be added "necessary expenses in finding and caring for such chattel during its unfitness for use, caused by the unsoundness complained of."—*Tritlipo v. Lacy*, 55 Ind. 287.

[f] (Sup. 1881)

Where, in an action for the price of a mare, there was no evidence that plaintiff had warranted the mare to work in cart or at defendant's limekiln but, on the contrary, the evidence clearly showed that plaintiff positively refused to warrant the mare to work in the cart, and the jury specially so found in answer to an interrogatory, it was improper for the court to charge that if they should find from the evidence that plaintiff warranted the mare to be a good mare to work in the cart at the limekiln, and that defendant bought her for that purpose and so informed plaintiff, and if they should further find that the mare would not work in the cart at the limekiln, and was worthless for that purpose, they should find for defendant.—*Kitch v. Schoenell*, 80 Ind. 74.

[g] (Sup. 1884)

In an action for damages for breach of warranty, where a set-off to a certain amount was admitted, an instruction that if the jury find for plaintiff they should, after ascertaining his damages, deduct therefrom the amount of the set-off, was not, as suggesting that plaintiff's damages must exceed the amount of the set-off, erroneous, where defendant did not request another instruction, and the jury found that plaintiff's damages largely exceeded the set-off.—*Poland v. Miller*, 95 Ind. 387, 48 Am. Rep. 730.

In an action for breach of warranty in the sale of barrels manufactured and sold for the purpose of storing whisky, an instruction was properly refused that, if plaintiffs' negligence contributed to their loss, they could not recover, as the action was brought for breach of warranty in delivering defective barrels, and such damages as plaintiffs sustained by reason of such breach they were entitled to recover, though their negligence contributed to the loss of the whisky.—Id.

In an action for damages for breach of warranty in the sale of barrels manufactured and sold for the purpose of storing whisky, an instruction was not erroneous that if defendant warranted the barrels to be suitable for storing

whisky, and plaintiffs filled them in the belief that they were reasonably suitable for such purpose, and without gross negligence, they could recover.—*Id.*

[h] (**App.** 1891)

In an action for the price of a horse, where the defense is breach of warranty, an instruction which, if taken alone, would seem to mean that the rule of caveat emptor would prevail, and there would be no warranty of the soundness if the horse were present, and the buyer had an opportunity of inspecting it, and if the defect were apparent, will be regarded as confined to cases of implied warranty.—*Postel v. Oard*, 1 Ind. App. 252, 27 N. E. 584.

[i] (**App.** 1891)

In an action for the alleged breach of a warranty implied in the sale of a boiler for a special purpose, where the plea is a general denial, it is error to instruct the jury that the burden is on the defendants to prove that the unfitness of the boiler was not caused by any defect in its construction.—*McKendry v. Sinkler, Davis & Co.*, 1 Ind. App. 263, 27 N. E. 506.

[j] (**App.** 1893)

Where a reaping machine is warranted to do good work, with proper management, it is error to charge that if, on a fair trial, the machine could not be made to "work profitably and successfully," there was a breach of warranty.—*Walter A. Wood Mowing & Reaping Mach. Co. v. Field*, 8 Ind. App. 107, 35 N. E. 516.

[k] (**App.** 1894)

Where, in an action for the purchase price of machinery, there was some evidence that, after the making of the written contract, there was a parol warranty which was relied on by the purchasers, a requested instruction assuming that the only warranty was the written one was properly refused.—*Ohio Thresher & Engine Co. v. Hensel*, 36 N. E. 716, 9 Ind. App. 328.

[l] (**App.** 1898)

Plaintiffs sued on notes given for the price of a certain machine, and containing a provision that the title to such machine should remain in plaintiffs until such notes were fully paid. Defendant pleaded a counterclaim for damages for breach of warranty, on the theory that plaintiffs sold such machine as their own, and not as agents for the manufacturer, which theory was controverted by plaintiffs, who claimed that they were agents of the manufacturer, and as such negotiated the sale to defendant, and that they did not own the machine when sold. *Held*, error to instruct that the mere fact, if so found, that such sale was made by plaintiffs, whether as agents or principals, required the jury to disregard any and all evidence tending to prove that plaintiffs were not the owners of such machine at the time of such sale.—*Tinsley v. Fruits*, 51 N. E. 111, 20 Ind. App. 534.

[m] (**App.** 1908)

Where defendant purchased wrought-iron drive pipe of a certain brand from plaintiff, the latter knowing the purpose for which it was to be used, and the pipe broke when driven, and was shown to be defective and a part of it to be made of steel, it being impossible to determine the kind or quality of the pipe except by use, there was an implied warranty that it was fit for the contemplated use, and an instruction that, if defendant purchased a known brand of pipe from plaintiff, he thereby defined the particular pipe he wanted, and there was no warranty by plaintiff that it was fit for the purpose intended, was improper under the evidence and was properly refused.—*Oil-Well Supply Co. v. Priddy*, 41 Ind. App. 200, 83 N. E. 623.

FOR CASES FROM OTHER STATES.

SEE 43 CENT. DIG. Sales, §§ 1309-1317

See, also, 35 Cyc. p. 483.

§ 447. — Verdict and findings.

Failure to answer interrogatories or make findings, see TRIAL, § 356.

Responsiveness of verdict to issues, see TRIAL, § 329.

Sufficiency of special findings in general, see TRIAL, § 355.

Verdict on several counts, see TRIAL, § 330.

[a] (**Sup.** 1888)

In an action for goods sold, where defendant set up breach of warranty, and that he was compelled to furnish other goods to his customers in their stead, the jury rendered a general verdict for plaintiffs for \$183; and, in answer to special interrogatories, valued the goods, had they been as warranted, at \$275; and the damage to defendant, by having to replace the goods sold, at \$92. *Held*, that plaintiffs were not entitled, on the answers, to a judgment for \$275, the special findings not being inconsistent with the general verdict.—*Blacker v. Slown*, 114 Ind. 322, 16 N. E. 621.

[b] (**App.** 1895)

Where the complaint in an action to recover for a breach of warranty alleges a sale, the warranty, its breach, and consequent damages, and the only answer is a general denial, defendant cannot complain that by the verdict he was given the benefit of a partial, instead of an entire, release.—*Milhollin v. Sharp*, 13 Ind. App. 697, 41 N. E. 552.

[c] (**App.** 1896)

In an action for goods sold, the absence of a finding on the facts alleged in the answer as constituting a purchase with warranty, of which it avers a breach, is equivalent to a finding against defendant as to such facts.—*Levi v. Allen*, 15 Ind. App. 38, 43 N. E. 571.

FOR CASES FROM OTHER STATES.

SEE 43 CENT. DIG. Sales, § 1318.

See, also, 35 Cyc. p. 485.

IX. CONDITIONAL SALES.

Application of statute of frauds to agreements to rescind, see FRAUDS, STATUTE OF, § 84.

Bulk stock laws as denial of equal protection of laws, see CONSTITUTIONAL LAW, § 240.

Conditional exchange of property, see EXCHANGE OF PROPERTY, § 14.

Liability on agreement to become surety for buyer, see PRINCIPAL AND SURETY, § 10.

Pleading in action for price, see ante, § 353.

Reservation of title to materials furnished as waiver of mechanic's lien, see MECHANICS' LIENS, § 209.

Title of purchaser as affecting validity of insurance policy, see INSURANCE, § 282.

§ 450. Nature of sales on condition.

[a] (Sup. 1853)

Courts of equity do not favor conditional sales, and they will pronounce that a mortgage which at law would be a conditional sale. They are disposed to consider every deed, whatever be its form, which resolves itself into a security for the performance of any act as a mortgage. — *Davis v. Stonestreet*, 4 Ind. 101.

[b] (App. 1906)

The consideration for a contract of sale, the seller retaining the title to the goods sold until the price is paid, is the delivery with the right to acquire title.—*Jessup v. Fairbanks, Morse & Co.*, 38 Ind. App. 673, 78 N. E. 1050.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 1321.

See, also, 35 Cyc. p. 652; note, 86 C. C. A. 448.

§ 453. Conditional sales distinguished from other transactions.

Assignments for creditors distinguished from sales, see ASSIGNMENTS FOR BENEFIT OF CREDITORS, § 9.

Chattel mortgages distinguished from conditional sales, see CHATTEL MORTGAGES, § 6.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1324-1335.

See, also, 35 Cyc. p. 654; note, 94 Am. St. Rep. 234-258.

§ 459. Contracts creating conditions on transfer of title in general.

[a] (Sup. 1859)

A contract was: "I have bought of A. two steers, for which I agree to deliver before March," etc. "Said A. holds said steers as his property until said delivery." *Held*, that this did not pass the title in the cattle.—*Thomas v. Winters*, 12 Ind. 322.

[b] (Sup. 1861)

A written memorandum of a contract was made and signed by A. and B. to the effect that A. should buy of B. certain merchandise, and should take up the notes of B. given to various parties, paying to each such a sum as he would

receive from a pro rata distribution of the merchandise between these several noteholders and A.; and, if this arrangement should not be acceded to by the noteholders, then A. was to give his note to B. for the amount which, under the arrangement, would have been payable by him to the said holders. *Held*, that the transaction constituted an actual sale upon a consideration to be performed on a future day.—*Conner v. Comstock*, 17 Ind. 90.

[c] (Sup. 1867)

A., by parol, agreed with B. that the latter should have the use of two horses owned by A., keeping them on the farm B. was then occupying, and upon the payment to A. of a certain sum at a future day fixed they should be the property of B. Afterwards, and before such payment, A., without the consent of B., sold the horses to C., who in turn agreed with B., by parol, that he should have the horses to work and use, keeping them on the place then occupied by B., and upon paying C. a certain sum at a future day fixed they should become the property of B., but until payment should remain the property of C. *Held*, that B. acquired no title, but a mere right of possession, which was forfeited by a subsequent removal of the property from the farm.—*Dunbar v. Rawles*, 28 Ind. 225, 92 Am. Dec. 311.

[d] (Sup. 1882)

A sale for cash on delivery is a conditional sale, not vesting title until the condition is complied with.—*Evansville & T. H. R. Co. v. Erwin*, 84 Ind. 457.

[e] (Sup. 1884)

Where it is agreed that the title to chattels paid for in part only shall not pass until full payment, the transaction is a conditional sale.—*Forrest v. Hamilton*, 98 Ind. 91.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1337-1347.

See, also, note, 5 L. R. A. (N. S.) 475.

§ 460. Necessity of writing.

[a] (Sup. 1855)

A partner, being sick at the time, conveyed to his copartner, by a written instrument, all his interest in the firm, agreeing with him verbally, at the same time, that, in case he should recover, the sale was to be null and void, and he was to continue in the firm as before. *Held*, that this verbal condition was nugatory, and the sale absolute.—*Wallace v. McVey*, 6 Ind. 300.

[b] (App. 1900)

A stipulation that a sale of personal property shall be conditional may be in parol.—*Sears v. Shrout*, 56 N. E. 728, 24 Ind. App. 313.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 1348.

See, also, 35 Cyc. p. 663.

§ 464. Validity of conditions.

[a] (Sup. 1887)

As a general rule, where the owner of personal property sells and delivers it to a purchaser for his own use, and not for the purpose of consumption or resale, for an agreed price, payable at a future time, an express condition and agreement that the title shall remain in the vendor until the price is paid is valid, and the original vendor will hold it as against a purchaser from his vendee; but when the purpose of the sale is that the goods may be resold, as where a manufacturer sells to a retail dealer, the rule is otherwise.—*Winchester Wagon Works & Mfg. Co. v. Carman*, 109 Ind. 31, 9 N. E. 707, 58 Am. Rep. 382.

[b] (App. 1900)

A contract of sale reserving the legal title to the property in vendor until the price is paid is valid.—*Turk v. Carnahan*, 57 N. E. 729, 25 Ind. App. 125, 81 Am. St. Rep. 85.

[c] (App. 1902)

A sale of personal property, on condition that the title shall remain in the seller until the purchase price is paid, is valid, and the seller retains such ownership, though he parts with the possession.—*Tanner v. Mishawaka Woolen Mfg. Co.*, 63 N. E. 313, 28 Ind. App. 536.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 1352.

See, also, 35 Cyc. p. 664; note, 87 C. C. A. 538.

§ 466. Construction and operation of conditions as between parties.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1354-1364.

See, also, 35 Cyc. pp. 667-670.

§ 468. — Conditions precedent in general.

[a] (App. 1906)

The vendor in a conditional sale is entitled to recover the balance of the purchase price, though the property sold has been destroyed without the fault of the vendee.—*Jessup v. Fairbanks, Morse & Co.*, 38 Ind. App. 673, 78 N. E. 1050.

[b] (App. 1910)

Where property is sold conditionally, no property passes until there has been a compliance with the condition.—*Lett v. Eastern Moline Plow Co.*, 91 N. E. 978.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1354, 1355, 1358-1364.

See, also, 35 Cyc. p. 667.

§ 469. — Payment of price.

[a] (App. 1906)

A contract of conditional sale, giving the possession and use of the goods to the buyer while title remains in the seller until full pay-

ment, affords a sufficient consideration for the buyer's absolute promise to pay the agreed price.—*Kilmer v. Moneyweight Scale Co.*, 76 N. E. 271, 36 Ind. App. 568.

[b] (App. 1905)

As between vendor and vendee, a conditional sale of a stock of goods, the title to which is reserved in the vendor until the stock is paid for, is neither fraudulent nor void.—*West v. Fulling*, 36 Ind. App. 617, 76 N. E. 325.

[c] (App. 1910)

A contract of sale of chattels on credit evidenced by notes, which stipulates that the title shall remain in the seller until the price is paid, and that the buyer shall have the right to possession, and that on the failure to pay the notes, or either of them, on maturity, the seller may take possession of the chattels, gives to the buyer the right to the possession, and on payment of the price he becomes the absolute owner, and on his failure to pay the price he agrees to deliver possession to the seller who holds the legal title subject to the buyer's right to possession and to acquire title by payment of the price.—*Ileyns v. Meyer*, 91 N. E. 973.

[d] (App. 1910)

A contract of conditional sale of certain wagons and farm implements to a retail dealer reserved title in the seller until the goods were paid for, and then provided that if the buyer sold out, or became insolvent or died, all accounts or notes for goods bought under the contract, including renewal notes in whosoever's hands they might be, should become due and payable, whether given in payment for goods or accounts or as collateral thereon. *Held*, that the clause relating to the contingency of the purchaser selling out had reference only to the effect on the unmatured notes and accounts, and did not contemplate a sale of the purchaser's stock in bulk.—*Lett v. Eastern Moline Plow Co.*, 91 N. E. 978.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, § 1357.

See, also, 35 Cyc. p. 667.

§ 471. Operation and effect of conditions as to third persons.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1366-1402.

See, also, 35 Cyc. pp. 675-693; note, 57 Am. Rep. 572.

§ 472. — In general.

[a] (Sup. 1884)

Where the buyer of personal property under a contract stipulating that the seller shall hold title thereto until the purchase price is paid, sells the property without the knowledge of the seller, the subsequent buyer acquires no title as against the original seller, and is liable to him for the value of the goods or for the balance due from the original buyer.—*Lanman v. McGregor*, 94 Ind. 301.

[b] (Sup. 1887)

A sale and delivery of personal property on condition that the title is not to pass until the purchase price is paid, does not vest the title in the vendee until the condition is performed, and one who purchases the property from the vendee with notice is bound by the condition.—*Baals v. Stewart*, 109 Ind. 371, 9 N. E. 403.

[c] (App. 1899)

Defendant sold a mill to A. and G. for a price payable in monthly installments, under an agreement that they should have possession of the property, but that the title should be in defendant until the price was paid. The buyers sold the mill without defendant's knowledge, taking notes for the price, secured by a chattel mortgage on the mill, which they assigned to plaintiff. *Held*, that defendant, having gained possession of the mill, was entitled to hold it as against such assignee, since the buyers had no right to sell or incumber the mill so as to defeat her title thereto, under the conditional sale.—*Sears v. ShROUT*, 56 N. E. 728, 24 Ind. App. 313.

Where personal property is delivered to a purchaser, to be used and kept by him at an agreed price, payable in the future, on condition that the title is to remain in the vendor until paid for, the vendee, until payment, cannot sell or incumber the property so as to defeat the vendor's title.—*Id.*

[d] (App. 1906)

Where the owner of personal property sells and delivers it to the purchaser, not for the purpose of consumption or resale, upon the express condition that the title to such property shall remain in the vendor until the price is fully paid, the vendee, prior to such payment, can neither sell nor incumber the property so as to defeat the title of the original vendor.—*West v. Pulling*, 36 Ind. App. 617, 76 N. E. 325.

[e] (App. 1910)

Where a seller of buggies, wagons, and farm implements at wholesale sold a quantity to a retailer, reserving title until paid for, intending that the retailer should sell the goods in the ordinary course of business at retail such contract was valid as between the parties, and while a purchaser at retail while the condition remains unperformed would get title as against the conditional seller, such title was that of the latter, and not of the retailer, and hence a sale of the retailer's stock in bulk while the contract remained unperformed transferred no title.—*Lett v. Eastern Moline Power Co.*, 91 N. E. 978.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1366-1376; 6 CENT. DIG. Bailm. §§ 93, 104.

See, also, 35 Cyc. p. 675.

§ 473. — Bona fide purchasers from buyer.

[a] (Sup. 1839)

A contract provided as follows: "I, E. H. J., have this day bought of V. T. & Co. two steers, for which I agree to deliver them. at their cooper shop at C., eight thousand and four hundred packing barrel staves, two hundred pieces of heading to eight hundred staves; the said staves to be merchantable; all of said staves to be delivered between now and the first day of March next. And the said company holds the said steers as their property until the delivery of said staves." *Held* that, the steers having been delivered at the time, it was error to charge, in an action on the contract, that the right to resume possession was a personal contract binding only on the vendee, and not on a bona fide purchaser from him; such rule being applicable to absolute and not to conditional sales.—*Thomas v. Winters*, 12 Ind. 322.

[b] (Sup. 1853)

A person in possession of a chattel under a conditional contract of purchase cannot, before the condition is complied with, sell the chattel, so as to vest the title thereto in a bona fide purchaser.—*Payne v. June*, 92 Ind. 252.

[c] (Sup. 1887)

Upon the trial of an action by the vendor of personal property, sold under a written agreement that the title should remain in the vendor until the payment of the purchase price, against a purchaser from his vendee to recover its possession, testimony of the plaintiff's general manager that the plaintiff and its agents expected and intended, when the property was sold, that the vendee, to whom plaintiff sold at wholesale, should and might at any time sell the same at retail, is competent and admissible on behalf of defendant.—*Winchester Wagon Works & Mfg. Co. v. Carman*, 109 Ind. 31, 9 N. E. 707, 58 Am. Rep. 382.

[d] (App. 1894)

A contract of sale provided that the title to the property should remain in the seller until either the price was paid or a mortgage given on the property. The contract also provided that the seller was to furnish, free of cost, a certain other article. The mortgage when executed did not cover the latter article. *Held*, that a bona fide purchaser of such article from the buyer acquired good title thereto as against the seller.—*Van Allen v. Smith*, 11 Ind. App. 103, 38 N. E. 542.

[e] (App. 1898)

Under one contract of sale, providing that the title should not pass until payment of the price, property was sold for resale, and delivered at different times, and part payments were made from time to time. One general account was kept, and the part payments were credited thereon, and not on any particular goods. Before full payment of the price, the vendee resold it in payment of a pre-existing debt. *Held*, that the title remained in the original vendor,

the purchase for a pre-existing debt not being a purchase for value in due course of business.—*Hench v. Eacock*, 52 N. E. 85, 21 Ind. App. 444.

[f] (App. 1900)

Where goods are delivered to be retailed by the vendee, the reservation of title in the vendor is void as to purchasers from the vendee at retail, and in the ordinary course of business. Such a sale and delivery are inconsistent with the continued ownership by the vendor.—*Sears v. Shrout*, 56 N. E. 728, 24 Ind. App. 313.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1377-1390.

See, also, 35 Cyc. p. 680.

§ 474. — Creditors of buyer.

Execution on interest of buyer, see EXECUTION, § 42.

[a] (Sup. 1858)

The vendor of personal property cannot set up title against creditors of the vendee whose demands originated while the property was in the possession of the latter.—*King v. Wilkins*, 11 Ind. 347.

[b] (Sup. 1862)

Where personal property was sold on a condition precedent, and the vendee was to have possession until the performance of the condition, the vendor had the right of possession as against a sheriff attempting to seize and sell the property as the property of the vendee, though not as against the vendee.—*Hanway v. Wallace*, 18 Ind. 377.

[c] (Sup. 1876)

Where one who, at an execution sale, buys chattels, which had been sold and delivered to the execution debtor on express condition that the seller retain title until payment of execution, purchaser gets no title as against the original seller.—*Bradshaw v. Warner*, 54 Ind. 58.

[d] (App. 1895)

The interest of the buyer under a conditional sale is not analogous to the interest of a mortgagor in possession, and such interest is not subject to sale on execution against the buyer.—*Keck v. State ex rel. National Cash Register Co.*, 39 N. E. 899, 12 Ind. App. 119.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1391-1402; 6

CENT. DIG. Bailm. § 91.

See, also, 35 Cyc. pp. 677-679.

§ 475. Effect of assignment of contract.

[a] (Sup. 1867)

A., by parol, agreed with B. that the latter should have the use of two mares owned by A., to keep them on the farm B. was then occupying, and upon the payment to A. of \$150 at a future day fixed they should be the property of B. Afterwards, and before such payment, A., with the consent of B., sold them to C., who agreed with B., by parol, that he should have the mares to work and use, keeping them on the

place then occupied by B., and upon paying C. \$100 at a future day fixed they should be the property of B., but until payment to remain the property of C. Afterwards B., without having made payment, sold one of the mares to D., who removed her from the place B. was then occupying. At the time of sale D. was ignorant of C.'s claim, but within an hour B. informed him of it, and offered to rescind and restore the consideration. D. refused, and C. brought replevin. *Held* that, the absolute title being in C., he was entitled to recover in replevin or trover from D.; the measure of damages being the value of the property if a return could not be had.—*Dunbar v. Rawles*, 28 Ind. 225, 92 Am. Dec. 311.

[b] (Sup. 1878)

A note, expressed to be for a sewing machine, provided that the machine should remain the property of the payee until the note be paid. *Held*, that an indorsement in blank did not in itself vest the title to the machine in the indorsee, so as to enable him to replevy it on demand for nonpayment.—*Domestic Sewing Mach. Co. v. Arthurhultz*, 63 Ind. 322.

[c] (App. 1910)

Under Burns' Ann. St. 1908, § 9071, making instruments for the delivery of a specified article negotiable by indorsement thereon, a conditional contract of sale, whereby the buyer acquired the right to the possession of the chattels and the right to acquire title by the payment of the price, and whereby the seller has the right to recover possession on the failure of the buyer to pay the notes given for the price, may be assigned by either party, and the assignment by either party carries with it all the rights of the assignor under the contract, and, where the seller assigns the contract and notes and delivers the same to the assignee, the latter may on default in the payment of the price recover the chattels.—*Heyes v. Meyer*, 91 N. E. 973.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1403-1406.

See, also, 35 Cyc. p. 695.

§ 476. Performance or breach of conditions.

[a] (Sup. 1837)

A horse was purchased for \$80, but neither the property nor possession was to pass until the purchaser had executed a note for the price. A note for only \$8 was, by mistake, executed and delivered. *Held*, that the property in the horse was not changed.—*Litterel v. St. John*, 4 Blackf. 326.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1407-1410.

See, also, 35 Cyc. p. 671; note, 32 L. R. A. 469.

§ 477. Waiver of condition or of forfeiture for breach.

[a] (Sup. 1845)

Where a sale is conditional until payment is made, it is not necessary, to avoid a waiver of the condition, that the vendor refuse to deliver the goods, or that he must make the delivery qualified and conditional. It is sufficient if the intent of the parties can be gathered from their acts and all the circumstances of the transaction. *Curme, Dunn & Co. v. Raub*, 100 Ind. 217.

[b] (Sup. 1899)

A vendor's lien under a conditional sale is lost by an election of vendor to treat the sale as absolute.—*Smith v. Barber*, 53 N. E. 1014, 153 Ind. 322.

An action for the price of property sold under a conditional sale evidences vendor's election to treat the sale as absolute.—*Id.*

[c] (App. 1906)

Where a seller in his contract of sale provides that "the title of said goods shall not pass until settlement is concluded and accepted" by such seller, and the goods are shipped and tendered, as provided in the contract, and the buyer refuses to accept the goods, an action by such seller for the contract price is an election to treat the sale as absolute, and the absolute title immediately vests in the buyer.—*Gaar, Scott & Co. v. Fleishman*, 38 Ind. App. 400, 77 N. E. 744, 78 N. E. 348.

[d] (App. 1907)

A seller suing for the price of goods sold and for the foreclosure of his statutory lien elects to waive the right secured by the contract of sale stipulating that the title shall remain in him until the price is paid.—*Elwood State Bank v. Mock*, 40 Ind. App. 685, 82 N. E. 1003.

[e] (Sup. 1910)

Where one placed property in a building in process of construction under a contract retaining title with the right to remove, the fact that he filed notice of a mechanic's lien was not an election to rely on the lien and a waiver of title.—*Ward v. Yarnelle*, 91 N. E. 7.

Where one placed property in a building in process of construction under a contract retaining title, with the right to remove, and executed a waiver of any mechanic's lien, the waiver did not alone operate to estop him from asserting his title.—*Id.*

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1411-1417.

See, also, 35 Cyc. pp. 673-675.

§ 478. Remedies of seller.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1418-1448.

See, also, 35 Cyc. pp. 696-710; note, 32 L.

R. A. 469; note, 133 Am. St. Rep. 563.

§ 479. — In general.

[a] (Sup. 1860)

A. sold property to B., on condition that title should not pass, and that B. should not sell any part of it, until payment. B. sold part and attempted to sell the rest. *Held*, that A. might take possession, if he could peacefully, of the part unsold.—*Shireman v. Jackson*, 14 Ind. 459.

[b] (Sup. 1877)

Where personal property is sold and delivered on condition that, if the purchase price is not paid at a specified time, the title shall remain in the vendor, replevin lies, in case of default of payment, to recover the property.—*Hodson v. Warner*, 60 Ind. 214.

[c] (Sup. 1883)

Where personal property was sold on condition that title was not to vest until payment, and notes were executed for the purchase price, which remained unpaid, an action to recover the property was not based on the notes, which need not be made a part of the complaint.—*Payne v. June*, 92 Ind. 252.

The rule that the seller, where the sale is procured by fraud, cannot recover his property without restoring or offering to restore the consideration, has no application where the seller has not parted with his title, and, in such case, he may recover his property without disaffirming his contract.—*Id.*

[d] (Sup. 1893)

Where, on a sale of chattels, notes were given for the purchase price, it being agreed that the purchaser should not acquire title until the notes had been paid, and that on failure to pay them the seller might retake the property, retaining what had been paid as hire, the seller could not retake and also enforce payment of the notes.—*Green v. Sinker, Davis & Co.*, 35 N. E. 262, 135 Ind. 434.

[e] (App. 1897)

A manufacturing company may, on default of payment, replevin goods sold under an agreement that the buyers are "to hold all goods and the proceeds of all sales of goods received under the contract * * * as collateral security in trust and for the benefit of, and subject to the order of, the * * * company, until we have paid in full in cash all our obligations" due the company.—*Orner v. Sattley Mfg. Co.*, 47 N. E. 644, 18 Ind. App. 122.

[f] (Sup. 1899)

Under a contract of sale of personal property, which stipulates that the title to the property shall remain in the vendor until fully paid for, the vendor, upon default by vendee to pay the purchase price according to the agreement, may elect to retake the property, or treat the sale as absolute, and sue for the price.—*Smith v. Barber*, 53 N. E. 1014, 153 Ind. 322.

To maintain an action for the price of machinery sold under a conditional sale, it is not essential that there should be a formal act of

delivery, and specific waiver of the right to reclaim the property, where vendees are in actual possession of the property, since the completion of the contract operated as a delivery.—Id.

Formal acceptance by vendee of property sold under conditional sale after an election by vendor to treat the sale as absolute by bringing an action for the purchase price is not an essential prerequisite to such action, where vendee is in possession of subject-matter of contract.—Id.

[g] (App. 1900)

A vendor who retains the legal title to property sold until payment of the purchase price, with the right to take possession on default in payment, cannot sue the vendee for a balance of the price after asserting the right to disaffirm the contract by taking possession of the property.—Turk v. Carnahan, 57 N. E. 729, 25 Ind. App. 125, 81 Am. St. Rep. 85.

[h] (App. 1900)

The rule that, in the absence of a statutory provision to the contrary, a buyer loses installments paid on the purchase price when the sale is rescinded on account of his default, has no application where the sale is rescinded under agreement.—Fruits v. Pearson, 57 N. E. 158, 25 Ind. App. 235.

[i] (App. 1905)

A provision in a contract of conditional sale, reserving title in the seller until the goods are paid for in full, does not affect the absolute obligation of the buyers to pay the purchase price, nor prevent the recovery by the seller of the price, as stipulated in the contract, on the failure of the buyers to execute notes for deferred payments or to make such payments when due.—Kilmer v. Moneyweight Scale Co., 76 N. E. 271, 36 Ind. App. 568.

[j] (App. 1906)

Though a contract for the sale of a chattel provided that title should remain in the seller until settlement is concluded and accepted by the seller, after a tender of delivery the seller may maintain an action for price.—Gaar, Scott & Co. v. Fleshman, 77 N. E. 744, 78 N. E. 348, 38 Ind. App. 490.

Where the seller retains title to the goods contracted to be sold, the measure of damages for the buyer's breach of contract is the actual injury which the seller sustains.—Id.

[k] (App. 1906)

A sale of goods, the seller reserving title until the price is fully paid, is a present sale on condition, giving the seller the right, on default by the buyer, either to retake the goods, thus disaffirming the sale, or to treat the sale as absolute by bringing an action for the purchase price.—Jessup v. Fairbanks, Morse & Co., 38 Ind. App. 673, 78 N. E. 1050.

[l] (App. 1908)

In an action for moneys due under a contract, a complaint showing that defendant con-

tracted for a set of books, plaintiff to retain title until payment, that the books were shipped, but defendant refused to accept them, and failing to show who had the books, is bad.—Rouse v. Rose, 41 Ind. App. 308, 83 N. E. 253.

[m] (App. 1910)

Where a seller retaining the title until payment of the price with the right to take possession on default in payment on condition broken, took possession by an authorized agent, the seller rescinded the sale, and he could not recover the price.—Reeves & Co. v. Miller, 91 N. E. 812.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1418-1438; 47 CENT. DIG. Trover, § 240.

See, also, 35 Cyc. pp. 696-708; note, 2 L. R. A. (N. S.) 97.

§ 480. — Against third persons.

[a] (Sup. 1875)

In consideration of the assignment and transfer by B. to A. of a promissory note made by C. to B., secured by a mortgage on land, A. delivered to B. a horse under a written contract of sale, it being stipulated that the sale was conditional, and that the title to the horse should remain in A. unless the latter should be able to collect the note by due process of law; but, if C. was solvent and responsible, and there was no legal defense to the note, then the property in the horse should vest absolutely in B. Subsequently D. purchased the horse from B. in good faith, and for value. In an action by A. against D. to recover possession of the horse it was shown that C., neither at the time of the sale nor afterwards, had any property out of which the amount of the note could be made, except the land covered by the mortgage; but it did not appear that such land was insufficient, that C.'s title thereto was defective, that there was any defense to the note, or that process of law had been resorted to for its collection. *Held*, that plaintiff was not entitled to recover possession of the horse.—Tully v. Fairly, 51 Ind. 311.

[b] (Sup. 1883)

In an action to recover property which plaintiffs had sold to a third person conditionally, and which was by him transferred to defendant before payment for the purchase price, testimony that witness as agent of plaintiffs had before the commencement of the suit demanded the property of defendants was relevant and necessary in order to enable plaintiffs to recover.—Payne v. June, 92 Ind. 252.

In an action to recover property, which plaintiff had sold to a third person conditionally who executed notes for the purchase price, and such third person had transferred it to defendant, the notes executed for the property were properly admitted in evidence without proof that they had been executed by such third person as they purported to be, for, if they were

executed as they purported to be, they only tended to show that plaintiffs had parted with their title, and, if they were not executed by them, they tended to show the same fact as they were received by plaintiff for the property.—Id.

[c] (**App.** 1896)

A conditional vendee of goods, while in possession thereof, resold them to one who had no notice of his conditional title,—their value to be determined by an invoice to be taken. While the invoice was being taken, the original vendor seized the goods, as owner, and stopped it; and the second vendee recovered them in replevin, having, during the replevin suit, sold all the goods without taking an invoice. Part of the purchase price was paid by the second vendee to his immediate vendor. *Held*, that in an action by the original vendor, as assignee of the contract of resale, for the balance of the price due under it, the second vendor was estopped from setting up the defense that no invoice had been taken.—*Jenkins v. Fisher*, 15 Ind. App. 58, 42 N. E. 954.

[d] (**App.** 1902)

A cross-complaint by a defendant in replevin, which alleges ownership of the goods in the defendant under a bill of sale providing that title shall remain in him as seller until they are paid for, and further alleging that plaintiff wrongfully obtained possession of the goods and was wrongfully in possession at the commencement of the action, is not defective for failing to aver a demand for the goods.—*Tanner v. Mishawaka Woolen Mfg. Co.*, 63 N. E. 313, 28 Ind. App. 536.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1439-1448;

47 CENT. DIG. Trover, §§ 26, 65, 272.

See, also, 35 Cyc. pp. 708-710.

§ 481. Remedies of buyer.

[a] (**Sup.** 1880)

In a suit for the conversion of a sewing machine, when defendant admitted that one installment of the purchase price of the machine was paid for in board, rebuttal evidence as to the length of time that board was furnished and the payment for the machine in board was competent.—*Isbell v. Brinkman*, 70 Ind. 118.

FOR CASES FROM OTHER STATES,

SEE 43 CENT. DIG. Sales, §§ 1449-1455;

47 CENT. DIG. Trover, § 39.

See, also, 35 Cyc. pp. 711-713.

§ 483. Remedies of creditors.

Execution on interests of parties to sale, see EXECUTION, § 42.

FOR CASES FROM OTHER STATES,

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See, also, 34 Cyc. p. 713.

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This Digest is compiled on the Key-Number System. For explanation, see page iii.

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J.S.S.
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